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Job Security: Protecting At-Will Employees with Good Cause Legislation

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by

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WITH GOOD CAUSE LEGISLATION

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

Recent decades have witnessed significant developments in employment termination law in the United States. The long-standing "at-will" doctrine[1] - employers can fire employees for good reason, bad reason, or even for no reason at all - has experienced great erosion and wide variations in law between the states.

There are two types of exceptions to the employment at-will rule: statutory exceptions and common law exceptions. Statutory exceptions include federal and state legislations specifying forbidden motivations for discharge, such as race, sex, religion or national origin,[2] age,[3] handicap,[4] or union activity.[5]

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[1]H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT §134, (1877).

[2]Civil Rights Act of 1964, §§701-716, 42 U.S.C. §§2000 to 2000e-17 (1982 & Supp. III 1985).

[3]Age Discrimination in Employment Act of 1967, §§2-16, 29 U.S.C. §§621-634 (1982 & Supp. III 1985).

[4]The American Disabilities Act of 1990.

[5]National Labor Relations Act, 49 Stat. 449 (1935), as amended; 29 U.S.C. §§151-69 (1988).

Common law exceptions generally fall under one of two categories: either tort theory or contract theory. The tort theories of wrongful discharge are not concerned with the private agreement between the parties to the at will employment contract. Rather, they seek to vindicate some public policy independent of the terms of any particular employment contract. Under the contract theories, courts find legal protection for employees by enforcing the private terms of their employment contract. By 1991, 45 states had recognized at least some exceptions to the at will doctrine,[6] and one state, Montana, had enacted a wrongful discharge act into law.[7] The movement of statutory and common law restrictions limiting an employer's freedom to terminate at will reflects the increasing consciousness about the importance of job security by society and workers. This tendency is also consistent with the developments of other industrialized countries in the West and Japan in which the problem of job security has been addressed with increased frequency in the post World War II period.[8]

Protection of jobs is commonly important to all the employees in the United States. The increasing number of

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[6]"At-Will Doctrine Under Fire," 14 Nat'l L. J. No6, page 1 (Oct. 14, 1991).

[7]Mont. Code Ann. §§39-2-901 to 914 (1991).

[8]W. Gould IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB.L.REV. 28 (1988).

lawsuits brought by employees, protesting their terminations as being unlawful, represent their cry for job security. An employer's right to arbitrarily discharge might be convenient for running its business without interference. At the same time, however, it would unfavorably affect the company's long-run success. The arbitrary discharge would cause a waste of training, continuity, and expertise and bring unfavorable effects on employees' morale, loyalty, motivation, and thereby business productivity in the long term because of the employee's fear of being discharged.[9] It is necessary to create a stable work environment in which employees can work productively without having uncertainty about their future in the workplace.

The stable work environment, however, does not force employers to keep inefficient or unproductive workers but only requires them to have a clear, legitimate, and job-related cause of discharge. Job security can foster employee identification with the goals of the company,[10]

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[9]*See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV.L.REV. 1816, 1834-35 (1980). *See generally,* SPECIAL TASK FORCE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WORK IN AMERICA 166 (1972).

[10]G. Minda & K. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK.L.REV. 1137, 1179 (1989). ("Some private corporations have recognized these employment values and have implemented their own fair employment procedures. Federal Express, Citicorp, and

which would be proved by the experience of other industrialized countries including Japan[11] and Germany.[12]

The comprehensive protection of employees outside the unionized[13] and public sectors[14] is particularly one of the important issues to be solved because these employees constitute a majority of the United States work force. Eighty-five percent of the present American work force, consisting of over approximately eighty-three million workers, are employed under the at-will doctrine.[15] The non-unionized employees are discharged at a rate two times that

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International Business Machines have adopted their own internal fair dismissal procedures.").

[11]The lifetime employment in Japan is a practice, not forced by a law or a contract. This practice has been widely applies and accepted by labor and management. *See also* RODO KIJUNHO (Labor Code), Law No. 49 of 1947, art. 20.

[12]*See* Note, *supra* note 9, at 1836 n.104. *See also*, C. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA.L.REV. 481, 511 (1976).

[13]Most of the unionized workers enjoy job security under a "just cause" provision of collective bargaining agreements. *See generally*, A. Cox, D. Bok & R. Gorman, Labor Law 701-02 (10th ed. 1986); *see* 2 Collective Bargaining, Negot. & Cort. (BNA) §40:1, at 121 (1986) (grounds for discharge found in 94% of contract analyzed).

[14]Public employees covered by state and federal civil service statutes who generally cannot be fired without cause and without a hearing. As to discharge of civil service workers, 15 A Am Jur 2d, Civil Service §§68 *et seq.*

[15]R. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U.PA.L.REV. 197, note 1 (1990).

of unionized workers,[16] and some 1.4 million of these workers are terminated from their job each year.[17] The disparity in the right and privileges of the American work force obviously has a significant effect on the at-will employee. Since it is unlikely that the complicated array of statutory and common law exceptions to the at-will presumption corrects the disparity in employment environments and uniformly provides all the employees with job security, a comprehensive statutory approach to employment termination would be the best solution.

This article, by consistently focusing on the problem of job security, contends that total abolition of at-will employment by unjust-dismissal legislation will ultimately be necessary for all employees to be fully protected against wrongful discharge.

Part II of this article traces the origin of the at-will doctrine to 19th century principles favoring economic individualism and formalistic interpretation of contracts and proves that there is a distinct difference in the social backgrounds between the past and the present. Part III examines the doctrinal basis for the at-will rule in light of modern tort and contract principles. Part IV reconsiders the subjects of Part II and III in relation to job security and discusses the total abolishment of the at

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[16]Hames, *The Current Status of the Doctrine of Employment-At-Will*, 39 LAB.L.J. 19, 19 (1988).

[17]Pratt, *supra* note 15, at 197 n.3.

will rule by legislative action. Part V advocates a federal statute requiring employers to fire employees only for good cause. It begins by dealing with the Montana Statute and Model Employment Termination Act and then analyzes the concept of "good cause". It also examines the coverage of a just cause statute, including topics such as remedies and procedures.

CHAPTER II

THE ORIGIN OF THE AT-WILL DOCTRINE AND HISTORICAL EXCEPTIONS

A. Wood's Rule

The employment at-will doctrine grew out of the pre-industrial concepts of master and servant in the 19th century whose relations were rooted in feudalism and family,[18] where the employer took responsibility for the servant's health and well-being. In an 1877 treatise,[19] Horace G. Wood articulated that a hiring for an indefinite period was presumptively a hiring at will, which could be terminated at any time by either party.[20] This so-called Wood's principle was first adopted by the New York court in the Martin case[21] and then became the "American rule" of

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[18]P. Linzer, *The Decline of Asset: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA.L.REV. 323, 375 (1986).

[19]H. Wood, *supra* note 1, at 272-73.

[20]*Id.* at 272.

[21]*Martin v. New York Life Ins. Co.*, 148 NY 117, 121, 42 N.E. 416, 418 (1895) ("With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants").

substantive law. Behind the scenes was a transition from Status, "the servant," to Contract, "the employee."

The at-will doctrine reflected the then laissez fair economic philosophy in the 19th century. With the coming of the era of large-scale industry, the attitude of Government was undoubtedly favorable to the employer, stressing the freedom of the employer to run its business without interference and encouraging industrial growth. By enabling the employer to enjoy great discretion over the employee in the employment relationship, the at-will doctrine contributed to the entrepreneurship and economic growth of the era.

The concept of "freedom of contract" was also evolved from the laissez-faire economic policy. In that age when large-scale industry was developing at a rapid pace, workers frequently changed jobs on their own initiative[22] thanks to the historic American shortage of labor. The policy of vesting employers with maximum freedom to terminate employees probably seemed to the courts an obvious interpretation of "mutuality of obligations." And so, "freedom of contract" that the terms of the employment relationship, like those of other economic relationship, should be determined entirely by the parties to the contract without interference from state or federal

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[22]A. Leonard, *A New Common Law of Employment Termination*, 66 N.C.L.Rev. 631, 641 (1988).

government[23] seemed to the courts an obvious translation of public policy into the employment sphere.[24]

B. Movements of Statutory Protections

At the turn of the century, there arose a movement to call for some protections for employees. The federal and state governments as well as the public began trying to correct the inequality of powers between employers and employees.

Legislatures carved out exceptions to freedom of contract running along two distinct lines: first, protecting collective employee rights, and second, protecting individual employee rights.

As to the former, social and economic pressures led to legal developments protecting the economic welfare of workers; collective bargaining and unionization of employees created the initial change and the erosion of the employment at-will doctrine. The Norris-LaGuardia Act of 1932[25] and the National Labor Relations Act of 1935[26] sought to create an environment in which collective bargaining would replace individual bargaining for most employees.

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[23]W. Freedman, *The Employment Contract Rights and Duties of Employers and Employees* 13 (Quorum Books 1989).

[24]Leonard, *supra* note 22, at 641. ("Furthermore such a rule was consistent with the general approach of the courts toward employment issues").

[25]29 U.S.C. §§101-115 (1988).

[26]29 U.S.C. §§151-169 (1988).

Acting through a representative of their own choosing, employees would become their own guardians[27] and obtain a voice in many decisions affecting their working lives such as wage rates, benefits, working conditions, and job security. Section 8(a)(3)[28] of the NLRA prohibits an employer from discriminating in employment in order to encourage or discourage union membership. The employer's freedom to discharge employees is curtailed in this significant respect. Furthermore, most of the unionized employees can enjoy protection from wrongful discharge under a "just cause" provision of collective bargaining agreements.[29]

The shift of American labor law in the late 1960's from the legislative protection of collective employee rights to protection of the individual further eroded the

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[27]C. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB.L.REV. 7, 9 ("The basic assumption of the N.L.R.A was that the labor market would be regulated by collective bargaining, not by legislation. Workers would be protected by their union, not by government officials. Workers' rights would be guaranteed by the collective agreement, not by the law. Those rights would be defined and enforced through grievance procedures and arbitration, not through administrative agencies or courts").

[28]§8(a)(3)("It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...").

[29]*See* note 13.

at-will presumption. "Equal Employment Opportunities" provisions of Title VII of the Civil Rights Act of 1964[30] protect employees from discriminatory discharge on the basis of race, color, religion, sex, or national origin. Other special purpose statutes prohibit discharge because of age[31] or disability.[32] Retaliatory discharges of employees exercising their statutory rights have also been outlawed.[33]

An overview of this legislative history indicates three general characteristics of the recognition of employee rights. First, working conditions, particularly economic interests of the employee, could be encompassed in collective agreements. Provisions requiring just cause for discharge seem to be by-products of collective bargaining rather than primary interests such as wages or benefits.

The second characteristic is that interests protected by legislation are primarily non-economic interests in

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[30]§703 (a)(1), 42 U.S.C. §2000e-2.

[31]Age Discrimination in Employment Act of 1975 (ADEA) §4(a), 29 U.S.C. §623(a)(1982). In 1986, the Age Discrimination in Employment Act was amended to forbid mandatory retirement based on age, with a few narrow exceptions pertaining to specified jobs. Act of Oct. 31, 1986, Pub. L. No. 99-592, 100 State 3342.

[32]The American Disabilities Act of 1990.

[33]19 U.S.C. §612(d) (1982 & Supp. IV 1986)(ADEA); 29 U.S.C. §158(a)(4)(1982 & Supp. IV 1986)(NLRA); 29 U.S.C. § 215(a)(1982 & Supp IV 1986)(FLSA); 29 U.S.C. §651 (1982 & Supp. IV 1986)(OSHA).

fairness, personal dignity, privacy, or physical integrity.[34] Most of the federal labor legislation falls in this category. Protection for substantive and procedural fairness and justice leads to the democracy of the work place.

The interrelation of the collective employee rights and the individual employee rights is worth discussing. Since labor legislation regarding individual rights generally regulates minimum standards of working conditions, it is desirable for unions to take an important role in order to further improve those conditions and to create dependable environment in which both labor and management abide by the rules with responsibility. Labor legislation concerning collective rights would function as a complement to the legislation regarding individual rights. However, because collective bargaining has failed to take root as the function of establishing or raising employment conditions,[35] statutes which regulate individual rights has played a significant part in the American employment law.

The third, and the most important, characteristic is that legislatures and the courts are in a formative phase to build on an assumption that the employee has a valuable

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[34]Summers, *supra* note 27, at 15.

[35]*See* 7 HOFSTRA LAW.L.J. 71, at 104 n.121 (1989)(noting that 12.9 percent of "all private nonagricultural wage and salary workers were members of unions...while 14.2 percent (of those same workers) were represented by unions").

interest in his job which ought not to be arbitrarily taken away.[36] This assumption is the very progressive attitude toward job security for workers.

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[36]Summers, *supra* note 27, at 15.

CHAPTER III

COMMON LAW EXCEPTIONS TO THE AT-WILL DOCTRINE

The history of employment law in The United States has been the history of adding demanded and recognized employee rights one by one. There is no doubt that the judiciary has made efforts to respond to the public's desire to see fairness and justice in the workplace.

Academic criticism of the at-will doctrine, starting generally in the 1960's[37] along with the felt need of the public, spurred courts to extend legal theories and to develop new remedies for at-will employees. By the 1980's, the courts of the majority of the states had created some exceptions to the at-will rule. Judicial developments also reflect a tendency of courts frequently to alter the common law rules concerning employment, often looking to decisions from other states for guidance.

The common law exceptions based on a variety of perceptions about the inadequacy of the at-will presumption generally divide into two broad categories: tort and

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[37]*See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM.L.REV. 1404 (1967); Peck, *Unjust Discharges from Employment: A necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979), *etc.*

contract. The tort theories of wrongful discharge are not concerned with the private agreement between the parties to the employment contract. They rather seek to vindicate some public policies, found expressly or by implication in statutes or common law, independent of the terms of any particular employment contract. The most common of the tort theories is the public policy exception.

Under the contract theories, courts find legal protection for employees by enforcing the private terms of their employment contracts. Breach of the implied covenant of good faith and fair dealing is rather a sub-category of suits based on breach of contract. The implied covenant theory argues that in every contractual arrangement between parties, the law implies that the parties will deal fairly and in good faith with one another regardless of whether there is a written, implied, or oral agreement. This is consistent with other contract developments, particularly the provisions of the "Uniform Commercial Code"[38] and the "Restatement(Second) of Contracts,"[39] stating that "every contract imposes a duty of good faith in its performance."[40] However, only a few states adopt this rule.[41]

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[38]U.C.C.

[39]RESTATEMENT (SECOND) OF CONTRACTS §90, ¶1 (1979).

[40]*Id.*

[41]Alaska, California, Connecticut, Iowa, Massachusetts, Montana, and Nevada (Table 1. Chronology of Exceptions to the Employment-At-Will Doctrine in Each of the Fifty States), A. Krueger, *The Evolution of Unjust-Dismissal*

A. Tort Theories

1. Public Policy Exception

The first exception to the employment at-will doctrine recognized in the United States is based on notions of public policy,[42] and the most widely accepted exception has been the "public policy exception."[43] The basis of the

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Legislation in the United States, 44 INDUS.& LAB.REL.REV. 644, 649 (1991).

[42]*Peterman v. Int. Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d. 25 (1959); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Monge v. BeebeRubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (1978); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), *etc.*

[43]*See*, Seligman, *At-Will Termination: Evaluating Wrongful Discharge Actions*, TRIAL, Feb. 1983, at 60,61 ("The Public Policy limitation on at-will termination is the most widely accepted of the new wrongful discharge causes of action"). *See generally*, Comment, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN.L.REV. 617 (1981); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L.REV. 153 (1981); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 *Harv.L.Rev.* 1931 (1983) [hereinafter cited as Public Policy Exception]; DeGiuseppe, *The Recognition of Public Policy Exception to the Employment-At-Will Rule. A Legislative Function?* 11 FORDHAM URB.L.J. 721 (1983); Note, *Development of the Pablic Policy Exception to the At-Will Doctrine*, 29 ARIZ.L.REV. 295 (1987); Cashman *et al.*, *Employment Law: Minnesota Adopts the Public Policy Exception to the At-Will Doctrine*, 14 WM MITCHELL L.REV. 210 (1988); *but see*, Note, *The Price of the Public Policy*

exception is the duty of the employer not to fire an employee for reasons that contravene fundamental principles of public policy.[44] Accordingly, the courts generally protect three categories of employee conduct:[45] (1) refusing to engage in illegal activities; (2) exercising a statutory right or performing a civil obligation; and (3) reporting criminal conduct to supervisors or outside agencies.

In the first category of cases, the most typical ones are those of employees fired for refusing to give false testimony at a trial or administrative hearing.[46] Typical was the leading case, *Petermann v. Local 396, International Brotherhood of Teamsters*,[47] where an employee was fired for refusing to perjure himself at the command of his employer. The court held that the public's interest in preventing perjury was sufficiently great to warrant judicial

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Modification of the Terminable At-Will Rule, 34 LAB L.J. 563 (1983).

