PROPERTY RIGHTS IN ONE'S JOB: THE CASE FOR LIMITING EMPLOYMENT-AT-WILL

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In the United States, employment is generally governed by the "employment-at-will" rule.[1] Simply stated, the doctrine provides that absent either a contractual or statutory provision, any employment relationship is one at will which is terminable by either party, employer or employee, for cause or no cause.[2] The harsh reality of this rule is that an employer may discharge an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[3] Since this rule applies to the vast majority of American job holders,[4] it has a profound impact on the individual's daily existence. One's fate is in the hands of his employer. As one commentator has put it:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource . . . . Such dependence of the mass of the peo-

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1. *See, e.g.*, Marin v. Jaccuzzi, 224 Cal. App. 2d 549, 553, 36 Cal. Rptr. 880, 882 (1964) ("a contract for permanent employment is interpreted as a contract for an indefinite period and in the absence of statutory provisions or public policy considerations is terminable at the will of either party for any reason whatsoever").

2. See Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981), which provides a traditional statement of the employment-at-will doctrine in these terms: "The common law rule . . . is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time." *Id.* at 36, 432 A.2d at 467. *See generally* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L. REV. 1435 (1975).

3. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). This position has been reiterated in contemporary opinions. *See also* Marin v. Jaccuzzi, 224 Cal. App. 2d 549, 553, 36 Cal. Rptr. 880, 882 (1964).

4. Approximately two-thirds of employees are employees-at-will. *See* U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 392 (1979) (table 644) (total labor force).

ple upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands*.[5]

While the employment-at-will rule continues to hold sway over employment relationships in the United States, it has nevertheless come under close scrutiny and increasing attack by both courts and commentators.[6] There is a growing consensus that the rule is no longer adequate for just resolution of the sometimes conflicting desires and interests of employer and employee, and that the rule needs modification consistent with "the new climate prevailing generally in the relationship of employer and employee."[7]

This Article will begin by considering the nature of property and rights. It will then examine the history of the employment-at-will doctrine and the present status of the rule in American courts. The suggestion will be developed that the employment relationship has been transformed by social and economic developments, and that the law governing employment contracts requires modification to reflect these environmental changes. The next section will consider the limitations on the claim of right to employment by considering the legitimate grounds which justify discharge. Attention will be given to judicial efforts at modifying the employment-at-will doctrine. Various approaches will be suggested which would protect employers' interests in maintaining control of their work force while, at the same time, giving expression to the legitimate claims and expectations of their workers. It will be suggested, however, that the courts have gone as far as they can, or probably will, in their efforts at judicial activism in modifying the employment-at-will doctrine. Consequently legislative reform will be suggested. To assist in identifying the form that such reform might take, this Article will undertake a comparative analysis by examining the approaches of some European nations to the problem of employment dismissals. This analysis should provide valuable insight for development of an appropriate framework for legal reform in the United States.

The Article will conclude by providing a model statute which attempts to develop a legitimate basis for an employee's claim of right on his or her job by bringing employees who are presently without legal protection within the ambit of statutory protection, independent of that provided by existing labor legislation. Substantive criteria for maintenance of one's employment and for termination will be established. Procedural safeguards will be set forth, which can provide a basis for adjudicating property claims to one's job. The employer's proper right to discharge will also be recognized, by identifying legitimate limitations on the employee's claim of right and through the establishment of grounds and procedures for proper employment dismissal. It is the contention of the authors that such a statute would provide a viable and efficient means of protecting the legitimate expectation of employees by recognizing a property interest in their jobs or employment.

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5. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951), *quoted in* Blades, *supra* note 2, at 1404.

6. *See infra* notes 42, 46, 58, 68 & 69 and accompanying text.

7. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

I. RIGHTS AND PROPERTY

In recent years, the subjects of "rights" and "property" have received increased attention in legal and philosophical writing.[8] Much of this work has been theoretical, and has attempted to refine these concepts and to provide justification for claims made on the basis of rights in property.[9] The aim of this Article is to examine the implications of some of this work for a contemporary claim of right by considering the issue of whether a salaried employee can plausibly claim a property right in his job, and to analyze the extent to which the law does or can provide a means for accommodating such a claim.

First, it is necessary to understand what it means to have a right, and to determine what justifies a claim so that it may be said to give rise to a right. Rights have significance in that they establish claims by which a person can demand recognition by others of freely asserted interests, or they provide a basis for establishing a license to engage in certain conduct.[10] The notion of protected interest here is generally thought to include exercise of one's physical and mental faculties, as well as exercise of control over one's possessions.[11] To have a right implies that others have a duty to recognize one's claim, and not to interfere with one's interests, conduct, or exercise of control over the same.[12] This implies not only a liberty

8. This increased attention is reflected in the publication of recent yearbooks of the American Society for Political and Legal Philosophy, which in 1981 dealt with the subject of human rights and in 1980 with the issue of property. *See* 23 NOMOS: HUMAN RIGHTS (J. Pennock & J. Chapman eds.) (1981); 22 NOMOS: PROPERTY (J. Pennock & J. Chapman eds.) (1980). Two valuable collections of recent papers on these subjects are RIGHTS AND ECONOMIC JUSTICE (D. Lyons ed. 1979) and PROPERTY, PROFITS AND ECONOMIC JUSTICE (V. Held ed. 1980). Examples of individual works examining these topics are L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977) and R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

9. On the subject of property, see, for example, Grunebaum, *Two Justifications of Property*, 17 AM. PHIL. Q. 53-58 (1980); Snare, *The Concepts of Property*, AM. PHIL. Q. 200-06 (1972). On the subject of rights, see, for example, Machan, *Some Recent Work in Human Rights Theory*, 17 AM. PHIL. Q. 103-15 (1980); Martin & Nickel, *Recent Work on the Concept of Rights*, 17 AM. PHIL. Q. 165-80 (1980). *See generally*, Martin & Nickel, *A Bibliography on the Nature and Foundations of Rights, 1947-1977* 6 POL. THEORY 395-413 (1978).

10. This is the notion of claim right which is relatively uncontroversial and described in basic discussions of ethics. See J. MACKIE, ETHICS (1977), where this concept is explicated in the following terms:

> To say that someone has a certain claim-right may similarly be to say that if he claims (or if someone representing him claims on his behalf) whatever it is that he has this right to, the system will support his obtaining what he claims—or (speaking within the system) to say that he has this right may be to give him this support, typically imposing on one or more or indefinitely many others the duty of fulfilling the claim if it is made.

Id. at 173. *See generally* A. MELDEN, RIGHTS AND PERSONS (1977).

11. *See* Peffer, *A Defense of Rights to Well-Being*, 8 PHIL. & PUB. AFF. 65-87 (1978).

12. See, for example, PROPERTY, PROFITS AND ECONOMIC JUSTICE, *supra* note 8, at 3-4, where it is argued:

> Although there is no clear consensus of what rights are, I shall take the position that *rights are central and stringent entitlements yielded by justifiable rules or principles. The rights of one person impose obligations on others*, as the rights of a person not to be assaulted imposes obligations on other persons not to assault that person. *The obligations that rights impose may be both obligations not to interfere and obligations to enable*, as when the right of a child to live imposes obligations on others to provide the child with food and shelter.

(emphasis added). *See generally* C. WELLMAN, *Legal Rights* in SÄRTRYCH UR, UPPSALASKOLAN-OCH EFTERAT 213-21 (1978).

to be exercised by the right holder but also a freedom from interference by others in the exercise of the liberty established by the claim of right.[13] Legal rules may permit one either to prevent the interference by others,[14] or to compel others to act in conformity with recognition of one's claim.[15] While rights seem to establish fundamental claims, rights are not necessarily absolute in the sense of being unqualified.[16] Competing rights of others may limit the extent of a claim, and may determine the conditions under which a claim can be made.[17]

To argue that one has a right to a job might mean that one has a right to employment.[18] This would constitute a claim of right against society, by which one would require society to provide an opportunity for each person to earn the necessary means of support. While an argument can be made for such a claim, a much narrower claim of right is being considered in this Article.

The narrower claim of right to a job against a specific employer involves a presumptive claim to retain a position of employment which one has obtained through voluntary contractual relations. This claim is established as an interest growing out of a relationship based on contribution to an enterprise in which one is employed and is further based on the need to have some assurance of a continued position providing the necessary means of support.[19] In addition, there is a reliance basis for the em-

13. See Plamenatz, *Rights*, 24 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME 75-82 (1950), where the definition of right is seen as involving both liberty and claim right. Plamenatz maintains: "A man (or an animal) has a right whenever other men ought not to prevent him doing what he wants or refuse him some service he asks for or needs." *Id.* at 74.

14. This view is the concept of right transformed into the notion of legal liberty or privilege. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING 38-50 (1923).

15. This is the concept of right transformed into the notion of legal power. *See* W. HOHFELD, *supra* note 14, at 30-60.

16. This view is adopted by most contemporary legal philosophers. See, for example, Hart, *Are There Any Natural Rights*, 64 PHIL. REV. 175-91 (1955), where it is asserted: "[N]o man has an absolute or unconditional right to do or not to do any particular thing or be treated in any particular way." *Id.* at 176.

17. See, for example, PROPERTY, PROFITS AND ECONOMIC JUSTICE, *supra* note 8, at 4, where the notion of rights being limited by other rights is explicated with reference to a need to develop a basis for resolving conflicting claims of right such as the right of an employee to his or her job and the right of the employer to terminate an employee. "Rights are not absolute, whether they are moral rights or legal rights. *Prima Facie* rights, or what appear to be rights' first sight', may have to yield to other rights with greater stringency. When rights conflict, we need additional principles or rules to determine priorities between rights . . . ." *Id.* at 4.

18. *See* Nickel, *Is There A Human Right to Employment*, 10 PHIL. F. 149-70 (1978).

19. An analogy to and an explication of the theoretical underpinnings of this claim are provided by A. Melden's discussion of promises giving rise to rights and obligations. See A. MELDEN, *supra* note 10, at 40, where the relation of promising and creation of rights and obligations is set out; Melden asks rhetorically: "But what is the specific obligation incurred by promising?" *Id.* at 40. To which he responds:

> Surely this is an obligation to the person to whom the promise was made. That obligation is the very same moral relation, viewed from the point of view of the promiser, as the right which the promisee has with respect to the promiser. In short, the promiser who ought to keep his promise is obliged to perform the act in question because of the right conferred by him upon the other person, a right to a certain performance on his part. And if the promiser who fails to engage in that performance is placed outside the moral pale or loses his moral credit because of his failure to keep his word, the reason for this loss can only be that he has violated the right that he himself has conferred upon the promisee.

ployee's claim to a right in his job based on the fact that in accepting and continuing in a particular job, he has forgone other employment opportunities and the security they might offer. The longer one continues in a particular position, the greater that reliance becomes since with age the employee has decreasing opportunities to obtain an alternative position and over time the employee's skills can become specialized to the demands of his particular job. A claim of right to a job implies a duty on the part of an employer to recognize an individual's claim to a position and to the related means of earning a livelihood. Such a claim to a job is not necessarily unqualified; it may presuppose continued economic viability of the employing enterprise, continued need for the services of a particular position or range of activities, and even a continued level of employee performance including productive activity and conformity to an understood standard of behavior. The essential feature of such a claim to a job, however, is an implicit restriction on the ability of an employer to arbitrarily terminate an employee.

Also, a claim to a property right in a job requires some understanding of the nature and justification of property claims. Two approaches to property claims have dominated Anglo-American thought. The first views all property claims as rights to use, transfer and dispose of interests derived from grants by the state and established by action of law.[20] According to this view property is entirely the creature of law, and any claim to property can be established only by reference to positive law.[21] A second tradition bases property claims in human nature or in social activity.[22] According to this tradition, a person has a right to his labor, and a person justifies a claim to property based on the fact that one has invested labor in an object or enterprise.[23] Similarly, an individual can be said to have a claim to property growing out of cooperative social practices.[24] A person's partici-

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Id.