[44]Public Policy Exception, *supra* note 43, at 1936.

[45]Some commentators divide the conduct as follows: (1) refusing to commit an unlawful act; (2) performing an important public obligation; and (3) exercising a statutory right or previlege. *Id.*

[46]The nature of the proceedings in which the employee is asked to testify untruthfully should not affect the cause of action, i.e., before a state legislative committee, before a state fair-employment agency, before federal agencies, etc.

[47]174 Cal.App.2d 184, 344 P.2d 25 (1959).

intervention.[48] A case such as discharge for refusing to take part in price-fixing schemes, with *Petermann* at one extreme, falls into this category.[49]

The rationale for protecting these employees appears to be twofold. First, the courts feel it necessary that they prohibit employers' illegal conduct in order to protect the general welfare or the policy evidenced by penal codes, constitutions, and other statutes. Second, the courts seemingly permit a cause of action relying on the widely accepted principle that employees should not be required to choose between violating a law or becoming unemployed.[50]

The second category includes discharges for filling workers' compensation claims,[51] refusing to take polygraph

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[48]*Id.* at 189, 344 P.2d at 27.

[49]*E.g.*, *Tamenny v. Atlantic Righfield Co.*, 27 Cal.3d 167, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980); *Haigh v. Matsushita Electric Corp.*, 676 F. Supp. 1332 (applying Virginia Law).

[50]*Winther v. DEC International, Inc.*, 625 F. Supp. 100; *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330.

[51]*Kelsary v. Motorola, Inc.*, 74 Ill. 2d, 172, 384 N.E. 2d. 353 (1978); and *Firestone Textile Co. v. Meadows*, 666 S.W.2d. 730 (1983); *but* rejected in *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978).

tests, or performing an important civil duty such as jury service.[52]

Finally, there are situations where the discharge results from the reporting of improper or criminal activities of employers or co-workers to superiors or outside agencies, including the press or government; i.e., "whistle-blowing" cases.[53] The judicial approaches vary concerning the protection for whistleblowers. The best approach would be that employees discharged for reporting statutory violations be entitled to relief because public policy clearly favors the exposure of crime,[54] although no law compels an employee to step forward to communicate his suspicions regarding illegal activity. The enactments of federal whistleblower legislation, including a statute protecting all government workers,[55] and state legislation

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[52]*Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978).

[53]*See generally*, Malin, *Protecting the Whistle Blower*, 16 U.MICH.J.L.REF. 277 (1983); D.Massengill, *Whistleblowing: Protected Activity or Not?*, 15 EMPL.REL.L.J. 49 (Summer 1989); or *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment AT Will*, 59 U.CIN.L.REV. 513 (1990).

[54]*Belline v. K-Mart Corp* (CA 7 Ill) 940 F.2d 184.

[55]5 U.S.C.S. §§2302(b)(8),and 2302(b)(9).

including New York laws,[56] are based on the rationale of protecting whistleblowers.

2. Definitions of Public Policy

One of the most difficult issues presented in a public policy case is determining what public policy is. The full scope of the "public policy" exception, if it is not to be limited to a state's specific legislative enactments or even to its judicial decisions, is a remaining question. The most traditional sources for finding public policy are the official documents of policy such as federal and state constitutions and legislative enactments.[57] The Illinois Supreme Court acknowledged in its landmark decision, *Palmatter v. International Harvest*:[58]

> There is no precise definition of the term. In general, it can be said that public policy is what affects the citizens of the state collectively. It is to be found in the state's constitution and statutes and, when they are silent, in its judicial decisions.[59]

The Michigan Supreme Court in *Suchodolski* readily accepted that ethical conduct was important but held that a private code of ethics, such as that for internal auditors,

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[56]N.Y.LAB.LAW §740 (McKinney Supp.1988).
[57]Leonard, *supra* note 22, at 659.
[58]85 Ill.2d 124, 421 N.E.2d 878.
[59]*Id.* at 878.

did not comprise a "clear public mandate."[60] In *Schwartz v. Michigan Sugar Co.*,[61] the court declared that an articulation of a clear public mandate is limited to subjects that have actually been treated by the public, whether by the legislature, state agencies, or state courts or their federal equivalent. A majority of the courts adopting public policy exceptions in general hold the view that a clearly established public mandate must be found in statutes, regulations or court decisions.[62] This is "public policy" in a narrow sense.

On the other hand, courts that adopt a broad definition of "public policy" theoretically do not require the

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[60]*Suchodolski v. Michigan Consolidated Gas Co.*, 316 N.W.2d 710 (Mich. 1982).

[61]106 Mich.App. 471, 308 N.W.2d 710.

[62]*See, e.g., Turner v. Letterhenry Fed. Credit Union*, 505 A.2d 259 (9a. Super.Ct. 1986)(need a clear public mandate to overcome employment-at-will doctrine); or *Wagenseller v. Scottsdale Memorial Hosp.*, 174 Ariz. 370, 710 P.2d 1023 (1985)(only those statutes, constitutional law, and judicial decisions will provide the basis for a wrongful discharge claim). *See also, Salazar v. Furr's Inc.*, 629 F. Supp. 1403 (1986)(The court rejected the plaintiff's public policy argument that her dismissal for being married to an employee of the company's competitor violated the public policy that encourages family unity and the maintenence of family discipline. The court said this was a very broad principle but stated no specific expression of the alleged public policy. The court found that plaintiff's asserted public policy was "too amorphous" and therefore held that she failed to state a claim for wrongful discharge).

policy in question to be embodied in a specific statute, authority, or precedent. The broad definition of public policy may be found in the *Cilley* decision in New Hampshire.[63] Although the plaintiff cited no specific statute authority or precedent as the source of his complaint, the Court held that he was entitled to a trial on his complaint. Saying that "[t]he public policy contravened by the wrongful discharge can be based on statutory or non-statutory policy,"[64] the Court opined that what all the plaintiff must do in order to maintain an action for wrongful discharge is to prove he was discharged because he refused to do something public policy would condemn or did something public policy would encourage.[65]

New Hampshire is one of the very few states that adopts the broad definition of public policy and is, as one might notice, one of the first states to adopt the public policy exception.[66] Fewer and fewer courts are willing to

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[63]*Cilley v. New Hampshire Ball Bearings*, 514 A.2d 818 (1986)(The plaintiff claimed that he was fired for refusing to lie to the company president to cover for a senior official then alleged his dismissal constitute wrongful discharge in violation of public policy).

[64]*Id.* at 820.

[65]The Court further said that a jury could find that the plaintiff was discharged for refusing to lie and that public policy supports truthfulness.

[66]*Monge v. Beebe Rubber Co.*, 316 A.2d 549 (NH 1974). In *Cilley*, the Court cited *Monge* even though the sweeping holding in Monge was subsequently narrowed in *Cloutier v. A & P Tea Col*, 436 A.2d 549 (NH 1974).

accept the broad definition for fear that "public policy" could be found anywhere under such a broad view. Still other courts treat the whole concept of public policy as unsuited for judicial application in this context and instead declare it as a matter to be left to the legislature.[67]

3. Interrelation Between the Public Policy Exception and Job Security

It is unlikely that the public policy exception leads to a drastic modification of the at-will doctrine because it probably covers only a small percentage of wrongfully discharged employees. In light of the prevalent narrow definition of public policy, shrewd employers who know the public policies of the state and nation as expressed in their constitutions, statutes, judicial decisions, and administrative regulations are free from liability. The public policy exception is not designed to provide all employees with job security[68] but rather to protect the "public" from employers who break the law. "The public policy exception has nothing to do with job security."[69] The fact that a substantial majority of states have adopted

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[67]*Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 488 N.E.2d 86 (1983).

[68]D. Kornblau, *Common Law Remedies for Wrongfully Discharged Employees*, 9 INDUS.REL.L.J. 660, 667 (1987).

[69]*Id.*

the public policy exceptions that are relatively non-controversial and even endorsed by some strong defenders of the at will presumption[70] does not necessarily indicate a progressive attitude towards job security.

B. Contract Theories

Under contract theories, courts find legal protection for employees by enforcing the private terms of their employment contracts. According to the theories, the at-will presumption may be rebutted by certain employer actions or statements, written or oral, regarding job security or termination procedures which are legally binding contractual obligations.

In Woods' time, master-servant relations rooted in feudalism were similar to relationships of the family, in which the servant was only "a protected and restricted creature of status."[71]

In the post-Wood period, the industrial revolution brought "a movement from Status to Contract,"[72] and it was settled that the employer-employee relationship was the product of an agreement between the parties regarding the nature of work to be performed and terms or conditions of employment. As such, the employer-employee relationship,

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[70]Epstein, *In Defense of the Contract at Will*, 51 U.CHI.L.REV. 947, 952-53 (1984).

[71]*Id.*

[72]H.Maine, Ancient Law 165(1964)(emphasis in original).

even though terminable at will, is basically contractual. Relying upon this contractual nature found especially in written company policies and procedures, terminated employees argued with increasing frequency that their indefinite terms of employment are terminable only for cause.

For decades, it has been increasingly common for employers to promulgate company policies and rules through the medium of employee handbooks or personnel manuals. Employers generally regard the handbook as an effective tool to communicate to all or specific employees about the company's policies and practices.[73]

Such handbooks usually outline two types of formal rules: substantive policies governing the employee's job and employment expectations; and procedual policies dealing with personnel benefits. They may contain explicit provisions regarding personnel benefits and human resources, or they may contain only vague statements.[74] Whatever the

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[73]It is not, however, always necessary for a company to prepare such a document.

[74]Personnel policy has been rejected as part of the employment contract where it was found that the policy was nothing more than a mere general expression of goodwill and optimism for the future. *For example, Brown v. Safeway Stores, Inc.*, 190 F. Supp., 295 (E.D.NY. 1960)(the company president's statement at a meeting of district managers that the district managers would always be employed is not to secure life or permanent employment). *See also, Brookfield v. Drury College*, 139 Mo.App. 339, 123 S.W. 86

form they may take, employees began to assert that promises and procedures found in documents give rise to some contractual obligations on the part of the employer.

1. The Traditional Approach

In its literal sense, "breach of contract" in the employment context means the existence of a formal, written contract that has been breached. The issue now raised more frequently is whether documents other than formal contrcts such as company policies are part of the employment contract.

Courts traditionally supported the view that employee handbooks did not affect the employer's right to discharge the employee at will. The cases rejecting company policy as part of the employment contract are premised upon the absence of meeting of minds, mutuality, consideration, or definiteness.

a. Meeting of Minds

The Supreme Court of Kansas' decision in *Johnson v. National Beef Packing Co.*[75] exemplifies strict adherence to the traditional contract requirements. In *Johnson*, a policy manual was published and distributed after the

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(1909); and *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910 (E.D.Mich. 1977).

[75]220 Kan. 52, 551 P.2d 779 (1976).

commencement of the plaintiff's employment.[76] Stressing the unilateral nature of the policy manual, the court wrote as follows:

"It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the [employer's] unilateral act of publishing company policy."[77]

This rationale was followed by some other jurisdictions.[78] In *Darlington v. General Electric*,[79] the Pennsylvania Superior Court remained faithful to the rationale expressed in Johnson, refusing to find a contract based on the plaintiff's job interview and a manual given him during the interview. The court held that the simple fact of publishing a manual did not prove the "meeting of the minds" necessary to the formation of a contract. The terms of the handbook were not bargained for, hence unenforceable.[80]

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[76] *Id.* at 781.

[77] *Id.* at 782.

[78] *E.g. Lieber v. Union Carbide Courp.*, 577 F. Supp. 562, 564 (E.D. Tenn. 1983)(there must be a meeting of the minds by the parties that the handbook's provisions conferred a contractual right on the employee).

[79] 2 Individual Employment Rights Cases 1666 (Pa. Super. Ct. 1986).

[80] *Id.*

b. Mutuality of Obligation

In addition to citing lack of "meeting of minds" as a bar to employees' contract claims, some courts have said that a handbook is not a contract because there is no "mutuality of obligation."[81] In employee handbook cases, courts have applied the doctrine of mutuality of obligation that the employer is not bound to employ if the employee is not bound to continue his employment but is free to quit his job at any time for any reason.[82]

The view that job security provisions lack enforceability because of the absence of mutuality of obligation has been widely criticized and rejected by the courts.[83] Confusion has resulted most frequently from the word "mutuality" itself, which connotes symmetry. Since the law of contract, however, does not require the exchange of symmetric promises, the doctrine of mutuality of obligation

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[81]There are at least three discrete mutuality concepts: (1) mutuality of assent; (2) mutuality of remedy; and (3) mutuality of obligation. The doctrines have been repeatedly confused by the courts. William J. Holloway & Michael Leech, *Employment Termination Rights and Remedies* 53 (2d ed. 1985).

[82]*Hamlen v. Fairchild Industries, Inc.*, 413 So.2d 800 (Fla, Dist. Ct. App.1982).

[83]*E.g., Pugh v. See's Candies Inc.*, 116 Cal App 3d 311 (1981); *Pine River State Bank v. Mettille* 333 N.W.2d 622 (Minn 1983); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (1980).

cannot be sustained on the basis of symmetry.[84] Mutuality of obligation simply requires that both parties give consideration "in the form of a valid, legal, and binding promise."[85] It does not, accordingly, require the exchange of identical promises.

To summarize, mutuality appears, therefore, to be merely a form of consideration, and as long as some valid consideration for a contract is present, mutuality of obligation, in the sense of requiring such reciprocity, is not essential.[86]

c. The Requirement of Additional Consideration

The contract theory of consideration in employment law is the single confusing issue. Contract law requires that consideration be given in exchange for the promiser's offer in the form of a promise in order to convert that offer into a binding agreement. The question is what value the employee must give in exchange for the promises of job security contained in the handbook.

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[84]Holloway & Leech, *supra* note 81, at 54.

[85]*Id.*

[86]*Weiner v. Mcgraw-Hill, Inc.*, 443 N.E.2d 441, 444; *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629. *See also, Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880,885. Mutuality of obligation is disposed of in one sentence: "[t]he enforceability of a contract depends, however, on consideration and not mutuality of obligation."

Courts taking the traditional contract approach have answered this question by stating that a promise of job security must be supported by independent or additional consideration, consideration other than services to be rendered,[87] because work is already being compensated by wages. This "additional consideration" doctrine appears to be grounded upon an unstated presumption that a single, undivided consideration may be bargained for the agreed equivalent of only one promise. Thus, where services are made only in consideration of wages or salary, employees who have not given additional consideration to support their reliance on the promises in the handbook have usually been unsuccessful in proving a contract right to these promises.

The requirement of additional consideration for a promise of job security has received increasing criticism. One reason for judicial disapproval is that several employer promises may be enforced by a single performance by the employee, thus there is no requirement of a one-to-one relationship of promises or equivalency of consideration.

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[87]Some examples of additional consideration include: the employee's release of a tort claim against the employer, giving up another job, moving to take another job, forgoing another job opportunity, and longevity of service. *See Holloway & Leech*, *supra* note 81, at 47-50.

The court in *Pugh v. See's Candies, Inc.*[88] referred to the formalistic approach of independent consideration as follows: "Moreover, while it has sometimes been said that a promise for continued employment subject to limitation upon the employer's power of termination must be supported by some 'independent consideration,' i.e., consideration other than the services to be rendered, such a rule is contrary to the general contract principle that courts should not inquire into the adequacy of consideration. (*See* Calamari & Perillo, Contracts (wd ed. 1977) §4-3, p.136.). 'A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises.' (1 CORBIN ON CONTRACTS (1963) § 125, pp. 535-536.) Thus there is no analytical reason why an employee's promise to render services, or his actual rendition of services over time, may not support an employer's promise both to pay a particular wage (for example) and to refrain from arbitrary dismissal."[89]

As the court goes on to explain, where courts view the employment relationship as the exchange of a set of multiple employer promises, such as promises to pay a particular wage and to offer some kind of job security, for a single

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[88]116 Cal. App. 3d 311, 171 Cal. Rptr. 917(1981), *appeal after remand* (1st Dist) 203 Cal. App. 3d, 743, 250 Cal. Rptr. 195 (1988).

[89]*Id.*

consideration by the employee, there is no need to apply the additional consideration doctrine.[90]

Some Illinois cases illustrate the evolution of the law of consideration but also exemplify the continuing struggle with the idea of the requirement of additional consideration. In *Carter v. Kaskaskia Community Action Agency*,[91] the employer adopted a personnel manual, which was reviewed and accepted by the employees and approved by the employer's board of directors, four years after the employee began work. The employee contended that he was illegally discharged because the discharge procedures set forth in the manual were not followed.[92] The court held that the manual was enforceable as part of the employment contract, and the employee was thus illegally discharged.[93]

Carter stands for the proposition that personnel manuals can be part of an employment contract if two conditions are met: (1) a manual is a modification of the contract; and (2) the manual is bargained for or given independent consideration in the form of the employee's continuing to work after the manual takes effect.