20. This is the view of legal positivism which has its foundations in the work of Thomas Hobbes, who was quite explicit in developing the view that all individual actions with regard to property were necessarily empowered by authority granted by the law. According to Hobbes, the idea of property as right or title does not arise in the state of nature but comes with the establishment of the commonwealth or civil state. Hobbes writes: "The distribution of the materials of this nourishment, is the constitution of *mine*, and *thine*, and *his*; that is to say, in one word *propiety*; and belongeth in all kinds of commonwealth." T. HOBBES, LEVIATHAN 185-86 (M. Oakeshott ed. 1962).

21. This view is developed by Jeremy Bentham. *See* J. BENTHAM, OF LAWS IN GENERAL 225 (H. Hart ed. 1970), where Bentham states: "Now begin with property. Now property before it can be offended against must be created: and the creation of it is the work of law." *Id.*

22. This is the tradition of modern natural law theory which is best exemplified by John Locke's discussion of the origin and nature of property in Chapter V of *The Second Treatise*. *See* J. LOCKE, THE SECOND TREATISE ON GOVERNMENT 303-20. (P. Lastlett ed. 1967).

23. According to this view, labor creates a basis for a property claim as a result of the increase in value caused by the application of labor. *See* J. LOCKE, *supra* note 22, at 306: "*[L]abour* put at distinction between them and common. That added something to them more than Nature, the common Mother of all, had done; and so they became his private right."

24. This modification of Locke's theory is necessitated by the fact that there are no longer resources free in the state of nature to which one can directly apply one's labor. Rather, one necessarily finds oneself part of a co-operative process which has social dimensions. See PROPERTY, PROFITS AND ECONOMIC JUSTICE, *supra* note 8, at 5-6, where it is argued that:

> Locke's assumptions concerning the justifiable acquisition of property are, however, seldom plausible in the contemporary world. The unowned wilderness waiting to be appropriated, so central to Locke's argument, no longer exists. Rarely do we simply mix our

pation in cooperative activity gives rise to a society's wealth, and through a process of mutual recognition and reciprocity one establishes claims to possession and use of a portion of that social product.

To say that one has a property right in one's job is, according to the positivist tradition, simply to mean that the law recognizes a claim or interest to retain one's employment position.[25] One might claim on moral grounds that, in the absence of recognition of such a right, the law should be modified to provide a basis for such a claim; but ultimately the right to a job would depend on the law's recognition of such a right. However, if one invokes the second tradition, he is viewed as having a property right in his labor and concomitantly a right in the product of his labor. Then there is a basis prior to the law's recognition of property right to a claim of a right in one's job to the extent that the job is a product of one's labor.[26] If one's labor has been incorporated into a product and service, for which a wage has been received, and if that wage captures the full value of such service, then there is no basis for any further claim to one's job. To the extent, however, that one's labor value is not fully captured in a salary or wage, there may be a basis for a further claim to the employment position which has been enhanced by one's labor. Alternatively, it may be argued that the joint activity of those employed along with the efforts and investment of employers produces not only the value of wages and profit, but also a social product reflected in the value of the ongoing enterprise in which those associated with the enterprise have a vested property interest including interests in employment as well as the good will and the value of an ongoing enterprise.[27] It is such a vested interest in the ongoing enterprise which, according to this second view of property, provides a plausible claim by employees to a right of continued employment subject to the type of limitations which have already been identified.

While there appears to be a plausible theoretical ground for an employee to make a claim to a property interest in his job, the positive law has moved slowly in establishing or recognizing such a right. Rather, the law has treated the employment relationship as providing for a claim to wages as compensation for the rendering of labor, with an employee having the right to freely withdraw from continued employment. However, this reciprocity of claim to wages and claim to labor is subject to a reciprocal power to terminate employment absent any agreed-upon limitations.[28] Thus, an employee cannot be compelled to continue his employment (sub-

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labor with nature. Nearly always we mix our labor with an economic system, an industrial economy, and it makes little sense to think of the result as the outcome of *our* labor. A person's labor cannot be distinguished from the other labor it is mixed with in producing a product or contributing to production.

25. *See* J. BENTHAM, *supra* note 21, at 84: "For Bentham one has a right because it is given to him by the law, in Bentham's terms one is 'favored' by the law just in that case where it bestows upon him a right."

26. *See* J. LOCKE, *supra* note 22, at 317. "Thus *Labour*, in the Beginning, gave a *Right of Property*, where-ever anyone was pleased to imploy it, upon what was common, which remained, a long while, the for greater part, and is yet more than Mankind makes use of."

27. *See, e.g.*, T. DONALDSON, CORPORATIONS & MORALITY 153-56 (1982).

28. *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118-35 (1976).

ject to very special limitations), and reciprocally an employer cannot be compelled to continue the employment of a worker (except under the terms of the particular labor contract).[29] To the extent that the employment-at-will theory rests upon such a perceived reciprocity, it fails to recognize fundamental features of the actual socio-economic relationship. In a highly developed complex economy, it is not realistic to view a laborer as completely uninhibited in choosing to maintain or to seek employment. Given the nature of the economy and the state of the work force, many factors limit mobility and act to reduce the employment opportunities of a worker over time and space. The relative imbalance of power, which generally favors the employer, makes an analysis based on perceived reciprocal powers and duties one which fails to account for the true nature of the labor market. Clearly, the employment-at-will doctrine favors employers; arguably, it denies employees their right to jobs and a right to the related means to a livelihood. The failure to recognize a right to one's job denies one control over central features of one's life. In our society, work or gainful employment occupies a central role in the person's life, because the job both provides the basic resources to meet most people's needs and is related to their sense of identity and self worth.[30] Thus, there are very strong interests on which employees can base their claim to a right to their job. Now, this Article will turn to a consideration of whether there is a legal basis or a framework for establishing such a right.

II. THE EMPLOYMENT-AT-WILL DOCTRINE

A. *History of the Doctrine*

Until the late nineteenth century, the law governing the employment relationship was characterized as "master-servant" law.[31] The master-servant relationship was construed chiefly as a domestic relation; accordingly, the household was its model.[32] Work was performed by servants either in the house or in the master's shop. These workers were described as "menial" because they lived *intra moenia*—within the walls of the master's house.[33] The legal relationship between the parties was construed in terms of the law of contracts.[34] Contract terms such as duration and wages to be paid were theoretically subject to bargaining and mutual agreement, but were in actuality based on the customs of the trade.[35]

The master-servant relationship in Anglo-American law as it existed from the seventeenth through the early nineteenth centuries consisted of

29. *See* P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 130-37 (1969); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

30. *E.g.*, Kahn, *The Meaning of Work: Interpretation and Proposal for Measurement*, in THE HUMAN MEANING OF SOCIAL CHANGE (A. Campbell & P. Converse eds. 1972) (a review of the social science literature on the importance of work).

31. *See generally* P. SELZNICK, *supra* note 29, at 123; Feinman, *supra* note 28.

32. Feinman, *supra* note 28, at 120; Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979).

33. BLACK'S LAW DICTIONARY 738 (5th ed. 1979). *See also* 1 BLACKSTONE, COMMENTARIES 425 (1941).

34. *See, e.g.*, Parker v. Ibbeston, 140 Eng. Rep. 1118 (1858).

35. *Id.*

several basic elements.[36] The first element was relational and was characterized by the master's power to command and the servant's duty to obey; accordingly, the terms of this relationship gave rise to a power or authority in the master to discipline or to terminate the service of the employee.[37] The second element of the relationship was that it was for a term, a specified or implied time of service, and thus not strictly a relationship at will.[38] In the absence of a contrary agreement, the employment relationship was construed to be for a period of one year.[39] A third element of the relationship can be characterized as paternalism; generally, the master was responsible for the safety, physical well-being, and even the moral condition of the employee.[40] Although the master-servant doctrine was considered a contractual relation, it was actually a status-oriented relationship. This situation, however, began to change with the advent of the Industrial Revolution.[41] Along with the transformation to an industrial economy, characterized by factory employment, there was a corresponding transformation of the master-servant law into one governed by distilled contract principles including independence, mutuality and freedom of contract. What became known as free-employment contract theory took form during the period of laissez-faire economic development prevalent in the second half of the nineteenth century.[42]

The principal legal corollary of the social institution of the free market was freedom of contract.[43] The contract was the principal legal instrument which underlay the new economic order and provided the basis for

36. *See generally* P. SELZNICK, *supra* note 29, at 125.

37. *Id.* at 125.

38. *Id.* at 126.

39. *Id.*

40. *Id.* at 127.

41. Elaborating on the history of the doctrine, one commentator remarked: "The uneven relevance of master-servant doctrine had a limited importance before the Industrial Revolution . . . . A truly contractual theory of employment did not emerge until the concept of a free market gained ascendance in economic life." P. SELZNICK, *supra* note 29, at 130. *Accord* Feinman, *supra* note 28, at 124; Glendon & Lev, *supra* note 32, at 457-58.

42. See Note, *supra* note 29, where the author observed: "At that time [the late nineteenth century] the prevalent ideology was laissez faire and its corollary freedom of contract . . . . A more precise term for the philosophy . . . is freedom of enterprise, which was considered to include the . . . 'fundamental right' of the employer to discharge employees as he or she pleased." *Id.* at 343. *Accord* P. SELZNICK, *supra* note 29, at 130; Glenton & Lev *supra* note 32, at 458.

The term laissez-faire meaning "let things proceed without interference" originated in France as early as the first half of the eighteenth century, and was adopted by Adam Smith as a rule of practical economic conduct. *See* H. SLOAN, DICTIONARY OF ECONOMICS 191 (1961). The principle was expressed in the assertion that *the individual* is most productive when allowed to follow his own self-interest without external restrictions. Adam Smith expressed his opinion on the strength of the individual in these terms:

> The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity but of surmounting a hundred impertinent obstructions. . . .

A. SMITH, THE WEALTH OF NATIONS, BOOK IV 508 (E. Cannan ed. 1937). The doctrine of laissez-faire provided the foundation for the concept of free market which was extended to include the notion of a free market for labor with the consequence that labor was perceived as a commodity subject to exchange.

43. *See generally* J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

its growth.[44] Contract theory provided for and validated the mutual rights and obligations of "free" parties bargaining in permitted transactions. Against the background of a laissez-faire economy the new employment relationship took shape.

This theory of free contract as applied to employment relationships presumed a freedom of the employee to bargain with the employer as to the terms of the employment relationship. This included the implied right to withdraw from the employment relationship, subject to specific contractual limitations.[45] Concomitantly, the employment contract implicitly allowed the employer to maintain a "fundamental right" to discharge employees at his discretion.[46] According to one nineteenth century commentator, the terms of the employment relationship were governed by an inflexible rule which provided that employment was *prima facie* a hiring at will, and if an employee claimed that his employment was for a term, say a year, the burden was on him to establish it by proof of explicit contractual terms.[47] Any employment, whether it be ostensibly for a day, week, month or year, or without a time being specified, was considered an indefinite term, and no presumption attached that it was for a day even, but only at the rate fixed for whatever time the party actually served.[48] Thus, even the implied terms present in the master-servant relationship were eliminated. The employment relationship became one of simple contract, consisting of terms agreed upon by the parties with power in either party to withdraw at any time, absent contractual terms to the contrary.

The doctrine that employment was governed solely by contractual terms and characterized as employment-at-will unless specifically agreed otherwise, was adopted by most state courts and gave rise to a variety of propositions or constructions which were developed and adopted by courts in their interpretation of employment contracts.[49] This judicial activity was necessitated by an apparent ambiguity in the principle of at-will em-

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44. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 464-68 (1973), where the author remarked: "The law of contract occupies a special place in American law in the 19th century . . . . [I]n theory the whole century was the century of contract. Contract was identified as the single most important hallmark of modern law." *Id.* at 464. *See also* J. HURST, *supra* note 43, at 14.

45. See, for example, Adair v. United States, 208 U.S. 161 (1908), *overruled*, Phelps Dodge Corp. v. NLRB, 313 U.S. 187 (1941), wherein the court observed:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.