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[90]*See also, Holloway & Leech, supra* note 81, at 4("Our research has not identified any court opinion that attempted to explain why a promise of a pension is enforceable but a promise of some kind of job security is not when both are in exchange for employee services.").

[91]24 Ill. App.3d 1056,322 N.E.2d 574 (1974).

[92]322 N.E.2d at 575-76.

[93]*Id.*

According to the court, the manual subsequently distributed was a modification of the existing "at-will employment" contract[94] and the employee provided independent consideration to support the second requirement by continuing to work.

In *Sargent v. Illinois Institute of Technology*,[95] the court held the manual was not an enforceable contract[96] because two conditions, which the Carter court addressed, were not met. The *Sargent* court said: (1) the personnel manual prescribing the guidelines for the predischarge hearing was not a modification of any preexisting employment contract because the plaintiff was given the manual when he commenced work; and (2) the terms set forth in the manual were not bargained for and the employee provided no independent consideration for the predischarge hearing requirement.[97] Thus, the personnel manual is not part of an employment contract unless the manual is a modification of the contract and supported by independent consideration.

The Illinois cases exemplify a different treatment of services to be rendered. The courts regard commencing work

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[94]The court also found that the employee's thirty days' notice before resigning and certain grievance procedures satisfy mutuality of obligation.

[95]78 Ill. App.3d 117, 397 N.E.2d 443 (1979).

[96]397 N.E.2d at 446.

[97]*Id.*

as no consideration,[98] whereas they regard continuing to work after a new handbook is approved by employees as a sufficient independent consideration to make the handbook binding. The courts should have a specific explanation why an employee who accepts and commences work from an employer, who has already promulgated a personnel policy, is considered not to have bargained for that policy. There must be good justification for the distinction between continuing to work and commencing work in these instances.

Having struggled with the traditional treatment of employment handbooks, as Illinois did, more and more jurisdictions abandon the requirements of bargain, mutuality of obligation, and additional consideration in the employment context. The traditional contract analysis has revealed its limitations and inadequacy to deal with the realities of the workplace in the employment context.[99]

The more courts lean toward application of the traditional treatment of employee handbooks, the more the approach they take becomes dogmatic. A typical example is the application of the additional consideration doctrine.

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[98]*Sargent*, 397 N.E.2d 446 (by agreeing to be bound by the handbook when commencing employment, the employee "merely agreed to properly perform his required duties and nothing more"); *see also, Evis v. Continental Ill. Nat'l Bank & Trust Co.*, 582 F. Supp. 876, 879 (N.D. Ill. 1984).

[99]Courts and commentators to a large extent view the employment relationship as a unilateral contract, as opposed to as a bilateral contract.

The additional consideration doctrine originally comes from the consideration doctrine in American contract law that consideration functions as a more objective and evidentiary proof for the parties' intent. In the employment context, it is certainly more probable that "the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer or suffer[ed] some detriment, beyond the usual rendition of service."[100] Thus, the traditional rule requiring independent consideration is only a rule of construction, not of substance;[101] courts should avoid a mechanical, arbitrary application of this doctrine in the employment context. The courts rejecting the additional consideration requirements embrace the viewpoint that additional consideration in order to enforce an employer's promises of job security is not necessary where it can be determined the parties intended to be bound by certain terms. A minority of courts, however, still hold to the additional consideration doctrine.[102]

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[100]Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324, 171 Cal. Rptr. 917, 924 (1981).

[101]*Id.* at 326, 171 Cal. Rptr. 917, 925.

[102]Indiana and Kentucky are such examples. *Murphee v. Alabama Farm Bureau ins. Co.* (Ala 449 So. 2d 1218, *Shah v. General Electric Co.* (WD Ky) 697 F. Supp. 946.

2. The Progressive Approach

Responding to increasing criticism against the traditional contract analysis in cases dealing with employee handbooks, more and more jurisdictions in the 1980's began to reappraise such a formalistic theory and thus to develop a new, more progressive approach in this area of law.

a. Unilateral Contract Analysis

A major feature of the progressive courts that find statements in employee handbooks binding is a willingness to utilize unilateral contract analysis. "In most of the cases involving an employer's personnel policy manual, the document is prepared without any negotiations and is voluntarily distributed to the employees,"[103] though it is not always necessary for the company to prepare such a document.

The voluntary nature of the manual shows that it seeks no return promise from the employees. Thus, the unilateral contract analysis is perfectly adequate in employment cases[104] in which the manual is an offer from the employer that seeks the formation of a unilateral contract and the

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[103]*Woolley v. Hoffmann-La Roche, Inc.*, (Sup. Ct. of N.J. 1985) 99 N.J. 284, 491 A.2d 1257, 1267.

[104]"Although unilateral contrct theory may be inappropriate for analyzing complex, multi-party transactions, it has been widely deemed appropriate for employment and handbbok scenarios." Pratt, Comments at 210.

performance of services serves as consideration in exchange for the employer's promise.[105] Today, many states have recognized implied unilateral contracts in the employment context.[106] This new approach to employment handbook cases has disposed of the problematic traditional requirements of independent consideration and mutuality of obligation.

One seminal case, *Toussaint v. Blue Cross & Blue Shield*,[107] adopted a variation on the unilateral contract analysis. In this case, which joined two separate cases with similar but somewhat different circumstances,[108] Toussaint claimed that he was orally assured of job

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[105]*Id. See generally*, M. Petit, *Modern Unilateral Contracts*, 63 B.U.L.Rev. 551 (1983).

[106]*See* Krueger, *supra* note 41, at 649 (Table 1. Chronology of Exceptions to the Employment-at-Will Doctrine of the Fifty States).

[107]408 Mich. 549, 292 N.W.2d 880 (1980).

[108]Two separate cases are consolidated in *Toussaint*. Plaintiffs Toussaint and Ebling, both middle-level managers, were discharged after serving five and two years for Blue Cross and Masco Corporation respectively. "Toussaint testified that he was told he would be with the company 'as long as I did my job.' Ebling testified that he was told that if he was ' doing the job' he would not be discharged."(292 N.W.2d at 884). Each claimed that he had received oral assurances at the time of hiring that he would not be discharged without just or good cause. It should be noted that *Toussaint*'s case is stronger because he was also handed a manual of the company personnel policies which reinforced the oral assurances of job security.

security when hired[109] and that he was also handed a "Supervisory Manual" with a pamphlet of "Guidelines" which contained a "just cause" provision.[110]

One of the disputes was whether the company policies regarding job security contained in the Manual and Guidelines were enforceable as part of Toussaint's employment contract or mere gratuitous statements of intent. Relying on established doctrines of contract formation, Blue Cross contended that separate and distinct consideration other than services should be required in order for employment contracts to be enforceable.[111] The company adhered to the additional consideration doctrine.

The company also put emphasis on the necessity of mutuality of obligation in the instant case.[112] In response to the idea that courts should inquire into adequacy of mutuality of obligation, the Supreme Court of Michigan rejected the idea by saying that the enforceability of a contract depends on consideration, not on mutuality of obligation.[113] The court regarded mutuality of obligation as a legal doctrine unworthy of addressing; "at best it was synonymous with consideration."[114] The court in *Pugh v.*

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[109]408 Mich. at 595, 61, 292 N.W.2d at 883, 884, 890.

[110]Id. at 638-40, 292 N.W.2d at 903-04.

[111]292 N.W.2d at 885.

[112]*Id.*

[113]*Id.*

[114]Holloway & Leech, *supra* note 81, at 89.

See's Candies, Inc.[115] also agreed that there is no requirement of mutuality of obligation if the requirement of consideration is met.[116] The concept of mutuality in employment contract cases is being widely discredited.[117]

The most significant issue then concentrates on what is exchanged between the employer and employee that amounts to consideration. The Toussaint majority noted as follows:

> While an employer need not establish personnel policies or practice, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. ... 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, they are established and official at any give time,

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[115]203 Cal. App.3d 743, 250 Cal Rp. 195 (1988).

[116]*Id.* at 751, 250 Cal. Rp. at 200.

[117]*Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (1983)("we see no merit in the lack of mutuality argument); and *Weiner v. Mcgraw-Hill, Inc.*, N.Y., 443 N.E.2d 441 444 (1982)("while coextensive promises may constitute consideration for each other, 'mutuality,' in the sense of requiring such reciprocity, is not necessary when a promise receives other valid consideration").

> purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with obligation."[118]

The majority first states that it is the company that has created a special environment in which the employee shall not be discharged without just cause by establishing personnel policies providing job security, though it is not forced to do so. The majority opinion then state that employees' reliance on written assurances of job security creates a cooperative and loyal workforce,[119] which consequently confers a benefit on the employer. Because the employer has taken that initiative and enjoyed the benefit of the employees' satisfactory job performance through the job security promise,[120] the court finds an implied contract of just cause discharge that the employer must recognize.

Although majority does not apparently overrule precedent requiring additional consideration,[121] this approach to enforcement of a promise of job security is at

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[118]408 Mich., at 613, 292 N.W.2d at 892.

[119]*Id.*

[120]*See Holloway & Leech, supra* note 81, at 89-90 ("[i]nstead of searching in vain for a reciprocal commitment from the employee, the court found improved morale to be the benefit to the employer in exchange for its job security commitments").

[121]*Id.*

odds with the formalistic, bargained for exchange view of contract.[122]

Noting that Toussaint did not receive the Manual and Guidelines or even learn of their existence until *after* he was hired,[123] the dissent concluded that "no meeting of minds occurred on the proposition that the defendant's Manual or Guidelines, or any part of either, would constitute the plaintiffs employment contract as claimed."[124] Hence the dissent regarded preemployment negotiation as a special circumstance, as amounting to the equivalent of consideration,[125] while the majority held that no preemployment negotiation over job security need take place.[126]

Indeed, the impact of the *Toussaint* decision in the attack on the traditional contract approach can be proved by the fact that an impressive number of jurisdictions have followed Toussaint's rational in wrongful discharge cases.

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[122]Linzer, *supra* note 18, at 351 ("this is heresy as far as traditional contract law is concerned").

[123]408 Mich. 579, 644, 292 N.W.2d at 906 (*emphasis added*). The Majority, however, speaks of Toussaint receiving manuals at his meeting with the company Treasurer. *Id.* at 597 n.5, 292 N.W.2d at 884 n.5.

[124]*Id.* at 646, 292 N.W.2d at 907.

[125]*Id.* at 641 n.4, 292 N.W.2d at 904. ("The record bears no evidence that during Mr. Toussaint's several preemployment interviews, any reference was made either to the Manual or Guidelines.") 292 N.W.2d at 906.

[126]"[A]nd the parties' minds need not meet on the subject") Id. at n.4, 292 N.W.2d at 892.

It seems, however, that *Toussaint*, invoking the idea of reliance, has made personnel manuals binding through the use of a promissory estoppel coloring approach rather than the use of unilateral contract analysis. The Restatement (Second) of contracts defines promissory estoppel as follows: " [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of a promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[127]

According to the definition, there are four requirements: First, there must be a promise; Second, the promise must be one the promisor should reasonably expect to induce action or forbearance; Third, the promisee must actually act or forbear to his detriment; and Fourth, the promise should be enforced only if injustice otherwise would result. Justice Ryan in his dissent refers to this point and says that "[w]hile the plaintiff in [Toussaint] case has not pleaded a claim of promissory estoppel concerning his wrongful termination claim, even if one be assumed, the record before us is without any evidence whatever that Toussaint relied upon any policy statements contained in the Supervisory Manual or the Guidelines concerning the duration of his employment, notice of termination or entitlement to written or oral warnings prior to

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[127]RESTATEMENT (SECOND) OF CONTRACTS §90, ¶1 (1979).

termination either as an inducement to become employed by or to remain in the employment of the defendant."[128] It might be possible to construe the case as that the employer has received consideration in the form of a "cooperative and loyal workforce."[129] Nevertheless, *Toussaint* failed to address the issue of consideration fully, which several other cases in the last decade have attempted to discuss more precisely.

The Minnesota Supreme Court of *Pine River State Bank v. Mettile*[130] contains a review of contract formation. In *Pine River*, the bank fired a former employee, Mettille, a loan officer, and sued him on two notes on which he was in default. Mettille counterclaimed, alleging that the bank had breached his employment contract, dismissing him without cause and in violation of the disciplinary procedures set forth in the employee handbook.[131] The bank distributed to *all* of its employees a printed employee

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[128]*Toussaint*, 408 Mich. at 649, 650, 292 N.W.2d at 908. The dissent further distinguished job security from proposes of a bonus, pension benefits, or severance pay that the employer should reasonably have expected would induce reliance by the employee in joining or remaining on the job. *Id.*

[129]The use of promissory estoppel as a substitute for consideration is recognized in some cases. *E.g., Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487, 492 (W.D.Ark. 1982).

[130]333 N.W.2d 622 (Minn. 1983).

[131]*Id.* at 624-25.

handbook containing specific provisions regarding job security and disciplinary policy.

The central issue was whether a personnel handbook, distributed *after* the plaintiff was hired, can become part of the employee's contract of employment.[132] In analyzing the issue, the court recognized the importance of the discussion concerning the need for the agreement process, i.e., an offer and an acceptance.[133] This is based on contract formation that requires an offer, acceptance and consideration.[134]

The court begins its contract analysis by noting that a handbook can become part of the employment contract if the requirements for formation of a unilateral contract, (offer, acceptance, and consideration) are met.[135] To be more precise, a promise of employment on particular terms of unspecified duration may create a binding unilateral contract, if the offer, definite in form, has been communicated to the offeree, the employee, and there has been an

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[132]*Id.* at 625 (*emphasis supplied*).

[133]*Id.* ("Whether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration").

[134]Mutual assent pervades all three contract elements: offer, acceptance and consideration. RESTATEMENT (SECOND) OF CONTRACTS §§3, ¶24, 50 & 71 (1979).

[135]*Pine River State Bank v. Mettille*, 333 N.W.2d at 625, 627.

acceptance of the offer and consideration furnished for its enforceability.[136]

In this case, according to the court, the alleged provisions of the handbook section[137] do set out in definite language an offer of a unilateral contract for procedures to be followed in job termination. This offer was communicated to the employees including respondent, by dissemination of the handbook. Mettile's continued performance of his duties, although free to quit, constitutes an acceptance of the bank's offer and also supplies the necessary consideration for that offer.[138] Hence, procedural restraints on termination of employees contained in the employment handbook were held contractually binding, and Mettille was wrongfully discharged contrary to those provisions.

As to consideration, the court disposed of the idea that a provision for job security in a contract of indefinite duration was not binding without additional, independent consideration other than services to be performed.[139] The independent consideration rule was not regarded as the exclusive means for creating an enforceable

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[136] *Id.* at 626-27.

[137] *Id.* at 630. This portion of the employee handbook was entitled "Disciplinary Policy." The handbook section entitled "Job Security", however, was not found definite enough to constitute any offer. *Id.*

[138] *Id.*

[139] *Id.* at 628-29.

job security provision; it served, at best, an evident function.[140] The gist of *Pine River*'s treatment of the consideration issue is that the court recognized the employee's continued labor despite his freedom to leave as sufficient consideration for implied promises.[141] The court also mentioned that it found no need to distinguish handbook provisions of job security from those of bonuses, severance pay or commission rates which were enforced with a single performance, the continued labor.[142] This approach seems more plain than the "reasonable expectations" standard applied by the Michigan Supreme Court in *Toussaint*.

The courts' discussion, as in *Pine River*, of implied unilateral promises of job security ranges over several important subissues. Some of the factors courts consider necessary to finding that the manual is an implied contract are as follows: the question of when the manual was given to the employee, at the time of hire or some time after; the question of whom the manual was given to and whom it was intended to cover; and the question of whether and to

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[140] *Id.* at 629. *See also, Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981).

[141] "Despite, her freedom to resign, an employee's labor, particularly if continued faithfully and satisfactorily over a reasonable period of time, is ample consideration to support all of an employer's express or implied promises including those related to job security." Note, supra note 9, at 1816, 1819-20.

[142] *Id.*

what extent the employee knew its provisions or of whether the employee was even aware of its existence.

As to the first question, for the courts in *Toussaint and Pine River*, it made no difference whether the manual was given to the employee at the time of the original hiring or later.[143] The New York Court of Appeals in *Weiner v. McGraw-Hill, Inc.*,[144] however, held job security promises contained in the handbook enforceable *only because they existed at the time of hiring*.[145] In the course of discussions looking towards his joining McGraw-Hill, Inc., the plaintiff was orally assured of job security as well as a well-paying position.[146] During the course of these discussions, he signed and submitted the application specifying that his employment would be subject to the provisions of the employee handbook prohibiting discharge

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[143]*Toussaint*, 408 Mich. 579, 292 N.W.2d 880, 892. *See also, Pine river*, 333 N.W.2d 622, 629 and 630 ("We hold, therefore, that where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude handbook provisions on job security from being enforceable, whether they are proffered *at the time of the original hiring or later*, when the parties have agreed to be bound therby")(*emphasis added*).

[144]57 N.Y.2d 458, 443 N.E.2d 441, 457, N.Y.S.2d 193(1982).

[145]*Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197 (*emphasis added*).

[146]The plaintiff had been working for another publisher, a competitor, for 4 years when he was invided by McGraw-Hill to discuss joining it.

without "just cause." During the eighth year of his employment, the plaintiff was dismissed allegedly for "lack of application."[147]

In upholding a breach of contract claim, the court concluded that the plaintiff should be entitled to establish an implied-in-fact contract obligation not to be discharged without just cause under certain circumstances surrounding the employment relationship. The circumstances the court found essential to state a cause of action consist of four factual grounds: (1) inducement based on oral assurances of just cause employment; (2) the assurance incorporated in the employment application; (3) detrimental reliance; and (4) the defendant's general enforcement of its just cause policy.[148] The court found it important that the job security policy existed at the time of hiring. The company was bound by the just cause policy, and it received consideration in the form of the employee's initial and continued employment or in the form of the employee's rejecting other offers of employment in reliance on the policy.

The court also noted that "it is not [an employer's] subjective intent nor any single act, phrase or other expression, but 'the totality of all of these, given the attendant circumstances, the situation of the parties, and

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[147]57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 197.

[148]*Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

the objectives they were striving to attain,' which will control."[149] In the *Weiner* court's point of view, all the course of conduct of the parties combined to state a good cause of action for breach of contract.

Where an employee brings suit for wrongful discharge in violation of the terms of the handbook, the question of whether the handbook was intended to cover the employee is relevant. The New Jersey supreme court in *Woolley v. Hoffmann-La Roche*[150] held that implied promises that it will discharge employees only for just cause in an employee handbook distributed by a large employer to its workforce are enforceable by all the employees.

Woolley, hired as an engineering section head, sued for breach of contract, complaining that the express and implied promises in the personnel manual created a contract underwhich he could not be fired without just cause.[151] In this company, the manual was generally distributed to *supervisory personnel*, however, the court in *Woolley* placed great emphasis on the fact that the manual was circulated

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[149]*Id.* at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198. The court's decision in Weiner has been criticied by some comentators, "[T]he court's decision was problematic since the majority merely listed four factors in the record without providing any indication as to the importance of any particular fact or mixture of factors." Minda, *supra* note 29, at 1145.

[150]99 N.J.284, 491 A.2d 1257 (1985).

[151]491 A.2d at 1258.

among a substantial number of its employees, who thus reasonably believed that the provisions should cover not only a particular class of employees but all employees as well.[152]

The court concluded that when an employer of a substantial number of employees circulates a manual providing certain benefits such as job security, the judiciary should construe them in accordance with the reasonable expectations of the employees.[153] In this point, the *Woolley* court adopted the same "reasonable expectations" standard applied by the Michigan Supreme Court in *Toussaint*. By the manual's extensive dissemination, in the absence of contradicting evidence, both the reasonable expectations of the employees to be covered by the provisions and the employer's *intent* to apprise a*ll employees* of the benefits it conferred were implied.[154] The general rule is that an employee whom a manual was not intended to cover may not sue the company for breach of contract based on the manual. This may be overcome by other circumstantial evidence that the company intended the manual to apply to all employees as in *Woolley* and *Weiner*.[155]

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[152]*Id.* at 297-98, 491 A.2d 1264-65.

[153]*Id.*

[154]*Id.*

[155]*See, Carbone v. Atlantic Richfield Petroleum Products Co.*, 3 Individual Employment Rights Cases 336 (Conn. 1987)(the court held that the manual, which was distributed only to supervisory personnel, was not intended

The *Woolley* court clearly characterized the employment relationship bound by the employee handbook as a unilateral contract.[156] "In most of the cases involving an employer's personnel policy manual, the document is prepared without any negotiations and is voluntarily distributed to the workforce by the employer. It seeks no return promise from the employees."[157] Thus, the court concludes that it is reasonable to interpret the manual as a unilateral offer,[158] in the form of promise.

In order for a unilateral offer in the form of promise to be enforceable, it must be accepted and supported by consideration.[159] Several questions arise from analysis that performance of job duties in response to an employer's unilateral offer simply satisfies both acceptance and consideration. Realistically, employees receiving a manual, reading it, and relying upon the policies would reasonably expect that those policies will be followed and that they

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to cover employees like the plaintiff, who was a non-managerial marketing representative).

[156]99 N.J. at 301-04, 491 A.2d at 1267. In a bilateral contract, however, promise is given in exchange for a promise rather than for performance. As to the requirements in a bilateral contract, *see* the privious Chapter.

[157]99 N.J. at 304, 491 A.2d at 1267.

[158]*Id.*

[159]Unilateral contract analysis views the employment handbook as an implied contract if the requirements of offer, acceptance and consideration are met.

will become the beneficiaries of those policies. With knowledge of the manual, the employee's continuing work when free to quit evinces acceptance and consideration. In that situation, the court's ruling is correct.[160]

However, would the courts conclude that the continued work of employees who are *unaware* of the policies of job security contained in a handbook evinces both acceptance and consideration? It seems anomalous to conclude that employees who are totally unaware of employment terms providing job security can be expected to respond by being a "cooperative and loyal work force."[161]

The majority in *Toussaint* held that it is unnecessary that the employee know of the particulars of the employer's policies and practices.[162] What seems important under the court's analysis is the fact that the employer published the policy for the employees' benefit.[163] The court in *Woolley* seems to follow *Toussaint* or even more to extend the scope of the unilateral contract treatment of acceptance and consideration.[164]

The Idaho court in *Watson v. Idaho Falls Consolidated Hospitals, Inc.*[165] is an opposite example. Citing *Woolley*,

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[160]99 N.J. at 301-04, 491 A. 2d at 1266-68.

[161]Harris, RUTGERS L. J. 715, at 732 (1986).

[162]*Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892.

[163]*Id.*

[164]*Woolley*, 99 N.J. at 304, 491, A.2d at 1268 n.10.

[165]1 Individual Employment Rights Cases 1540 (Idaho, 1986).

the Idaho Supreme Court noted that in employee handbook cases and in the employment relationship, all that is required as consideration is that the plaintiff continued to work under the terms of the manual and relied on it. The court's finding that the handbook constituted a unilateral contract was partly, but indeed, supported by the plaintiff's testimony that she and other employees *read* and *relied upon* the handbook as creating the terms of her contract of employment.[166]

As discussed above, a uniform rule of unilateral contract analysis has not been established in employee handbook cases especially where the employee does not know the particulars or even existence of job security provisions in the handbook. If courts consistently apply the strict contract formation in contract law requiring an offer, an acceptance, and consideration, to the employment cases, they will confront its inherent limitations. In

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[166]The fact that the handbook was distributed to employees and their signatures were required to establish receipt of the handbook reassured the existence of the agreement process in this case. One commentator also argues with the holding of Woolley by indicating that the "Anthony court [51 N.J. Super. 139, 143 A.2d 762], on which the Woolley court relied, explicitly required that the employee know of the offer in order to conclude that employee reliance would be presumed where an employer makes promises through its policy statements." Harris, *supra* note 161, at 731. ("the supreme court [of *Woolley*] neglected to mention this vital point in its own analysis.").

order for the offer of job security to be accepted, the employee needs at least to know of the offer's existence, not to say its particulars. The courts' analysis of the benefits of an orderly, cooperative and loyal workforce as consideration is correct in situations where the employee knows of the provision. The analysis is rather strained where the employee does not know of the provision.

Accordingly, it is reasonable to conclude that a promise contained in an employee handbook becomes part of an employment contract under unilateral contract analysis, if the following conditions are met: (1) a promise in the handbook is sufficiently definite to constitute an offer;[167] (2) the offer must be communicated to the employee, for instance, by the dissemination of the handbook; and (3) as a general rule, the employee who is aware of the policy accepts the offer and supplies the necessary consideration by commencing work or continuing to work.

b. Unilateral Alterations to Employee Handbooks and Effect of Disclaimers

Ironically, erosion of the employment-at-will doctrine among state courts through handbook exceptions has yielded some favorable results for employers. Like *Toussaint*, the *Woolley* court held that if the employer, for whatever

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[167]The courts are fairly consistent on this requirement of definiteness.

reason, does not want the manual to be capable of being construed by the court as a binding contract, "all that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual."[168] Inserting such disclaimer language in the handbook is favorable for employers wishing to avoid being sued based on implied contract theories.

But situations where employers unilaterally alter existing employee handbooks are rather problematic. Such court decisions as in *Toussaint* and *Pine River* respectively referred to the issue of contract modification and stated that an employer may subsequently and unilaterally change a handbook provision so as not to be bound by it as a contract. In *Pine River*, for example, *the* court notes that "[l]anguage in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions."[169]

It is certainly a wise idea for an employer to review the contents of an employee handbook and to keep it current by eliminating outdated, inapplicable rules and adding new provisions to improve the labor relations environment of the workplace. In that sense, as the *Pine River* court

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[168]*Woolley*, 491 A.2d at 1271.

[169]*Pine river*, 333 N.W.2d at 627.

mentions, "[u]nilateral contract modification of the employment contract may be a repetitive process."[170]

In reality, however, surveys[171] and case histories suggest that the changes actually made almost always disfavored the employees; alterations to employee handbooks from discharge for cause to termination at-will. Such alterations have great impact especially on employees of long service, who may be fired soon after such alterations.[172] Hence, the harsh effects of employer alteration of handbooks raise a question of whether detrimental unilateral amendments are effective *automatically* upon the employee remaining at work.

Only a handful of jurisdictions have considered the issue of employer alteration of handbooks. *Chambers v. Valley Nat'l Bank*[173] is one of the cases that has allowed

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[170] *Id.*

[171] "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." Jack Stieber and Mark D. Baines, *The Michigan Experience with Employment-at-Will*, 67 NEB.L.REV. 140, 171 n.241 (1988).

[172] *E.g., King v. Hosp. Care Corp.*, No.1-85-1 (Ohio App. may 13, 1986) (WESTLAW, Ohio Cts Database)(an employer added a disclaimer to a handbook with just cause provisions and soon after fired an employee); Chambers v. Valley nat'l Bank, 721 F. Supp. 1128, 1131 (D. Ariz. 1988)(an employee with 14 yrs of service was fired soon after a just cause handbook was disclaimed).

[173] 721 F. Supp. 1128 (D. Ariz. 1988).

unilateral modification by employers. In *Chambers*, the bank revised its original manual that had contained a discharge-for-cause provision and disclaimed any obligation to discharge for cause. The court characterized the employer's inclusion of a disclaimer in a handbook published subsequent to plaintiff's employment as an offer to modify a unilateral contract, which the plaintiff accepted by continuing to work.[174] This logic is based on the unilateral contract theory that if an employer's handbook is specific enough to constitute an offer, an employee's commencement of work or continuation constitutes both acceptance and consideration.

One recent case, *Bankey v. Storer Broadcasting Co.*,[175] also upheld unilateral modifications but on a different basis. In *Banky*, a discharged salesman with 13 years of service filed a complaint, alleging that there existed a policy that the company would not terminate its employees without just cause and that he continued to work for the store in reliance upon that policy.[176] In fact, the company revised its Digest to eliminate any for cause requirement for discharge of its employees two months prior to his

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[174]Id. at 1131-32. *See also, Bookshaw v. South St Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct. App. 1986) (stating that if an employer alters existing policies, a new unilateral contract is offered which the employee accepts by remaining on the job).

[175]432 Mich. 438, 443 N.W.2d 112 (1989).

[176]*Id.*

termination.[177] The Michigan Supreme Court held that "an employer may, without an express reservation of the right to do so, unilaterally change its written policy from one to discharge for cause to one of termination at will, provided that the employer gives affected employees reasonable notice of the policy change."[178]

In analyzing the enforceability of a new policy, this court finds it inappropriate to apply unilateral contract theory in this instance.[179] The court, instead, relies on "the analysis employed in *Toussaint* which focused upon the benefit that accrues to an employer when it establishes desirable personnel policies."[180] The *Toussaint* analysis states that an employer who chooses to establish desirable policies, such as one of discharge-for-cause, is seeking to promote an environment conductive to collective productivity.[181] The benefit the employer derives by establishing such policies, (a loyal, productive and cooperative work force), gives rise to a situation "instinct with an obligation."[182] Thus, when, as in the question before us,

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[177] *Id.* at 442, 443 N.W.2d at 114.

[178] *In re* Certified Question (*Bankey v. Storer Broadcasting Co.*), 432 Mich. 438, 443 N.W.2d 112 (Mich. 1989).

[179] *Id.* at 454, 443 N.W.2d at 119 . This court does not reject the applicability of unilateral contract theory in other situations.

[180] *Id.*

[181] *Id.*

[182] *Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892.

the employer chooses to revoke its desirable policy, the employer's benefit is correspondingly extinguished as is the rationale for the court's enforcement of the discharge-for-cause policy.[183]

This notion of mutual injury[184] and the premise that an employer should certainly retain discretions to change its policies, when necessary, to correspond to the business's needs underlie the argument permitting unilateral modifications. On fairness grounds, the court in *Bankey* required that reasonable notice be given to the affected employees for the revocation of a discharge-for-cause policy to become legally effective.[185]

Indeed, as the court notes, a business policy is generally understood as"a flexible framework for operational guidance, not [as] a perpetual binding contractual obligation,"[186] which supports the unilateral amendment of employment manuals. In this sense, a Missouri court's statement in *Enyeart*[187] may be true that "the employer is

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[183]One commentator notes "such changes injure the employer just as they injure the employee." Pratt, *supra* note 15, at 218 n.137.

[184]*Id.* at 219.

[185]*Bankey*, 432 Mich. at 456, 443 N.W.2d at 120 ("Fairness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoled by a pennywhistle trill at midnight").

[186]*Id.*

[187]*Enyeart v. Shelter Mutual Ins. Co.*, 693 S.W.2d 120, 123 (Mo.App. 1985).

contractually bound to observe [its] policies *until they are modified or withdrawn.*"[188]

Nevertheless, the issue that the employer's change in policy purported to affect employee benefits secured under the first handbook must be discussed more carefully. As one commentator suggests, "issuing a second unilaterally modified handbook is not the same as issuing the first"[189] because "the [modified] handbook constitutes an offer to *modify* the *existing* implied contract."[190] In *Bankey*, the unilaterally modified handbook constituted an offer to modify the existing contract of discharge-for-cause to the detriment of the employee, one of termination-at-will. The existence of the legitimate expectations of affected employees grounded in the discharge-for-cause policy makes such cases complicated to deal with.

Some foreign jurisdictions have dealt with the issue of the enforceability of a unilaterally modified handbook to the detriment of the employee and have advanced rather restrictive views of its enforceability. The Supreme Court of Japan held that the employer's change in policy purporting to affect employee benefits already accrued or vested may be binding only with an absolutely reasonable cause to alter.[191]

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[188] *Id.* (*emphasis added*).

[189] Pratt, *supra* note 15, at 221.

[190] *Id.* (*emphasis added*).

[191] 1968-12-25 MINSHU.

Two English cases held that an employer may unilaterally change its employment rules, provided that the employer gives affected employees reasonable notice of the rule change.[192] Hepple supported the ruling, noting that the contract may be legally binding based on the principle of promissory estoppel.[193] Under the principle of promissory estoppel, requiring that reasonable notice of a change that revokes a discharge-for-cause policy must be uniformly given to affected employees protects legitimate expectations of the employees who worked under this view. Without reasonable notice or other means to protect the expectations, employers would be allowed to change their policies *only* when *absolutely necessary*. It would be doubtful, however, for courts to apply such a reasonable standard as that of Japan to the cases in which the employer is attempting to alter the handbook from a discharge-for-cause to one of termination at-will because "the concept of 'accrued or vested rights [in this country] cannot be stretched to include the right not to be discharged except for just cause."[194]

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[192]*Carus v. Eastwood* [1975] I.T. 885 (Q.B.), *James v. Hepworth and Grandage Lt.* [1968] I.Q.B. 94 (C.A.).

[193]Hepple, B.A., *Employment Law*, 4th ed., 1981.

[194]*Ottawa Co. v. Jaklinski*, 423 Mich. 1, 26, 377 N.W.2d 668 (1985). "Vested or accrued rights" in Michigan include as followes: *Psutka v. michigan Alkali Co.*, 274 Mich 318, 264 N.W. 385 (1936)(pensions and death benefits); and

Like *Toussaint*, the analysis employed in *Bankey* seems to be close to the principle of promissory estoppel. Courts making employee handbooks binding through the use of promissory estoppel need not search for offer, acceptance, and consideration; instead, they look for an employee's reasonable reliance upon statements made by the employer. The courts simply prefer a promissory estoppel approach in employee handbook cases, or some of them may shrink from unilateral contract approach.[195] Although the *Banky* court clearly states that the use of unilateral contract theory is not appropriate in the instant case,[196] it seems to say so in order to avoid struggling with contractual obstacles.