Id. at 174-75.

46. See, for example, Ryan v. Upchurch, 474 F. Supp. 211 (S.D. Ind. 1979), *rev'd sub nom.* Ryan v. J.C. Penney Co., 627 F.2d 836 (7th Cir. 1980), where the court summarized the defendant's position which said that "because of the doctrine of 'mutuality of obligation,' in an employment contract . . . plaintiff was not bound. She could leave her position at her will. The mutuality doctrine then mandates that because the employee is not bound, the employer is not bound, even if it makes representation to the contrary." *Id.* at 214. *See generally* P. SELZNICK, *supra* note 29, at 131; Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty To Terminate in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *supra* note 29, at 343.

47. H. WOOD, MASTER & SERVANT § 134, at 272 (1877).

48. *Id.*

49. *See infra* notes 50, 52 & 57 and accompanying text.

ployment, which arose in early employment contract disputes. This ambiguity arose out of the apparent inconsistency which developed by the holding of employment contracts, ostensibly for a term, to be in fact for an indefinite period and subject to termination at-will.

An early case which applied the employment-at-will rule to a situation where the employee claimed that the contract was not merely for a term, but one providing for a "permanent" position was *Perry v. Wheeler*.[50] This case involved a minister who had been elected "permanent" rector of a church. After a dispute with the congregation, an ecclesiastical review board recommended that the relationship be severed, despite the minister's insistence that he had a right to maintain his rectorship and thus to continue his employment. The Kentucky Supreme Court held that although the minister had been elected "permanent" rector, "it was intended [by the parties that the minister] should continue to hold the place [only] until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligations. . . ."[51]

The *Perry* decision was perhaps independently explained by reference to the terms of the special relationship between a minister and his congregation. The case was cited, however, as precedent in *Lord v. Goldberg*,[52] a California case, for the proposition that even outside the special case of clerical employment, "permanent" did not mean lifetime employment. In *Lord*, the employee had been given written assurance that he would have permanent employment as solicitor "so long as he should use his best efforts" to extend the employer's business.[53] However, the employer had severed the relationship on the basis that the employee had misrepresented his capabilities at the time of hiring. The California Supreme Court held that it was "clear that plaintiff's employment was not intended to be for life, or for any fixed or certain period;" rather, it was to continue indefinitely, or until one of the parties should wish to terminate the relation.[54] Although the special facts of misrepresentation provided an independent basis for termination in *Lord*, the observations concerning the implicit power of either party to terminate the employment were viewed as a significant statement of the law governing employment contracts.

While both the *Perry* and *Lord* courts found an implied right of at-will termination within the employment agreements, the opinions implicitly adopted the propositions that employment should be based upon "fair and equitable terms"[55] and that termination should be only for "good cause."[56] The decisions, however, were interpreted by subsequent courts as construing "permanent" to mean "indefinite" employment, terminable at the will of either party. Of the two principles implied by construction,

50. 75 Ky. (11 Bush) 541 (1877).
51. *Id.* at 548-49.
52. 81 Cal. 596, 22 P. 1126 (1889).
53. *Id.* at 598, 22 P. at 1127.
54. *Id.* at 601-02, 22 P. at 1128.
55. *Perry*, 75 Ky. (11 Bush) at 549.
56. *Lord*, 81 Cal. at 601-02, 22 P. at 1128.

only the proposition that the terms of employment be "fair and equitable," which was understood to be reciprocal, survived in later cases; the good-cause requirement was either abandoned or forgotten.[57] Thus, courts viewed all employment contracts in the same manner: Absent a special contractual provision to the contrary, permanent employment means indefinite employment or employment-at-will, and therefore, terminable at the will of either the employer or the employee.[58] This legal posture was taken by most American courts in employment cases. At the turn of the century, the employment-at-will doctrine was tested in the United States Supreme Court, where it received full endorsement in two landmark cases.[59] The Court's analysis was rooted in the notion of reciprocity as articulated under the contract doctrine of mutuality. The Court maintained that the right of the employer to dismiss an employee is equivalent to, and reciprocal with, the employee's right to resign; the Court implicitly considered the two parties to be on equal footing in their contractual relationship.[60]

The Court first held the employment-at-will rule to be constitutional in *Adair v. United States*.[61] In this case, the court held unconstitutional a federal statute which protected unionized employees from dismissal based upon their union membership.[62] The Court held that the statute constituted an unwarranted interference with the employer's right to enter into and to terminate employment contracts.[63] This position was reaffirmed in *Coppage v. Kansas*,[64] where the Court declared unconstitutional a Kansas statute forbidding "yellow dog" contracts requiring employees to agree not to join a union as a condition of employment. The Court held that such statutes violated the parties' freedom of contract.[65] While the Court did recognize that the employer and employee may not be on equal footing in the bargaining process,[66] it implicitly upheld the employer's property rights to be paramount over the employee's rights to his job. The Court specifically recognized the possible inequality in bargaining position, but

57. See, for example, Sullivan v. Detroit, Y. & A.A.Ry. Co., 135 Mich. 661, 98 N.W. 756 (1904), where the court held that "permanent employment" meant "employment for an indefinite time, which may be severed by either party and [s]uch contracts, in the absence of special considerations . . . are terminable at any time by either party." *Id.* at 673, 98 N.W. at 760.

58. In Williams v. Kansas City Pub. Serv. Co., 294 S.W.2d 36 (Mo. 1956), the Supreme Court of Missouri enunciated the rule as follows: "Unless there is a contract pertaining to the duration of the employment or limiting the reasons for which the employee may be discharged the employment is at the will of either party, and the employer may terminate the relationship at any time." *Id.* at 39. *See generally* Note, *supra* note 29, at 345; Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y. L. SCH. L. REV. 743 (1979).

59. See Coppage v. Kansas, 236 U.S. 1 (1915) and Adair v. United States, 208 U.S. 161 (1908), which were both overruled in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941). *See also* Note, *supra* note 29, at 346-47; Note, *supra* note 58, at 746-47.