In analyzing the enforceability of the unilaterally modified handbook from one of discharge for cause to one of termination at-will, the most important factor to which courts should look is acceptance by affected employees. In that sense, reasonable notice given to all employees is useful for a jury to determine that continued work satisfies both acceptance and consideration. Thus, assumption that continued work by the employee automatically makes the unilaterally modified handbook binding is hasty.

Gaydos v. White Motor Corp., 54 Mich 143, 220 N.W.2d 697 (1974)(severance pay).

[195]A difference betwee these two approaches lies in damages. *See*, Pratt, *supra* note 15, at 216.

[196]Justice Boyle in his concurring agrees with the majority. Bankey, *supra* note 178.

The applicability of unilateral contract theory in the above situations should be judged based upon whether the court pays careful attention to the agreement process not the mere fact of the employee continuing to work.

Today courts and commentators to a large extent generally view the employment relationship as a unilateral contract. Unilateral contract analysis disposes of the traditional obstacles of bilateral contract and is viewed as particularly useful, combined with the progressive court approach to consideration in the employee handbook context. The history of contract exception cases also reflects public interests stated in private agreements. The court's application of contract law in both ordinary handbook cases and those of modification, however, leaves questions to be resolved.

C. The Covenant of Good Faith and Fair Dealing

An employee may allege that the employer's action violated the covenant of good faith and fair dealing implied by law in every contract. The idea of implying such an obligation into employment contracts was extended from other contract developments, particularly the provisions of the Uniform Commercial Code[197] and the RESTATEMENT

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[197]U.C.C. §1-203 provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

(SECOND) OF CONTRACTS[198] that every contract imposes a duty of good faith in its performance.

California, for example, has led the way in developing causes of action to protect at-will employees, first allowing a contract cause of action, then a tort cause of action for discharge in violation of public policy, and also a cause of action for discharge based on breach of the implied covenant of good faith and fair dealing. California appellate courts allowed even tort relief for breach of the implied covenant until the California Supreme Court determined in *Foley v. Interactive Data Corp.* that an employer's breach of the implied covenant is not a tort.[199]

While some courts recognize the rule under certain circumstances,[200] most of the jurisdictions still reject a cause of action for breach of the implied covenant in employment contracts, arguing that "although there may be an implied covenant of good faith and fair dealing in other types of contracts (e.g., sales, insurance, surest, [or] various commercial transaction), no such covenant should be implied in employment contracts,"[201] because an implied

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[198]RESTATEMENT (SECOND) OF CONTRACTS §205 (1981) provides: "Every contract imposes uon each party a duty of good faith and fair dealing in its performance and its enforcement."

[199]*Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Ca. Rptr. 211, 765 P.2d 373.

[200]Accompanying text, n.41.

[201]Cerard P. Panaro, Employment Law Manual 8-39 (Warren, Glrham & Lamont, Inc. 1990).

covenant is considered inconsistent with the rule of employment-at-will. Alternatively, courts argue that any changes in the area of the employment law should be accomplished legislatively and not by courts.[202]

These conditions illustrate several problems: first, there is no uniform rationale for the theory of an implied covenant of good faith and fair dealing; second, states vary on what elements the plaintiff must prove to establish a case; and third, courts do not agree on whether breach of an implied covenant of good faith and fair dealing is strictly a contract action, a tort, or both. Thus, this type of wrongful discharge suit is probably the weakest and most complicated of all types of wrongful discharge suits.

1. The Historical Development

Review of the historical development of the implied covenant of good faith and fair dealing should start with the New Hampshire Supreme Court case, *Monge v. Beebe Rubber Co.*,[203] the seminal case on the bad-faith wrongful discharge cause of action. In *Monge*, the plaintiff alleged the employer may be subject to contract damages and compensatory damages for emotional distress for wrongful discharge on a non statutory claim for sexual harassment on the

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[202]Panaro, *Supra* note 14, at 8-38 - 8-40.

[203]114 NH 130, 316 A.2d 549 (N.H. 1974).

job.[204] Reversing the award of compensatory damages, the New Hampshire Supreme Court affirmed the judgment for contract damages and held "that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[205]

Although the court in *Monge* injected public policy considerations into the employment relationship and imposed an obligation on the employer, this case was rather confusing as it included tort and contract concepts in a single holding.[206] Several years later, the New Hampshire Supreme Court, in *Howard v. Dorr Woolen Co.*,[207] suggested that New Hampshire was aligned with the majority view that permitted a public policy exception to the at-will rule and

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[204]When the case arose, sexual harrassment as a violation of Title VII was not generally recognized. The Supreme Court has only recently held that sexual harrassment is actionable as unlawful discrimination on the basis of sex. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-68 (1986).

[205]*Monge* 114 NH at 132, 316 A.2d at 551.

[206]Lucy A. Singer, *Employment-at-Will and the Aftermath of Foley v. Interactive Data Corp.*, 34 SAINT LOUIS L.J. 695, 703 (1990). *See also*, Tom May, *The covenant of Good Faith and Fair Dealing: A Common Ground for the Torts of Wrongful Discharge from Employment*, 21 SANTA CLARA L. REV. 1111, 1157 (1981).

[207]120 NH 295, 414 A.2d 1273 (1980).

that it did not intend in *Monge* break new ground on a bad-faith theory. A year later, the court in *Cloutier*[208] reconciled these two cases and articu-lated a two-part test[209] to apply in wrongful discharge cases alleging bad faith.

Despite New Hampshire's retreat, several courts began to apply the bad-faith theory to wrongful discharge cases on the rationale of the implied covenant of good faith and fair dealing. The first case following *Monge* on this bases was a decision of the Massachusetts Supreme Judicial Court in *Fortune v. National Cash Register Co.*[210] Fortune, an employee of National Cash Register as a regional salesman, was fired to prevent the vesting of certain commission rights. The Supreme Judicial Court held that: (1) even though the salesman's contract was terminable at will, there was an implied covenant of good faith in the contract; and (2) evidence supported the determination that the employer had discharged the salesman in order to avoid

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[208]*Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 NH 915, 436 A.2d 1140 (1980).

[209]"In order to recover damages, the plaintiff must show that the defendant was motivated by bad faith, malice, or retaliation in terminating the plaintiff's employment; in addition, the plaintiff must demonstrate that the firing was because of the performance of an act that public policy encouraged or the refusal to perform an act that public policy condemned."

[210]373 Mass 96, 364 N.E.2d 1251 (1977).

paying certain bonuses to the salesman,[211] hence breach of the covenant. Recognizing the general requirement in law "that parties to contracts and commercial transactions must act in good faith toward one another"[212] and the existence of this duty in the contract, however, the court found it unnecessary to reach the question as to whether all employment contracts contained a duty of good faith and fair dealing.[213] The New Hampshire and Massachusetts courts have shied away from a broad incorporation and adopted instead more limited exceptions.[214]

One of the influential decisions involving the duty of good faith and fair dealing is *Cleary v. American Airlines*.[215] In *Cleary*, a plaintiff with 18 years' seniority who was discharged for alleged theft, brought suit on a contract theory, arguing that the due process guaranteed in the handbook and a general duty of good faith and fair dealing were not followed.[216] A California court of appeals

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[211]364 N.E.2d 1256.

[212]*Id.* at 1257.

[213]*Id.*

[214]The New Hampshire court limited Monge to discharges that violate the usual public policy exception standard. (*See* Haward, 120 N.H. at 297). In Massachusetts, the implied covenant was applied only in cases in which employees lost "identifiable, reasonably anticipated future compensation, based on ... past services" because of a discharge without cause.(*Gram v. Liberty Mut. Ins. Col.*, 384 Mass. 659, 660, 429 N.E.2d 21, 22 (1980)).

[215]111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

[216]*Id.* at 447-48, 168 Cal. Rptr. at 724.

held that the longevity of the employee's service could provide a basis for finding a violation of the duty of good faith and fair dealing.[217] The court focused on Cleary's eighteen years of apparently satisfactory performance as the basis for an implied-in law requirement that employers can discharge long-term employees only in good faith.[218]

As to the proper remedy, the New Hampshire court in Monge rejected damages for pain and suffering.[219] The Cleary court, however, stated that the employer's breach of the covenant "sounded in both contract and in tort"[220] and that "[the discharged employee] will then be entitled to an award of compensatory damages, and in addition, punitive damages if his proof complies with the reguirements for [punitive] damages."[221] The Montana court in *Gates v. Life of Montana Insurance Co.*,[222] while rejecting the plaintiff's

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[217]*Id.* at 455, 168 Cal. Rptr. at 729.

[218]Leonard, *supra* note 22, at 655 (noting while longevity of service, by itself provides a basis for finding a violation of "the duty of good faith and fair dealing", the promulgation of a handbook policy is evidence of the employer's recognition of such an obligation).

[219]*Monge*, 114 N.H. at 133, 316 A.2d at 551.

[220]*Cleary*, 111 Cal. App.3d at 456, 168 Cal. Rptr. at 729.

[221]*Id.*

[222]196 Mont. 176, 638 P.2d 1063 (1982), [hereinafter *Gates I*] *appeal from decision on remand*, 205 Mont. 304, 668 P.2d 213 (1983)[hereinafter *Gates II*].

express contract claim based on the handbook,[223] found that the employer's duty of good faith and fair dealing was implied in the employment contract.[224]

In *Gates II*, the court held that the duty of good faith and fair dealing was implied by law, "apart from, and in addition to, any terms agreed to by the parties."[225] The breach of the duty sounds in tort and supports an award of punitive damages if the employer acted with oppression, fraud, or malice.[226]

2. The Foley Decision

Several years later, the California Supreme Court issued its long-awaited decision in *Foley v. Interactive Data Corporation*.[227] The court, against the continuing trend toward recognition of an award of tort damages, refused to extend tort remedies to employment relationships based on the duty of good faith and fair dealing.[228] Foley, with over six years of satisfactory performance, was fired after reporting to an another supervisor that his immediate superior was under an FBI investigation for suspected

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[223]The employer issued a handbook two years after the plaintiff was hired.

[224]*Gates I*, 638 P.2d at 1067.

[225]*Gates II*, 668 P.2d at 214.

[226]*Id.*

[227]47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

[228]765 P.2d. at 396.

embezzlement.[229] Foley brought three causes of action against his former employer: (1) a tort cause of action alleging a discharge in violation of public policy; (2) a contract cause of action for breach of an implied-in-fact promise to discharge only for good cause; and (3) a tort cause of action for breach of the duty of good faith and fair dealing.[230]

Ultimately, the California Supreme Court held that "tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharge in violation of the covenant."[231]

The *Foley* court began its discussion of this issue by addressing the distinction between contract and tort causes of action. The court emphasized the importance of predictability of contract damages in the commercial system as well as the purpose of contract damages to compensate the injured party, rather than to punish the breaching party.[232] Recognizing the premise that the implied covenant of good faith and fair dealing applies to every contract, however, the court suggested that since it is a contract term, remedy for its breach should be limited to contract remedies.[233]

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[229]765 P.2d at 375.

[230]*Id.* at 374.

[231]*Id.* at 396.

[232]*Id.* at 389.

[233]*Id.*

The court then distinguished the insurance cases, where tort damages are allowed for breach of the implied covenant, from general employment contract cases. The court found that the "special relationship" between insurer and insured[234] is not analogous to the relationship between employer and employee. The special relationship in insurance contracts involves parties in unequal bargaining positions, where one party is seeking security as opposed to profit, and the weaker party must trust the stronger party.[235] The court found these factors are not present to the same degree in the employer-employee relationship.[236]

The court reached the conclusion based primarily on three arguments. First, if an insurer in bad faith refuses to pay a claim, i.e., breaches the contract, "the insured cannot turn to the marketplace"[237] to obtain the same amount of what he was deprived. If an employer discharges an employee for a bad reason, he still maintains the

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[234]*Id.* at 390-91.

[235]Various forms of insurer misconduct were identified as torts. Among those cases, the court in *Egan v. Mutual of Omaha Ins. Co.*(24 Cal.3d 809 (1979)) emphasized that "the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargining position."(*Id.* at 820). This so-called "special relationship" model has been reiterated in the discussion of tort remedies in the employment context.

[236]*Id.* at 396.

[237]*Id.*

opportunity to seek alternative employment. Second, "the role of the employer differs from that of the 'quasi-public' insurance company with whom individuals contract specifically in order to obtain protection from potential specified economic harm."[238] Third, the interests of the insurer and insured are always at odds. If the insured makes a valid claim, the insurer loses financially. On the contrary, the employer's and employee's interests are generally in alignment. While the employer must pay the employee for the work done, the employer receives the benefit of the work in exchange for the payment. Since a "special relationship," which gives rise to tort remedies in insurance cases, does not exist in employment relations, the court judged that it was unnecessary to extend tort remedies to discharged employees based on the implied covenant of good faith and fair dealing.

The question as to whether the implied covenant of good faith and fair dealing is implied-in-law or implied-in-fact is answered in the *Foley* decision. The court states that "an allegation of breach of the implied covenant of good faith and fair dealing is an allegation of breach of an 'ex contracts' obligation, namely one arising out of the contract itself. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some

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[238] *Id.*

general public policy interest not directly tied to the contract's purposes."[239]

In *Gates II*, the existence of an employment contract also led the dissenters to conclude that the employer's breach of the covenant sounded in contract.

Judicial reluctance by the majority of courts to extend the duty of good faith and fair dealing to the employment context may derive from "the poor fit of employment agreements with commercial contract doctrines"[240] and from the contradiction that the covenant would impose on at-will employers, who enjoy the right to fire employees at-will, i.e., in *bad faith*.

Even the decisions recognizing the duty of good faith and fair dealing in the employment context leave questions to be resolved, including the nature and scope of its duty: "[w]hen the duty applies, does it require discharges to be made merely in subjective good faith?; [o]r must an employer have some objective good cause to fire an employee to whom he owns the implied-in-law duty?"[241] A narrow formulation would only require the good faith duty, while the broadest extension requires that the employer faithfully discharge the employee based on "good cause." In employment contract cases without written or oral implied job security provisions, it is unlikely for the broadest

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[239]765 P.2d at 394.

[240]Leonard, *supra* note 22, at 656.

[241]Kornblau, *supra* note 68, at 688.

extension to have a prevailing effect. The covenant of good faith and fair dealing, therefore, remains only a limited exception to the at-will doctrine.

CHAPTER IV

DISCUSSIONS REGARDING WHY AND HOW JOB SECURITY SHOULD BE PROTECTED

Job security became a matter of increased concern for unions, workers, and society during the past decades. The trend may be traced back to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967,[242] and several "whistleblower" statutes, all of which protect certain groups of employees from retaliatory discrimination or discharge by employers. Common-law development of the exceptions to the at-will doctrine, a doctrine that reflected the laissez fair economic philosophy, also indicated increased recognition of fairness to employees as good ethics in the workplace as well as good business.

The felt need to protect employees' rights in the workplace spurred courts to develop legal theories and remedies. The *Wooley* court, recognizing importance of job security, clearly states that "[w]ages, promotions, conditions of work, hours of work, all of those take second place to job security, for without that all other benefits

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[242]*See supra* note 2-3 and accompanying text.

are vulnerable."[243] The court goes on to explain that job security is the assurance of the employee's livelihood and of the employer's family' future, which thus will not be destroyed arbitrarily by the employer without just cause.[244]

"Discharge" is indeed labeled as the capital punishment of the industrial world. The issue of job security has been addressed with increased frequency by industrialized countries in the post World War II period.[245] The International Labor Organization recommended at the conventions in 1963 and particularly in 1982 that workers not be terminated except for good cause.[246]

Today, about 61 countries around the world provide workers with protection against unfair discharge by statutes or through some other measures.[247] For example, in Britain, protection against "unfair" discharge is provided by legislation, as is also true in Sweden. In Germany, dismissals may only be instituted where their causes belong to one of the socially warranted exceptions listed in the

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[243]*Woolley*, 491 A.2d at 1266.

[244]*Id.*

[245]Gould IV, *supra* note 8, at 28.

[246]Termination of Employment at the Initiative of the employer, International Labour Conference, 68th Session, Reports V(1) & (2)(1982).

[247]Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB.L.REV. 56, 68 (1988).

Act on Dismissal Protection of 1951.[248] In Japan, where there is no wrongful discharge legislation, the Civil Code prohibits both disciplinary and economic discharges which constitute an "abuse" of power.[249] As opposed to the universal appeal of job security, the United States remains the last major industrial country that has not heeded the call for an overall unjust discharge reform.[250]

Abandonment of the at-will presumption has been advocated by a number of legal scholars and judges. This Comment also supports the argument that the at-will doctrine must be abandoned in order to secure job security for employees in the workplace. This is not to state that all discretion employers possess in making decisions regarding discharge should be limited. This is to argue against any rationale that suggests the at-will doctrine is the substantive backgroud rule of law.

A. Reasons for Abandoning the At-Will Doctrine

1. Socioeconomic Justifications

The employment-at-will doctrine was a creature of an era in which the primary function of the common law was to promote industrial growth. Employment-at-will was

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[248]The Act has been amended for several times. *See also*, M. WEISS, LABOUR LAW AND INDUSTRIAL RELATIONS IN THE FEDERAL REPUBLIC OF GERMANY 39-103 (1987).

[249]Sugeno, K., LABOUR LAW, 2nd ed.,343-63, 1990.

[250]Antoine, *supra* note 247, at 68.

appropriate for nineteenth-century America in that the doctrine giving employers total freedom to discharge employees at-will served evidentiary purposes to protect developing industry and the capitalist's investment.

The doctrine is not appropriate for the 1990's, in which sophisticated American businesses should no longer need judicial protection at the expense of justice and fairness to employees in the workplace. The promotion of industrial capitalism by the courts has already been achieved. The California court in *Cleary* notes that "when viewed in the context of present-day economic reality and the joint reasonable expectations of employers and their employees, the 'freedom' bestowed by [the at-will doctrine] may indeed be fictional."[251]

As commentators argue that the at-will rule is incompatible with the realities of modern economics and employment practices, the economic and socioeconomic justifications for the rule no longer exist. Calling for abandonment of the at-will rule and adaption of a rule more protective of employee interests in job security is consistent with the trend toward justice in the workplace and the tendency of the courts' recognition of various exceptions to the doctrine.

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[251]*Cleary*, 111 Cal. App. 3d at 449-50, 168 Cal. Rptr. at 725.

2. Justifications Against Economic Arguments

A primary purpose of private companies is the pursuit of profits. Based on that premise, employers enjoy flexibility in job arrangements so that business will not lose out in "competitiveness" in the market. But abandonment of the at-will presumption requires only fairness and job security for employees in the workplace; it does not require keeping unproductive employees. Without the at-will presumption, employers can still enjoy the right to discharge employees through reasonable procedures and just cause standards. Employees, on the other hand, would still have to meet reasonable standards of performance if they expect to be guaranteed continued employment.

Job security under the Japanese system has been often referred to as "lifetime" employment. It should be noted that lifetime employment does not mean, however, that all employees are guaranteed continued employment until their retirement age. It merely means that employers' discretion to terminate employees are strongly limited by the "abuse of power" test. Japanese employers usually make utmost efforts to keep employees, through such measures as *shukko*[252] (temporary transfer to a subsidiary firm), and job rotation during an economic slump.[253]

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[252]This so-called *shukko* or temporary transfer is one of the Japanese employment practices. The origin of this system goes back to the pre-war period. It was widely prevalent in private enterprises after the end of World War

As to job performance of employees, Japanese employers have a strong incentive to improve the quality of their hiring process, management, and supervision of their workforces. It should be noted that the employers are not forced to keep unproductive employees; an employer's discharge decisions may be sustained when dismissals are based on "just cause," not on the "abuse of power." That most of the industrialized countries have already provided some measures of job security through legislation or standard practice proves that the abandonment of the at-will rule would not be detrimental to profitability and competitiveness of American businesses.

Another economic argument in support of maintaining the at-will doctrine is that "[t]o extend job security to nonunionized private employments, however, would be to make all the wider the chasm between employment and unemployment, and to make more difficult entry into protected employments."[254] Professor Power goes on to mention that "the just cause rule would be an improvement in an era of economic expansion, abundant job opportunities and near

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II. Today many Japanese companies have a provision stating that "company may order employee to transfer to a subsidiary company."

[253]Joji Akita, *Employment Practices Versus Contract in Japanese Firms*, 39 SYAKAIRODOKENKYU 322, 1992.

[254]Richard W. Power, *A Defense of the Employment At Will Rule*, 27 ST.LOUIS U.L.J. 881, 893 (1983).

full employment."[255] He explains that job security, particularly in an era of economic stagnation, becomes the big hurdle which prevents even talented young people from entering into job markets.[256] Amid recession, employers under the at-will rule are likely to eliminate redundant employees or employees whom they just dislike or think unfit. On the other hand, they are unlikely to hire new employees, which raises the unemployment rate and hence makes the *chasm* between employment and unemployment wider. If, as he states, employers discharged unfit employees and instead hired new talented people, it would not be likely that "[the discharged employees] will find employment more suitable to their talents and temperaments elsewhere"[257] under harsh economic conditions. The argument that the just cause rule would be inappropriate in an era of economic slump is not persuasive at all.

Job security might be a major consideration as distressed businesses try to make themselves leaner. Even in Japan where job security has been the hallmark of the Japanese employment system, a growing number of companies have moved to shed surplus workers. The latest report from the Japanese Labor Ministry says as many as 40 percent of firms are making employment adjustments in one way or

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[255] *Id.*

[256] *Id.* at 894.

[257] *Id.*

another, amid the worst recession of the post-war period.[258]

The right way to deal with redundant workers would be to make better use of them, not to get rid of them outright. Where employers have to eliminate excess employees due to economic reasons, the just cause rule should only allow them to do so under certain circumstances.[259]

3. Benefit Justifications

The third argument in support of abandoning the at-will rule is that the at-will premise allowing arbitrary discharge creates severe emotional and financial hardships for employees, which is also detrimental to the long-run success of a business. Regarding effects of social and emotional traumas due to discharge, one court stated as follows:

> Every man's employment is of utmost importance to him. It occupies his time, his talents, and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security. It bears upon his personal well-being, his mental and physical health. In days gone by, a man's occupation literally gave him his name. Even today, a continuous and asecure

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[258]The Japan Times/ Monday Oct. 4, 1993 Editorial P18.

[259]This issue will be discussed in the following Chapter.

> employment contributes to a sense of identity for most people.[260]

Job security provides both employees and employers with a multitude of benefits.[261] Employees' expectations of not being discharged arbitrarily and not being treated unfairly in the workplace improve employee morale, satisfaction, self-esteem and loyalty to the employer and also foster "employee identification with the goals of the enterprise."[262] The benefits from loyalty and the cost savings from lower turnover improve productivity of the company in the long run. Some studies of worker participation projects prove the theory that productivity often improves with increased job security and a cooperative employer-employee atmosphere.[263] Indeed, employees appreciate their employers' efforts to eliminate wrongful discharge and unfair treatment in the workplace. Accordingly, the atmosphere becomes more favorable and cooperative to the employer. Incidentally, job candidates may find assurance of job security as an attractive factor when deciding whether to accept employment.

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

[261]Clare Jully, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 J.L.Reform 449, 451-55.

[262]Minda, *supra* note 10, at 1179.

[263]Note, *supra* note 9, at 1835 n.102.

Some commentators have rejected the hypothesis that job security actually may increase worker productivity and efficiency by improving morale, loyalty and job satisfaction, arguing that no evidence that a system of just cause dismissal would improve worker output has ever been offered in support of "the satisfaction-productivity hypothesis."[264] According to their argument, job satisfaction and motivation are different; "[the former] often results from factors extrinsic to the job itself such as pay, benefits, or working conditions [while the latter] results chiefly from intrinsic factors such as responsibility, recognition, involvement in decisionmaking, or a sense of achievement or self-esteem." Thus, regarding job security as one of the extrinsic factors, they conclude that job security cannot be relied on to motivate employees to increase their productivity.[265]

This logic seems perfunctory. Job security provides employees with material and morale benefits. Job satisfaction and motivation are not separable as in argument above; employees who find their jobs responsible, challenging or satisfactory to their self-esteem, would be reasonably motivated to increase their productivity. As

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[264]Fred & Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1132 (1989)(noting that a close examination of the satisfaction-productivity hypothesis demonstrates its many questionable assumptions.")

[265]*Id.*

such, motivation is basically or partially derived from job satisfaction. Thus job security may be regarded as a substantial element of job satisfaction, the same as pay, various benefits or other working conditions. It also plays an important role in the workplace as it increases the motivation of many workers who think their employers are reliable.

The argument that "job satisfaction, or morale, has virtually no causal impact on job performance,"[266] and thus confers no economic benefits on the employer is not persuasive at all. Job security provides employees with material and morale benefits, unlike the at-will premise which always imposes a fear of being discharged arbitrarily and being treated unfairly upon employees.

The leading defender of the at-will rule, Professor Epstein,[267] has argued that the employment at-will rule is superior to all other alternatives because it is mutually beneficial[268] to the parties and consistent with the concept of "freedom of contract."[269] His theory of mutual benefit is based on the idea of symmetry. He argues that the at-will rule is fair because it respects the right of both the employer and the employee to decide when the relation should be terminated. Professor Epstein's theory fails to

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[266] *Id.* at 1133.

[267] *See*, Epstein, *supra* note 70.

[268] *Id.* at 955-62.

[269] *Id.* at 953-55.

account for the realities of the workplace in which employers and employees have unequal bargaining power. Congress rebutted the assumption of equal bargaining power between employer and employee by enacting the National Labor Relations Act. The assumption of *asymmetrical* bargaining power has dominated labor law for the last fifty years and has also motivated courts to recognize several exceptions to the at-will doctrine.[270] Thus, the mutually beneficial argument is anachronistic.

The concept of freedom of contract in the employment relationship, rooted in feudalism and the laissez-fair economy, has been drastically transformed by society's recognition that "many aspects of the employment relation have too many external ramifications to be left entirely to a private bargain between an employer and an individual employee."[271] Thus the argument is also inconsistent with the history of employment law, which has witnessed the circumscription of freedom of contract in the employment relationship.

Today, the majority of state courts recognize tort- and contract-law exceptions to the at-will premise, and one state, Montana, has replaced the doctrine with a general just cause dismissal statute. An increasing volume of wrongful discharge litigation brought by arbitrarily

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[270]Minda, *supra* note 10, at 1170 n.116.

[271]Leonard, *supra* note 22, at 675.

discharged employees reflects today's American society; more and more employees' expectations of job security continue to expand, as does the growing recognition of how unjust discharge affects economic well-being and causes psychological harm.

Now is the time to call for abolition of the at-will doctrine supported by the social, economy, and moral rationales and to provide comprehensive legal protection against unjust discharge for all employees, including those who are note protected by collective bargaining agreements or by anti-discrimination legislation, civil service, or teacher tenure arrangements.

B. Search for the Best Way to Provide Job Security

Commentators opposed to the at-will doctrine have been confronting another issue. What would be, then, the best solution to replace the doctrine: increased unionization to negotiate collective agreements on their behalf; increasing the existing common law exceptions to the at-will premise; or adopting state or federal just cause dismissal statutes? Although each of these solutions has its own limitations and effects, this article finds unionism and judicially created exceptions to the at-will rule inadequate to protect *all* American workers from wrongful discharge. This advocates that the third type of solution; i.e.,legislation proscribing all discharges without just cause. Particularly,

comprehenseive federal legislation is the appropriate remedy for the issue of wrongful discharge.

1. Unions

Labor unions have succeeded in obtaining a just cause standard for employment discharge in most collective bargaining agreements.[272] Thus, unionized employees in the private sector are shielded from unjust discharge by collective bargaining agreements and are protected much more than nonunionized employees. The reality is, however, that such agreements cover only a small portion of the work force due to the declining union penetration. Unions represent less than twenty percent of American workers, which is the lowest level since the end of World War II.

There are some commentators who advocate that employees wishing to obtain meaningful protection from unjust dismissal must look primarily to the collective bargaining process, not to judicial or legislative action to change the at-will rule.[273] According to this argument, the problem of job security is so amenable to private provision

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[272]A.Cox.D.Bok & Gorman, labor Law 701-02 (10th ed. 1986); 2 Collective Bargaining Negot, & Cont (BNA) §40:1, § 51:1 (1986)(the just cause standard and greivance/ arbitration procedures found in 94% and 97-100% of contracts sampled respectively).

[273]Susan L. Catler, *The Case Against Proposals to Eliminate the Employment At Will Rule*, 5 INDUS.REL.L.J. 471 (1983).

that government regulation should be limited to ensuring judicial recognition of a public policy exception and to facilitating bargaining procedures.[274] The argument concludes that employees could insure continued job security by organizing themselves if they valued job security highly.[275] Thus, those who could be protected through organization do not need legislative or judicial modification of the at-will rule.[276] Theoretically, the primary purpose of collective bargaining was to protect individual employee rights, achieving industrial democracy by giving employees a voice in influential decisions in their lives and minimizing governmental and judicial interventions.[277] The purposes themselves were sound and were achieved when the interests protected were primarily economic, which were common to everyone.

A limitation of collective bargainings exists, however, in that an individual employee cannot enjoy the benefits of collective bargaining unless a majority of his fellow employees share the same desire for collective representation. To be sure, collective agreements have established not only wage rates but also other defined rights of employees in the work place. Collective bargaining really functions where the majority of employees desire equivalent

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[274]Catler, *supra* note 273, at 521.

[275]*Id.*

[276]*Id.*

[277]Summers, *supra* note 27, at 8-11.

protection, regardless of economic or non-economic interests. As interests of workers extended to more personal, non-economic interests such as the rights of privacy, personal dignity, fairness, and physical integrity,[278] the felt need to protect such individual employees' rights in the workplace spurred courts and legislatures to develop new remedies for employees. As a result, protection by collective bargaining became less attractive.

This decreasing reliance on collective bargaining means that more than 80% of private American workers are not covered by collective bargaining agreements. The decline of unionization seems to be continuing.[279] In light of the disappointing reality, collective bargaining, with its arbitration and grievance procedure, may be a sound way to achieve worker protection from unjust dismissal but fails to function as an effective instrument for protecting individual employee job security for most American workers.[280]

2. Common Law

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[278]Id. at 15.

[279]Michell, *The Changing American Workplace*, THE LAB. LAW. 301, 319 (1985).

[280]Interestingly, Japanese manegerial and supervisory employees who have not been covered by collective bargaining agreements are willing to organize themselves in order to protect their employment., Takenori Inoki, NIHHON-KEIZAI TIMES, March 29. 1993.

If collective bargaining does not fully protect private employees, the law will find other ways to protect them. Some commentators believe that the judiciary holds the best promise for doing away with the at-will doctrine.[281] Professor Blades urges courts to develop tort theories for "abusive" discharge. "[T]he aff[ected] employee [should have] a personal remedy for any damage he suffers when discharged as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment."[282] In keeping with the tort formulation of this cause of action, he suggests punitive damages would be available to aggrieved employees.[283]

Professor Leonard urges courts to construct a new common-law presumption that would more accurately reflect the contemporary employment law setting.[284] This presumption places a great deal of emphasis, far more than found in present handbook-as-contract cases, on circumstances that exist when employees enter into the employment relationship. If the parties have expressed themselves on the issue of a continuing relationship during the hiring process, courts should presume that the relation is not at

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[281]Leonard, *supra* note 22, at 680-83 (N.C.), *and see* 16 J.OF L. REFORM., 333.

[282]Blades, *supra* note 37, at 1413 n.4.

[283]*Id.* at 1427.

[284]Leonard, *supra* note 22, at 680.

will. "The more care the employer puts into the hiring process, such as interviewing, checking references, administering preemployment physical examinations, and specifying a probationary period, the more logical would be the presumption that the employer and the employee expected the relationship to be extended."[285]

When the employer has made an express promise by providing a printed policy manual including a just-cause provision, the presumption is even more soundly based in fact.[286] If the parties have *not* expressed themselves on the subject during the hiring process, courts should presume the employment relationship to be open-ended, unless the job does not exist or the employee proves unsuitable for the job.[287] He notes that it is reasonable to acknowledge that deferred compensation such as health care and retirement benefits, and holiday and vacation benefits are included in a relationship presumed to be of indefinite duration, and terminable only for just cause.[288] His theory is primarily based on the indicia of the unspoken understanding that the parties expect their relationship to be continuous so long as the job is satisfactorily performed.

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[285] *Id.* at 681.

[286] *Id.*

[287] *Id.* at 682.

[288] *Id.* at 681.

Professor Blackburn's proposal is similar to that of Professor Leonard, advocating contract formation as the proper way for change. He urges courts to cease inferring that parties intend employment to be terminable at will.[289] He states that "[i]n the absence of information on what employers and prospective employees expect when they enter into an employment relationship, courts should presume that each expects the relationship to continue as long as the employee adequately performs the job."[290] Incidentally, he also suggests that it is necessary to redefine the issue of *oral* employment contracts. The new presumption of extended employment, however, would be easily avoided if an employer offers during the hiring process the express contract that the employment relationship can be terminated at the will of either party at any time without notice and explanation.

The current common law exceptions to the at-will doctrine provide employees with less than uniform and sufficient protection against wrongful discharge. Public policy exceptions are applicable generally when public health and safety violations are involved. The public policy exception may also be unavailable to lower-level

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[289]Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 Am. Bus. L.J. 467 (1980).

[290]Stieber & Murray, *Protection Against Unjust Discharge: the Need for a Federal Statute*, 16 J.of L. Reform 319, 333 (1983).

employees who tend to lack access to information that allow them to blow the whistle on their superiors.