60. *See infra* notes 63, 65, 66 & 67 and accompanying text.

61. 208 U.S. 161 (1908), *overruled*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

62. *Id.* at 179.

63. *Id.* at 180.

64. 236 U.S. 1, 13-14 (1915), *overruled*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

65. *Id.* at 13.

66. *Id.* at 17-18.

held that this concern was overridden by the employer's property rights.[67]

Clearly the Court was aware of the conflict between the interests of the employer and employee, but held that the employer's rights prevailed. Thus, the Court either implicity rejected the claim of right asserted by the employee or determined that the employer's right to terminate prevailed over any claim of right by the employee.

Nevertheless, the conflict between the interest of an employee in his job and the terms by which it is held, and the employer's rights growing out of his ownership of the firm, has continued to confront courts and legislatures alike. Legislatures and courts have been encouraged to recognize that both employees and employers have vested and potentially conflicting interests in the employment relationship and that such interests require a principled basis for resolution when conflicts arise between the employer's desire to terminate and the employee's claim to retain employment. The earliest modification of the employment-at-will doctrine came in the form of legislation and judicial interpretation thereof.

B. *Legislative Modifications*

A fundamental purpose of both federal and state labor legislation is to redress the inherent imbalance in the bargaining positions between the individual employees and employer which is exacerbated when the employer operates in the form of a large and powerful corporation.[68] These statutes attempt to strengthen the bargaining position of the employee in his contractual relationship with the employer, and effectively abandon the employment-at-will doctrine with statutory imposition of limitations on the employers' right to dismiss its workers.[69]

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67. *Id.* at 18-19. The United States Supreme Court observed that the state court had noted that employees were not financially able to bargain for explicit terms in their employment contracts. *Id.* at 17. Nevertheless, the United States Supreme Court concluded that a system of private property inevitably leads to inequalities of wealth and bargaining power. *Id.* at 17-18. Thus, it was natural that parties agreeing to an employment contract would be affected by differences in wealth and bargaining power. *Id.* at 41 (Holmes, J., dissenting).

68. From Congressional debates of 1935 that led to the passage of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976) (NLRA), it is clear that equality of bargaining power between employers and employees was a major objective: "The second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that *equality of bargaining power* which is *prerequisite to equality of opportunity and freedom of contract. . . .*" S. REP. NO. 573, 74TH CONG., 1ST SESS. 2 (1935) (emphasis added). *See generally* Feliu, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUMAN RIGHTS L. REV. 149, 156 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 491-92 (1976); Note, *supra* note 46, at 1826.

69. For example, the NLRA recognized this imbalance as consisting of an inequality in bargaining power resulting from the fact that employees lacked full freedom of association and even actual liberty of contract following from inequality in bargaining power. Employers had not only the position of power given them by the corporation, as well as its wealth, but also are free to form associations for their collective interests. The right to form labor unions and to bargain collectively was seen as necessary for restoring equality of bargaining power between employees and employer. 29 U.S.C. § 151 (1976). *See also* Norris-La-Guardia Act, 29 U.S.C. §§ 101-115 (1976); Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 151-169 (1976); Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1976). The principal goal of these statutes has been to legitimize employee unionization as a compensating force against the theretofore unfettered power of the employer. *See generally* W. MALLONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 545-639 (1974) [hereinafter cited as W. MALLONE].

1. *Federal Legislation*

The initial federal enactment which gave a measure of employee protection against wrongful dismissal was the National Labor Relations Act (NLRA) passed by Congress in 1935.[70] Section 7 of the NLRA guarantees the employees' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[71] The right to unionize is the most important right granted by this statute. The right is bolstered by section 8(3) of the NLRA (now section 8(a)(3)) which prohibits the employer from discriminating in employment "to encourage or discourage membership in any labor organization."[72] Thus, the employer's freedom to dismiss is significantly restricted as a result of this statutory protection, while the statute itself does not prohibit an employer from dismissing an employee for reasons other than his union activities. This right itself has provided the means for workers to bargain for additional restrictions on the employer.

Thus, nearly all collective bargaining agreements established under the procedures provided by the NLRA require "just cause" for dismissal. This provision has been subject to repeated interpretation by labor arbitrators, and today there is a considerable body of decisions outlining the parameters of what constitutes a wrongful discharge.[73] Where it is found that the employee has been wrongfully discharged, one of the remedies available to him or her is reinstatement.[74]

The constitutionality of the NLRA was upheld in *NLRB v. Jones & Laughlin Steel Corp.*[75] The United States Supreme Court held that Congress could regulate labor relations at any manufacturing plant involved in

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70. 29 U.S.C. §§ 151-187 (1976).

71. Id. § 157.

72. *Id.* § 158(a)(3).

73. For example, see Penn-Dixie Cement Corp., 29 Lab. Arb. (BNA) 451 (1957), where the criteria for reasonable or just cause dismissal were outlined as follows:

> (1) Determination of reasonable cause must be made as of time of discharge; (2) discharge originally based on arbitrary or capricious considerations may not be justified by subsequent developments; (3) disciplinary action may not be said to be based on reasonable cause if, after it is taken on impulse, search for justifying reasons is made; (4) *reasonable cause must rest on employee's failure in job relations and not upon personal preference or predilections of the employer*. . . .

Id. at 451-52 (emphasis added). Also, in Great Western Malting Co., 67 Lab. Arb. (BNA) 660 (1976), the "just cause" standard was applied even in the absence of such a clause in the collective bargaining agreement between the union and the employer; the arbitrator applied the "just cause" standard even though the employment contract did not explicitly include it, on the ground that it was an implied term reflecting a "prevailing standard in labor agreements;" further, it was asserted by the arbitrator that "[t]o adopt a lesser standard would result in a basic inequality within the collective bargaining process." *Id.* at 664. Finally, in RLC & Son Trucking, 70 Lab. Arb. (BNA) 600 (1978), the "just cause" criterion was again used even where it was not expressly provided for in the contract on the ground that language in the contract to the effect that refusal of an employee to cross a picket line or to handle materials of striking worker "shall not be cause for discipline or discharge." The implication of recognizing certain conduct as not to constitute good cause for dismissal was held to be implicit recognition that any dismissal would have to be for good cause shown. *Id.* at 602.