Implied contract exceptions are applicable only when employees have received express or implied promises of job security. In reality, however, employers are certainly free not to issue employee handbooks containing a just-cause provision and also are free to issue personnel manuals that clearly tell that the manual is not part of the employment contract. In states still adhering to the traditional bilateral contract doctrine, company policies in the handbook are unlikely to be recognized as the employment contract. The covenant of good faith and fair dealing has provided the least protection for discharged employees. These exceptions do not go far enough.

The courts' ability to effect evolutions in the tort- and contract law has been evident. It is unlikely, however, that the courts are in fact moving toward adoption of such new common law presumptions and recognition of tort liability against unfair termination.[291] Both employers and employees do not want the complicated and complex array of statutory and common-law exceptions to the at-will doctrine. Some specialized legislation will ultimately be necessary for employees to be fully and effectively protected against wrongful discharge.

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[291]The California Supreme Court limited damage awards in cases over a breach of the covenant of good faith and fair dealing.

3. Legislation

Professor Clyde Summers advocated comprehensive unfair dismissal legislation as early as eighteen years ago.[292] Noting that major industrial countries abroad recognized at least some measure of job security, he concluded that society should provide legal protection of employees' job security by statute, in the most concrete fashion possible, including just cause clauses as in collective bargaining agreements.[293] A number of commentators agree that just cause legislation is desirable.[294]

Proponents of legislation must face the issue of union reaction; what would unions think about such a statute? It has been a common assumption that most of unions would not favor legislation protecting employees against wrongful discharge because it would dilute the incentive for employees to organize. One of the selling points that union organizers can offer to employees is protection against arbitrary dismissal.

Now, unions are beginning to support such statutes. With a just-cause requirement generally applicable, it will be far more difficult for employers to fire employees, including union organizers and union sympathizers because employers would have to show that some reasonable,

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[292]Summers, *supra* note 12.

[293]*Id.* at 532.

[294]Stieber & Murray, *Supra* note 290.

acceptable bases other than unjust cause prohibited by the National Labor Relations Act existed for the discharge.[295] The AFL-CIO's Executive Council has discarded its long-standing ambivalence toward proposals for wrongful discharge statutes.[296]

There are other signs supporting the idea that legislation will ultimately be needed. Bills forbidding wrongful discharge have been introduced in about a dozen state legislatures.[297] Most of the proposed unjust dismissal laws are similar. They typically require good or just cause for dismissal, while limiting employer liability by requiring arbitration rather than jury trials and by limiting damages for pain, suffering, emotional distress or punitive damages.[298]

Employers, who are well organized politically and are influential in legislative assemblies, historically have opposed any judicial or legislative action restricting their employment practices and discretion. However, the continued growth in common-law liability, particularly in

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[295]Summers, *supra* note 12.

[296]1 Lab. Rel. Rep. (BNA), Mar.3, 1987 at 1.

[297]California, Colorado, connecticut, Massachusetts, Michigan, Montana, New Jersey, Ohio, Pennsylvania, Virgin Island, Washington, and Wisconsin. See, Summer, *supra* n.14 at 58, *see also*, Krueger, *supra* note 41, at 650-60 (characteristics of proposed unjust-dismissal laws are included).

[298]Krueger, *Supra* note 41.

tort liability, for wrongful discharge probably have swollen the uncertainty and expense that employers bear in common law unjust-dismissal suits, which could shift the employers' preference toward legislation of an appropriate form.[299] Legislation becomes an attractive alternative for employers when it would limit the size of damage awards and reduce the uncertainty in unjust-dismissal suits. Business groups may come to support such proposed unjust-dismissal statutes.[300]

Nonunionized employees would benefit most from such unjust dismissal laws, though some of them might lose opportunities to receive large potential damage awards, since wrongful dismissal legislation would most likely include a cap on damages. It can be said that such laws are a kind of compromise between limited employer liability and assumption of fault.[301]

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[299]See,e.g., LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108-09 (1990)("[p]rior to 1987, the case-law development from *Gates I* to *Crenshaw* generated a belief among Montana employers and insurance companies who paid the damages for many employment tort actions that their best hope for changing the direction of the law was through direct legislative action.")

[300]*Krueger, supra* note 41.

[301]*Id.* at 651. *See also*, Stieber & Baines, *supra* note 290, at 176-77. Listing a form of compromise, they state that any bill must represent a compromise among various interest groups such as employers, defense bar, trade unions, plaintiff bar, non-union employees and academic

Montana became the first state to enact a comprehensive law protecting employees against wrongful discharge, the "Wrongful Discharge From Employment Act"(WDFEA), in July 1987.[302] The legislative history of this statute originates from the uncertain contours of common law prior to its enactment. Having recognized the possibility of a wrongful discharge action and thus partly rejecting the previously dominant presumption of at-will employment, the Montana court first implied a covenant of good faith and fair dealing in employment contracts in *Gates I*[303] and declared the breach of the covenant of good faith and fair dealing as a tort rather than a contract action in *Gates II*.[304] In *Nye v. Department of Livestock*,[305] the court gave a broad sweep to the public policy tort of wrongful discharge. In *Dare v. Montana Petroleum Marketing*,[306] the court extended the covenant to employees who had received oral or unintended objective manifestations by the employer of job security.[307] The court also mentioned that neither a

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lawyers. Job security is for many of our citizens one of their most valued rights.

[302]Mont. Code Ann. §39-2-901 to 914 (1989).

[303]Gate v. Life of Montana Insurance Co., 196 Mont. 178, 638 P.2d 1063 (1988).

[304]*Id., appeal after remand*, 205 Mont. 304, 668 P.2d 213 (1983).

[305]196 Mont. 222, 639 P.2d 498 (1982).

[306]212 Mont. 274, 687 P.2d 1015 (1984).

[307]*Id.* at 282, 687 P.2d at 1020.

statute nor a regulation was necessary as a prerequisite for a wrongful discharge action found on public policy.[308]

Particularly from 1982 through 1985, the Montana Supreme Court steadily expanded the grounds for wrongful discharge suits and extended the good faith obligation to all employment contracts, along with tort remedies.[309]

If a majority of the justices was unsatisfied with the developing state of the law but was unwilling to reverse such decisions as *Gates I & II*, *Dare*, and *Flanigan*, their anxiety was swept away by the subsequent enactment of wrongful dismissal legislation which prevented the court from going further. As such, Montana employers and insurance companies, who had paid the damages for employment tort actions, supported the bill, and this support was followed by enactment.

Finally, in August of 1991, the National Conference of Commissioners on Uniform State Laws adopted the "Model Employment Termination Act," which would provide protection for employees against wrongful discharge in states still adhering to the at-will rule, but which would sharply limit the damages recoverable. The adoption of a Model Act is considered a starting point for legislative action.

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[308]*Id.* at 280, 687 P.2d at 1019.

[309]*E.g.*, *Flanigan v. Prudential Federal Savings & Loan Association*, 720 P.2d 257 (Mont), *appeal dismissed*, 107 S.Ct. 564 (1986)(upholding an award of $1.4 million in punitive damages to a thirty-year employee).

4. Proposal for Federal Legislation

The developments noted above indicate a growing tendency among the states toward broader protection against unjust discharge. Again, an explosion of various employment statutes prohibiting employers' unfair dismissal practices also indicates that *both* federal and state governments consider the employement relationship deserving of sustained intervention.[310] The time is now ripe for unjust dismissal legislation. Particularly, this papaer advocates federal legislation is the appropriate remedy.[311]

Federal legislation is the best approach because wrongful discharge is a problem common to every state. Since protection of jobs is commonly important to all workers in the United States, state legislation on a state-by-state basis against unjust dismissal would be often inadequately enforced. A federal statute applying un*iformly* to the entire country and providing *uniform* standards would probably be the best approach.[312]

At the same time, state legislation seems more likely to be enacted in states other than Montana in the near

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[310]Elisabeth C. Brandon, *The Employment At Will Doctrine*, 15 HASTINGS CONST. L. Q. 359, 380 (1988).

[311]A full consideration of underlying issues of federal legislation, such as preemption problems of wrongful discharge claims, is far beyond the scope of this paper.

[312]*See* Stieber & Murray, *supra* note 290, at 336 ("The appropriate remedy for the problem of unjust discharge is comprehensive federal legislation").

future. It may be easier to persuade some progressive state legislatures to break new ground in this area, and such state legislation would be meaningful because "[e]nacting such legislation on a state-by-state basis would permit the variety and experimentation that is necessary to test new legislation before introducing it into the federal system."[313] Although comprehensive federal legislation is the appropriate long-term remedy for the problem of wrongful discharge, state legislative efforts are important as well.

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[313] *Id.* at 336 (citing Summers, *supra* note 12, at 521 n.4).

CHAPTER V
GOOD CAUSE LEGISLATION

Part IV concluded that a comprehensive federal statute is the most appropriate remedy for the problem of unjust discharge and the most preferable vehicle for achieving reform.

The "Wrongful Discharge From Employment Act" enacted in Montana (hereinafter as the Montana Act),the Model Employment Termination Act adopted by the National Conference of Commissioners on Uniform State Laws (hereinafter as the Model Act), and the bills introduced in several state legislatures in the 1980s'[314] are similar in many respects. Most of the laws provide that discharge must be for "good cause," encourage resort to arbitration rather than to jury trials, and frequently allow reinstatement with back pay, which is typically unavailable under the common law.

Proponents of such wrongful dismissal legislation confront a number of considerations to be taken into accounts such as the "good cause" standard, dispute

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[314]*E.g.*,California,1986 [SB 1827], Colorado,1981 [HB 1495], Michigan, 1982 [HB 5892], Pennsylvania, 1981 [HB 1742], Vermont, 1988 [SB 299], Washington, 1987 [HB 1133], Wisconsin, 1981 etc.

procedures, remedies, and employer and employee coverage. In an attempt to offer an appropriate comprehensive legislative scheme, the remainder of this Article discusses such considerations by analyzing the prevalence of good cause/arbitration models among the proposed and enacted laws.

A. The Good Cause Standard

A major feature of the Montana Act is that it replaces employment at-will with a good cause standard requiring employers to have "good cause" to discharge an employee. Under the Montana Act, a discharge[315] is wrongful if: (1) it was in retaliation for refusal to violate public policy or for reporting a violation of public policy; (2) it was not for good cause and the employee had completed the employer's probationary employment period; or (3) the employer violated express provisions of its own personnel policy.[316]

As noted above, the Act states that a wrongful discharge can arise in three different ways. It is an example of the shift in employers' perceptions of what was

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[315]"Discharge" is defined as any termination of employment including resignition, elimination of the job, lay off or lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason. Mont. Code Ann. 39-2-903 (2)(1989).

[316]Mont CA 39-2-904.

an acceptable public policy on employee discharges.[317] The Act also acknowledges the prevalence of express contract exceptions under today's common law. The legislature expanded protections against wrongful discharge to cover more employees by imposing a good cause duty on employers.

Modeled after the Montana Act, the Model Act also adopted the good cause standard, providing that "an employer may not terminate the employment of an employee without good cause."[318] The language of the provisions found in the bills proposed in several state legislatures is identical to that of the Model Act.[319]

1. Definitions of "Good Cause"

What is "Good Cause" is a substantive issue to be discussed. It is certainly a critical term. Under the Montana Act, the definition of good cause is "reasonable

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[317]The Act prohibits discharges against public policy, although public policy is defined narrowly. ("Public policy " is defined as a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule. Mont CA 39-2-903(7)).

[318]The Model Employment Termination Act, Section 3 (a)(1991).

[319]*E.g.*, "An employer shall not discharge an employee except for just cause," Michigan, 1982 [HB 5892], and "a discharge is wrongful if it is not for good cause," California, 1986 [SB 28001].

job-related grounds for dismissal based on a failure to satisfactorily perform job duties disruption of the employer's operation, or other legitimate business reasons."[320] The Model Act defines "good cause" as follows: (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct (on the job or otherwise), job performance, and employment record; or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the position filled by its work force, and determining and changing standards of performance for positions."[321]

Although the definition of good cause in the Model Act seems reasonably more specific than that in the Montana Act, both definitions embody the same idea that good cause as the basis for termination or discharge of employees includes both causes related to the individual employee and legitimate business or economic reasons.

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[320]Mont CA 39-2-903(5).

[321]The Model Employment Termination Act, Section 1(4).

2. Individual Causes and Business Reasons

a. Individual Causes

According to the good cause statute of Montana, an employer may discharge an employee for his unsatisfactory performance on the job. An underlying rationale of the provision may be the understanding of both parties in the employment relationship that the employer must pay the agreed wages and benefits while the employee must do "satisfactory" work in return.[322] "Satisfactory" work or job performance is obviously not a precise concept. It may vary from employers to employers.

For instance, Professor Abrams and Professor Nolan note that "satisfactory" work in the employment context has four elements: "(1) regular attendance, (2) obedience to reasonable work rules, (3)a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully."[323] An employee's failure to meet these obligations will justify discipline.[324]

Regular attendance is the most fundamental duty for employees. Excessive absenteeism and tardiness are likely to constitute good cause because such conduct is likely to

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[322]Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L. J. 594, at 598-99 (1985).

[323]*Id.* at 597.

[324]*Id.*

lead to inadequate performance of the job as well as interferring with the order of the workplace.[325]

Regular attendance is not necessarily an absolute obligation for employees. Where absences are for a good reason, such as a pattern of absenteeism based on an industrial injury, and are unlikely to continue in the future, discharge may be found unreasonable.[326]

Employee conduct violating work rules also constitutes "good cause" for a termination.[327] Work rules regulate employee conduct in order to maintain the safety and order of the workplace and maximize the productivity of the company. Violation of reasonable work rules is a legitimate cause for discipline.[328] In this instance, the rules must be legitimate.

Inadequate performance, incompetence, and neglect of work may deserve discipline if the standards of evaluation used by the employer are reasonable. The good cause standard in lieu of at-will employment is not to protect unproductive workers nor does it guarantee continued

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[325] *Supra* note 322, at 613. (Arbitrators tend to uphold dismissals where an employee is tardy or absent more than other employees and is likely to continue indifferently in the future regardless of repeated warning. *Id.*).

[326] *Id.* at 614.

[327] Examples of "good cause" under this category include conducts such as assault, theft, fighting on the job, destruction of property, or use of drugs or alcohol on the job (*Id.*).

[328] *Id.* at 614-15.

employment to an employee. Management can discipline or discharge an employee who is incapable of performing his job or who neglects his duties in its pursuit of productivity.

Insubordination has been a well-recognized ground for discharge.[329] It is taken for granted that employees have duties to follow rules or instructions and to be loyal to their employer's interests. Thus, an intentional refusal to follow orders without a reasonable excuse constitutes good cause for discharge.[330]

In the determination of good cause for a termination because of insubordination, however, the reasonableness of a company order refused or rejected should be considered. There are a number of possible defenses that a grievant can raise depending on the circumstances. The employee's refusal to comply with an order on grounds that it is unsafe, unreasonable, illegal, or immoral may be excused.

"When an employee can establish that there has either been actual past harm incurred in a particular assignment or that a reasonable person would have feared for life, limb, or property,"[331] a discipline offered by terminating the employee is likely to be regarded as abusive.

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[329]Holloway & Leech, *supra* note 81, at 127.

[330]*Circle Security Agency, Inc. v. Ross*, 107 Ill. App. 3d 195, 437 N.E.2d 667 (1982); *Deason v. Mobil Oil Co.*, 407 So.2d 486 (La. Ct. App. 1981).

[331]Fortado, Travis, & Jennings, *Refusal to Accept a Work Assignment: How Arbitrators Rule in Discharge Cases*,

The simple spectre of health and safety does not itself excuse an employee's refusal to accept a work assignment.[332] Arbitrators would only regard an assignment's inappropriateness if it repeatedly affected the health conditions of other workers in the past and the refusal by the employee is exactly based on such circumstances.

Occasionally, however, employees may be discharged for their health. In *Stowe-woodward Co.*,[333] for example, an arbitrator concluded that the employee was discharged because he was unable to work in the plant because of his health, severe asthmatic reaction to the work environment, contending that "an employer has the right to expect an employee to be available for work with reasonable regularity."[334]

Other reasons such as those of religion and morality "are also common employee defenses for their refusal of work assignment but [they] are difficult to establish to an arbitrator's satisfaction."[335] The tendency of arbitrators to sustain discharges or some other disciplines indicate that these defenses are often regarded as flimsy.

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16 Employee Rel. L. J. 205, 208 (1990).

[332] *Id.* at 209.

[333] 78 Lab. Arb. (BNA) 1038 (1982) (Thompson Arb.).

[334] Fortado et al., *supra* note 331, at 209.

[335] *Id. at 209-10. (E.g., Centreville Clinics, Inc.*, 85 Lab. Arb. (BNA) 1059 (1985) (Talarico Arb.); and *Crucible, Inc.*, 81 Lab. Arb. (BNA) 83 (1983), *Id.*).

Employee misconduct interfering with the operation may include off-duty conduct. Employee off-duty conduct away from the workplace may be "good cause," if it is relevant to the employer's successful operation, to business reputation or to similar concerns. Some off-duty misconduct violating no work rule may sometimes warrant discipline if the conduct raises serious doubt as to his future trustworthiness, tarnishes the company's reputation, and jeopardizes the business image.[336]

However, off-duty activity of the employee bearing no reasonable relationship to the employee's job performance and business reputation will not constitute just cause. Thus, the employer must demonstrate a nexus with its business needs. The most careful evaluation by employers in order to avoid overreaction on unfounded fears is also needed.[337]

b. Economic and Business Grounds

Dismissals that are part of large-scale coordinated layoffs necessitating economic downturns have been generally viewed as valid. The Model Act defines that the exercise of business judgment, including setting its economic or institutional goals and determining methods to achieve those goals and the size and composition of the

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[336]Abrams & Nolan, *supra* note 322, at 616.

[337]*Id.* at 616-17.

work force by the employer, constitutes "good cause." The Montana court formulated its own definition of the term of "legitimate business reason" as follows:

> [a]legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of an employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.[338]

In light of the particular circumstances of each case and a balancing of the employer's interest in operating and maintaining a business efficiently and profitably with the employee's interest in maintaining employment, legitimate economic or business reasons which require a reduction in force, such as a general recession and poor business, may be offered by employers in defense of wrongful discharge claims.

It should be noted, however, that reductions in force based on economic and business grounds *per se* do not constitute good cause for discharge. The employer's decisions as to the economic goals and methodologies of the

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[338]*Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont.276, 281-82, 811 P.2d 537, 540 (1991).

enterprise and the size of the work force must be governed by "*honest business judgment.*"

In the context of discharges based on economic and business grounds, the employer's required fairness in judgment would include three essential notions: (1)reasonableness of the employer's judgment; (2)procedural fairness; and (3)industrial consistent treatment among the same group of employees.

The law would not necessarily require the employer to prove layoffs or dismissals motivated by the employer's economic situation be the only measures in order to protect business in an economically hard situation. It would be enough that reasonable employers believe that the most stringent form of discipline, e.g., layoffs, is needed to protect the system of business and to get it going as a reasonable means in the circumstances.

The fact that a growing number of states and the federal government have enacted plant closure legislation which requires notification of closing information to be provided to employees , or the award of severance benefits to assist in relocation endorses the importance for employers to respond to procedural fairness including advance notice to the employees in the context of economic or collective dismissals. Expanding notions of employer liability for nondisclosure would be also important.

Examples of legitimate grounds for selecting a particular employee for layoff include the employee's past performance on the job, attendance record, seniority, etc.

An individual employee may still contest his selection for layoff on the grounds that it was discriminatory under certain federal, state, or local discrimination laws or established public policy.

Economic motivations for cutbacks in the work force have been generally viewed as supplying the requirement of just cause because an employer's decision as to the economic goals and methodologies of the enterprise are viewed as basic to the system of free enterprise. Layoffs during a recession, however, are likely to be even more devastating in terms of reemployment possibilities because of the lack of jobs in other sectors. Since economic and business reasons for discharge are unrelated to the employee's conduct or performance of the job, application of the good faith standard in analyzing the legitimacy of the collective discharges and in expansion of the employer liability for nondisclosure in the exercise of business judgment is also needed.

3. Concepts of Good Cause: Subjective V. Objective

"Just cause" or "good cause" for termination connotes a fair and honest cause or reason regulated by good faith

on the part of the employer.[339] The employer's good faith belief in the existence of cause for an employee's dismissal is the critical fact in many cases.

One case has held that good faith belief that good cause existed was sufficient to justify discharge.[340] The court in *Coombs v. Gamer Shoe Co.* seems to apply a similar subjective test.[341] The court stated that an employer may terminate an employee as long as the employer gives a fair and honest reason.[342] This test is comparable to the good faith requirement in the Uniform Commercial Code (UCC)[343] that has generally been interpreted as imposing a subjective test which relies on motive instead of actual knowledge.

The employer's good faith belief must focus on both the employee's performance and assertions that if true would amount to just cause. The court in *Sanders v.Parker Drilling Company*[344] illustrates the question of whether the employer need only show that he acted in good faith based on the information available, or if the employer must prove

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[339]*Pugh v. See's Candies, Inc.* (1st Dist) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, *appeal after remand* (1st Dist) 203 Cal. App. 3d 753, 250 Cal. Rptr. 195.

[340]*Simpson v. Western Graphics*, 293 Ore. 96, 643 P.2d 1276 (1982).

[341]778 P.2d 845 (Mont.)(1989).

[342]*Id.* at 887.

[343]U.C.C. §1-201(19)(1989).

[344]911 F.2d 191(9th Cir. 1990).

that the employee actually committed a wrongdoing. This is the issue of subjective and objective standards which has been discussed in some wrongful discharge cases.

Under Alaska law, two separate questions must be answered: whether employee actually engaged in conduct the employer alleges, and whether that conduct constitutes good cause for termination of employment.[345] The court concluded the employer must show the discharged employee engaged in alleged prohibited conduct, an employer's subjective belief that it possessed good cause is insufficient.

Indeed, the actual facts of the case would become insignificant if only the employer's mental state or subjective state of mind mattered.[346] It is odd that employees could be fired based on their employer's good-faith but nonetheless wholly mistaken beliefs. Application of such a subjective test would reduce good cause to an almost meaningless concept.[347]

An employer's subjective and honest belief that the employee committed an improper act does not itself amount to good cause. The "good cause" for discharge means that, first, the employer must show that the employee committed an act which warrants his discharge and, then second, the employer must have a reasonable ground for his decision to terminate the employee in good faith. Thus, if the

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[345] *Id.* at 194.

[346] *Id.* at 196.

[347] *Id.* at 197.

employer cannot prove the employee engaged in alleged misconduct which constitutes cause for discharge, even though the employer possessed a subjective belief, he does not have just cause for terminating the employee.

The second component of the objective standard is also important. The employer must not only have actual cause for discharge but must act in good faith.[348] This component implies two principles. First, even where actual cause exists, the employer cannot use the actual cause as a pretext for an unlawful discriminatory action or arbitrary discharge. Second, the employer must act fairly in deciding whether discharge is an appropriate and reasonable discipline.

Incidentally, in order to avoid the courts' struggles seen in cases applying the subjective test, advance notice is meaningful. The issue of whether the employer must prove that the employee actually committed the alleged misconduct would be solved by advance notice to the employee, because such a notice will let him know that he is subject to some discipline and will also give him an opportunity to prove that he has not actually committed the alleged wrongdoing subject to discipline.

B. Procedural Fairness

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[348] *Id.*

The remainder of this article will outline the following considerations which drafters of a federal unjust dismissal statute should take into account.

1. Dispute Procedures

Whether a wrongful dismissal statute should send claims directly to the regular courts, to an administrative agency, or to arbitration raises procedural fairness questions. Arbitration of unjust discharges shoud be recommended because that method of resolution combines speed, economy, and informality.

A complaint procedure should be designed to minimize legalistic formality and to resolve cases with finality at the earliest possible stage. Effective procedures are essential to the success of any system seeking to provide comprehensive, speedy, and less costly protection against wrongful discharge. In that sense, mediation-arbitration procedures should be given high priority in any wrongful dismissal legislation.[349]

Under the proposed bills, parties are generally encouraged to resolve their disputes via binding arbitration.[350] The Montana Act also encourages resort to

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[349]The Michigan Bill of 1982 recommends this model.

[350]The proposed unjust dismissal bills in several states typically rely on arbitration. Some recommend mediation-arbitration procedures. *E.g.*, Michigan, 1982 [HB 5892]; and Pennsylvani, 1981 [HB 1742](15 days advance notice of reasons for discharge required; then mediation, followed by binding and final arbitration).

arbitration, though arbitration is an option that the parties can establish if they so agree.[351] Under the unique arbitration clause of the Montana Act, if a complaint is filed, either party may request the commencing of arbitration within sixty days.[352] Where the other party rejects the request to arbitrate and loses the lawsuit, that party will be liable for the other party's attorney fees incurred subsequent to the date of the offer.[353] Where a valid offer is accepted, arbitration is the exclusive remedy for the wrongful discharge dispute, thus the arbitrator's award is final and binding.[354]

Proponents of legislation recommending arbitration procedures confront a number of issues, however. Most of the proposals for statutory arbitration of wrongful discharge claims regard the relative finality of awards as one of the most attractive features of the arbitration model, which seeks to limit the grounds for judicial review. Presumably arbitrators would at least attempt to follow the guidance of the courts. But in the statutory wrongful discharge setting, there may be some arbitrators who give their own interpretation to a statutory term such as "good cause" or "good faith." In order for arbitration to be utilized and to be a forum which produces a decision of

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[351]Mont. Code Ann. §39-2-914.
[352]Mont. Code Ann. §39-2-914(3).
[353]Mont. Code Ann. §39-2-914(4).
[354]Mont. Code Ann. §39-2-914(6).

high quality, the existence of arbitrators with experience and expertise is as important as the construction of the workable system.

In an attempt to make the system fair, effective, and appropriate, it would seem desirable to set a preliminary mediation stage of minimum duration before a case could go to the final arbitration.[355] The initial time spent with the employer and the mediator-arbitrator, understanding the facts and circumstances, would control the arbitrator's exercise of discretion, which sometimes may be troublesome and may produce a compromise.

After mediation is exhausted, the employee would be allowed to pursue the claim to final and binding arbitration. The facts revealed during the initial mediation stage would narrow the issues for arbitration. The mediation-arbitration procedure is attractive because it avoids those problems with judicial alternatives and covers a number of implicit disadvantages in statutory arbitration.

2. Remedies

Proposals for unjust dismissal legislation will face the problem of providing a suitable remedy for wrongful discharge. Under the various exceptions to the at-will rule developed in state courts, wrongfully discharged

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[355]Minda & Raab, *supra* note 10, at 1194-96.

employees have been permitted only money damages.[356] Under the rule at common law, monetary relief given in the form of a money judgment has been considered an adequate remedy for those found to be wrongfully discharged.

a. Reinstatement

There has been an almost recognized bar to the exercise of a court's equitable powers in wrongful discharge cases. Unlike monetary remedies, equitable relief in the form of reinstatement or injunction against discharge has been imposed by only a few common law courts. On the other hand, reinstatement with back pay constitutes a major sanction for enforcement of the National Labor Relations Act(NLRA). In deciding cases under the various discrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII),[357] and the Age Discrimination and Employment Act (ADEA),[358] courts have not been reluctant to order reinstatement.

The reluctance of courts to order reinstatement under the common law seems to stem from various reasons. First, a general recognition that as a prerequisite for equitable relief or reinstatement, relief at law, i.e., money damages,

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[356]Remedies can range from a small award of back pay to punitive and compensatory damage awards when liability is premised on a tort of wrongful discharge in violation of public policy or the duty of good faith and fair dealing.

[357]42 U.S.C.A. §2000 *et seq.*

[358]29 U.S.C.A. §621 *et seq.*

must be inadequate to compensate for the actual injury. Courts have recognized that relief at law in the form of a money judgment is an adequate remedy for wrongful discharge in most of the cases.

Second, the denial of reinstatement as a remedy rests on the general objection to ordering specific performance of contracts requiring judicial supervision.[359] The court's reasoning would be a rather exaggerated analogy that it would be impractical, if not impossible, for a court to provide the continual supervision necessary for specific enforcement of personal service contracts. Where the court orders reinstatement, it would need to intervene only in the event the employee subsequently complained of discharge or unfair treatment in the workplace.[360] The common law tradition of avoiding remedies that need for judicial supervision should be eroded.

Third, perhaps as the strongest objection to the remedy of reinstatement, some commentators criticize the proposal recommending reinstatement based on the problem of forced association. Professor West states that reinstatement may be a harsh consequence for both employers and employees when they find the workplace a hostile

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[359]"At common law it was recognized that a person cannot, by decree of court, be compelled to retain another in his service"(*Kurle v. Evangelical Hospital Association*, 89 Ill. App.3d 45, 411 N.E.2d 326 (1980)).

[360]*Holloway & Leech*, *supra* note 81, at 417.

environment after the resolution of their dispute.[361] Some courts also state that, since personal service contracts often require a cooperative relationship and trust in the workplace, reinstatement is not appropriate.[362]

Like the problem of judicial supervision, the forced association argument is also exaggerated.[363] Any request for reinstatement should not be summarily dismissed as unworkable, but should be examined according to the particular case's facts and circumstances. To be more precise, the possibility and appropriateness of the reinstatement order should be examined, for instance, in the context of the group's size, the nature of the employee's job, and the nature of the working relationships among the colleagues and with the superiors.

All of the above grounds for the courts' avoiding reinstatement as a remedy should not loom as obstacles to reinstatement, nor should lack of a statutory mandate preclude courts from ordering reinstatement as an alternative. Absent the presence of a duty imposed by

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[361]West, *The Case Against Reinstatemnet in Wrongful Discharge*, 1988 ILL.L.REV. 1. (according to the reserch, anywhere from a third to a half of employees offered reinstatement under National Labor Relations Board orders decline to return to the privious employer).

[362]*E.g., Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill.App.3d 901,905 (1979).

[363]"No reason for precluding reinstatement out of an exaggerated regard for the employee's psychic well-being," St. Antoine, *supra* note 250, at 79.

statute, however, it would be unlikely for courts to order reinstatement as a remedy even if appropriate in today's common law. Thus, it is recommended that the legislature require reinstatement of a terminated employee.[364] Moreover, justifications for equitable relief in the form of reinstatement must be meaningful, in particular, during the severe job market conditions that make reemployment in similar work and pay unlikely.

b. The Statutory Remedy of Reinstatement

Any unjust dismissal legislation should offer suitable and flexible remedies for wrongful discharge including reinstatement when appropriate. The proposed bills[365] and

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[364]"We recognize, however, that there are certain areas of the law where the legislature has required reinstatement of an employee by a private employer, *e.g.*, when an employee is discriminated against becasue of race, color, creed or sex." Antoine, *supra* note 250, at 79.

[365]The California Bill of 1988 [SB 1988](the arbitrator may award, among other things, reinstatement, back pay, and attorney fees); the Michigan Bill of 1982 [HB 5892](the arbitrator may award reinstatement with or without back pay or severance pay); the Pennsylvania Bill of 1981 [HB 1742](the arbitrator may reinstate the employee with no, partial, or full back pay, or award a severance payment with no reinstatement); and the Washington Bill of 1987 [HB 1133](arbitration award may include compensation for all economic loss, reinstatement, and up to 3 years of future lost wages. No punitive damages provided).

the Model Act[366] containing a just cause firing requirement frequently allow reinstatement in non-union settings.

Under the Model Act, for example, an arbitrator may make one or more of the following remedies for wrongful discharge violating the Act:

> (1) reinstatement to the position of employment the employee held when employment was terminated or, if that is impractical, to a comparable position;
> (2) full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence;
> (3) if reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding [36 months] after the date of the award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

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[366]The Model Act Sec. 7(b)(1)-(4).

(4) reasonable attorney's fees and costs.[367]

Reinstatement is the preferred remedy for terminations in violation of this Act. Reinstatement as a remedy for wrongful discharge, indeed, raises the difficult question of whether it is appropriate and effective in the nonunionized sector. American experts appear to be divided on this issue. What is important, however, is that an unjust dismissal statute offer a range of remedies, including reinstatement and back pay with interest for a fixed period. If reinstatement is not feasible because of the worsened relations between the parties which would adversely influence efficiency in the workplace and the safety of others, severance pay may be awarded instead.[368]

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[367] *Id.*

[368] The Model Act Sec. 7(b)(3).

CHAPTER VI

CONCLUSION

Today, job security is for many American citizens one of their most valued rights and important expectations. It provides a multitude of benefits to both employees and employers. Job security provides employees with economic stability and self-esteem, while it provides employers with improved morale, productivity, lower labor turnover, and expertise. Employers should owe their employees a duty to treat them with fundamental fairness. Limitation of the employment at will doctrine requires only fundamental fairness. It does not make employers keep unproductive employees.

Common law exceptions to the at will employment, based on public policy, the implied-in-fact covenant, and the implied covenant of good faith and fair dealing, have been significant restraints on the wrongful exercise of an employer's powers. Judicial recognition of such exceptions in one state continued to break paths for decisions in other states.[369] These common-law exceptions, however, do not amount to protection of all employees' rights in the

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[369]The state of Montana furthered its recognition to the good-cause legislation.

workplace. They also leave employees and employers unsure of the legality of personnel action in the workplace.

Total abolition of at-will employment by unjust-dismissal legislation will ultimately be necessary for all employees to be fully and effectively protected against wrongful discharge. It will also reduce the uncertainty and expense inherent in common law wrongful dismissal suits. For as "wrongful discharge" protection for all employees in the country becomes more of a reality, the enactment of federal legislation of this kind is inevitable.