74. The NLRA provides that where an unfair labor practice is established, the Board shall issue a cease and desist order and provide for reinstatement where appropriate. 29 U.S.C. § 160(c) (1976).

75. 301 U.S. 1 (1937).

interstate commerce.[76] The Court reexamined its position on the disparity of bargaining power between employer and employee which it had accepted as natural to a free enterprise economy in *Adair* and *Coppage*, and validated the authority of Congress to reconstitute the terms of this bargaining relationship in order to provide for greater equality of the parties, and to provide for recognition and enforcement of worker claims of right. The Court recognized that employees' right to self-organization was a fundamental right which arose from the very nature of the labor market.[77] It was apparent to the Court that an employee was relatively powerless in his dealings with an employer. The Court also recognized the dependence of the worker on his wage for the maintenance of himself and family.[78] Moreover, the Court recognized that if an employer refused to bargain as to the terms of employment, and refused to pay a wage which the worker felt was fair, the worker was in fact powerless, and generally unable to reject the terms offered by the employer given the necessity of work.[79] Thus, the Court concluded that a *"union was essential to give laborers opportunity to deal on an equality with their employer."*[80]

Clearly the Court's interpretation of the NLRA, in *Jones & Laughlin Steel Corp.*, modified its previous commitment to a laissez-faire analysis which characterized its decisions in *Adair* and *Coppage* at least in regard to the idea of mutuality in employment contracts. The Court gave explicit recognition to employee rights which were identified and were treated as having been given protection as a result of Congressional action. Minimally, the Court held that the government could intervene in the employer-employee relationship and protect the employee against certain practices on the basis of unfairness or other articulated public policy objectives.

The Court, nevertheless, limited its decision to industrial employees whose activities were within the purview of interstate commerce and who were engaged in industrial employment and who were the intended subjects of the Congressional enactment.[81] Consequently, the Court's decision explicitly excluded a great number of employees who thus continued to be employees-at-will.

An additional adjustment of the imbalance of the employee-employer relations was provided in Title VII of the Civil Rights Act of 1964.[82] This

76. The United States Supreme Court affirmed the Act's constitutionality by stating:
> We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority.
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> . . . .
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> [The Act] purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.

Id. at 30, 31.

77. *Id.* at 33.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 36-41. The Court concluded that Congress did not intend to address the inequality of bargaining power in all employment contracts, regardless of a showing that a particular employment contract affected interstate commerce.

82. 42 U.S.C. § 2000e (1976).

legislation was explicitly aimed at protecting employees from discriminatory practices.[83] Congress made it an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because the employee opposed practices that were considered unlawful employment practices by Title VII.[84] In addition to this protection provided by Title VII, employers were further prohibited from discriminating among employees on the basis of sex with reference to wages,[85] and on the basis of age[86] or handicap.[87]

The Civil Rights Act and the National Labor Relations Act constitute the most influential and effective pieces of federal legislation providing for the protection of employees against unjust dismissal. Through enactment of this legislation, Congress demonstrated that the employment-at-will doctrine was no longer the principal foundation for employment contracts. Furthermore, these enactments are evidence that the employee-employer relationship can be modified to meet the conomic conditions of contemporary society, and more generally, to give protection to the legitimate interests and expectations of employees by creating or recognizing specific rights in the employment relationship. In addition to the above statutes, the federal government has enacted other legislation that has further limited the employer's formerly absolute power of discharge.[88] The result of such legislation is the establishment of a qualified right of an employee to his or her job and reciprocally to impose a duty on an employer not to discharge an employee on one of the proscribed basis.

In addition to union employees, civil service workers are statutorily protected in their employment relationship.[89] This category of employee may not be dismissed except "for unacceptable performance"[90] or "for

83. *Id.*

84. *Id.* § 2000e-3(a).

85. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976).

86. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1976).

87. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).

88. Employees in various statuses are given statutory protection from wrongful dismissal. Veterans are protected by the Veterans Preference Act, 38 U.S.C. § 2021 (1976) (grants veterans the right to return to their former jobs and prohibits discharge for one year). Debtors are protected by the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (forbids discharge of employees whose wages are garnished for indebtedness). Jurors are given protection by the Jury System Improvements Act of 1978, 28 U.S.C. § 1875 (Supp. IV 1978) (prohibits discharge of employees who serve on jury duty). Moreover, many recent statutes provide additional protection for an employee against possible reprisal taken by his or her employer in response to the employee's assertion of a right under various acts. For example, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (1976), the Clean Air Act Amendment of 1977, 42 U.S.C. § 7401 (Supp. IV 1980), Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1976) all contain a section prohibiting discharge of employees exercising their right under these Acts. While each of these provisions is in furtherance of the purpose and enforcement of the specific statute in which the relevant protection is provided, which in turn reflect adoption of specific policies by Congress, it must be recognized that these protections afforded to private employees significantly restrict the employer's otherwise unqualified right of discharge and implicitly give rise to or recognition of employee rights in a job.

89. These employees are covered by the Civil Service Act, ch. 27, § 1, 72 Stat. 403 (1883). *See generally* Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287 (1968).

90. 5 U.S.C. § 4303 (Supp. IV 1980). The statutory mandate also provides for informing the employee of the reasons for the "unacceptable performance" evaluation. *Id.* § 4303(b)(1)(A).

such cause as will promote the efficiency of the [civil] service."[91] One commentator has suggested that the development of these protections for civil service employees against discharges in the absence of serious misconduct results in these workers having "the equivalent of life tenure" after a short probationary period.[92] The discharge of a government employee is clearly more restricted than is discharge in the case of the private sector employee; in the case of a civil service employee not only is dismissal restricted to "for cause" showings, but further, dismissal can occur only after the worker is afforded the required procedural protections.[93]

The courts have interpreted Congress' purpose in creating these protections for public employees to limit the government's discretionary dismissal power and thus ensure that an employee cannot be removed for arbitrary or capricious reasons.[94] This does not provide an absolute claim on a government job because a public employee can still be removed for cause. The courts have balanced several items in providing and fashioning relief under the Civil Service Act, including the public interest behind the governmental action, the private right involved and the degree of injury to the individual government employee.[95] Nevertheless, this balancing is another departure from the rigid constraints of the employment-at-will doctrine and demonstrates that the Congress and courts are willing to protect employees against arbitrary dismissal. In fact, interpretation of the Civil Service Act reveals a judicial attitude of broadening or giving liberal interpretation to the protection afforded by the statute. Moreover, the federal courts have explicitly discussed the concept of a job property right, when

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91. *Id.* § 7513. Employees removed based on this criterion are also to be afforded due process in terms of notice and a hearing. *Id.* § 7513(b).

92. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976).

93. *See supra* notes 90 & 91. The existence of such procedures have led the United States Supreme Court to hold in Arnett v. Kennedy, 416 U.S. 134 (1974) that civil servants are given a property interest in their jobs by the Lloyd-La Follette Act of 1948, 5 U.S.C. § 7501 (1976), a property interest that cannot be taken away without constitutionally imposed procedures. 416 U.S. at 167. Justices Powell, White and Marshall maintained that it was up to the legislature to grant such a property right, but that once the right was granted, it had constitutional protection. *Id.* These justices found that such a right had been granted, in the words regarding removal based only on "cause." *Id.* at 185.

94. *See, e.g.*, Greenway v. United States, 163 Ct. Cl. 72, 81 (1963) (the court recognized that a charge of arbitrariness, capriciousness, or maliciousness presents a different situation); Bilanow v. United States, 309 F.2d 267 (Ct. Cl. 1962) (reduction-in-force case where it was held that the cut-off date had been arbitrarily fixed); Gadsden v. United States, 78 F. Supp. 126, 127 (Ct. Cl. 1948) (courts have power to review and set aside discretionary administrative decisions regarding employee dismissal if they are arbitrary or capricious or rendered in bad faith).

95. Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081, 1095 (1973). This policy can be noted in the trend toward protection of individual rights in the security cases of the 1950's and early 1960's. *See, e.g.*, Cafeteria Workers Union Local 743 v. McElroy, 367 U.S. 886 (1961) (government's right to dismissal is not as extensive as a private employers' in that public employee could not be discharged for arbitrary or bad reason, yet notice and hearing not required in every case); Green v. McElroy, 360 U.S. 474 (1959) (the court recognized that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the fifth amendment); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (the court decided that notice and hearing were required); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (the court held that the plaintiff was not entitled to due process upon discharge), *aff'd*, 341 U.S. 918 (1951).

reviewing dismissals of public employees.[96] This Article will now discuss the observations and arguments which have been developed by various legal commentators concerning a public employee's interest in his job.

2. *Property Right In Public Employment: Arguments by Commentators*

Consideration of the claim of a job property right has not been limited to judicial opinions, but has been the subject of important commentary such as that provided by Charles Reich in his article entitled "The New Property."[97] In this article, Reich attempted to identify ways in which "government largesse" has become a major source of subsistence for a great number of people. One such area is public employment and the analysis made of public employment can be applied to private employment as well. In describing the importance of public employment, Reich noted that "a profession, job, or right to receive income, are the bases of . . . [an individual's] various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses."[98] While importance of an interest is not dispositive of the existence of a right, the importance of an interest which is reflected in a recognized right will be significant when that right comes into conflict with a claim of right made by another, such as an employer claiming a right to discharge an employee.

In light of the increasing dependence of individuals on new forms of wealth, Reich called attention to the relative impotence of employees which occurs to the extent that employees lack the protection of rights in employment and other intangible interests, which are traditionally afforded to other tangible and intangible property rights.[99] Reich stressed both the importance of the workers' interests in employment which satisfies their needs and the significance of the recognition of a right in a job

96. As early as 1897, Judge Jackson held that employees have an interest in the office they hold: "Has he [the employee] not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office . . . is there not a right which should be recognized and protected by the law in the employment of it?" Butler v. White, 83 F. 578, 586 (C.C.W. Va. 1897), *rev'd sub nom.* White v. Berry, 171 U.S. 379 (1898). Justice Harlan, dissenting in Taylor & Marshall v. Beckham (No. 1), 178 U.S. 548 (1899), remarked: "Apart from every other consideration, the right to receive and enjoy the salary attached to such an office *is a right of property* . . . unless we mean to play with words, and regard form rather than substance." *Id.* at 602 (emphasis added).

These statements seem to constitute the start of a trend towards a recognition by the courts of a "property" right within the meaning of the fifth amendment. This trend was evident in Justice Brennan's comment that employees have "an interest of sufficient definiteness to be protected by the federal constitution from some kinds of governmental injury." Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 899-900 (1961) (Brennan, J., dissenting). In Arnett v. Kennedy, 416 U.S. 134 (1974), the United States Supreme Court reviewed the constitutionality of the Lloyd-La Folette Act of 1948, 5 U.S.C. § 7501 (1979), which guarantees that civil service employees should be removed only for "such cause as will promote the efficiency of the service," but making a hearing only discretionary. Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, wrote a plurality opinion upholding the law, based on the argument that "the property interest which appellee [the employee] had in his employment was itself conditioned by procedural limitations which had accompanied the grant of that interest." *Id.* at 155. *See infra* notes 102-16 and accompanying text.

97. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

98. *Id.* at 738, 739.

99. *Id.* at 737.

which involves a right to a status.[100] Such a right, according to Reich, should be viewed as property and should receive legal recognition and protection as do other property rights. Reich argued that in modern society, status is important not only to a sense of identity but also to an ability to provide for one's needs. Thus, laws which have been formulated to protect one's sense of integrity and identity should be extended to statuses which provide the basis for earning the means of a livelihood.[101] One of the most important status relationships of a person in contemporary society is that of employee, and thus it is proper for the law to extend protection to the preservation of this status.

Courts have, in the two decades since the publication of Reich's article, begun to consider the asserted claim of a property right in one's job. In 1972, the United States Supreme Court discussed the issue of job entitlement in two decisions involving wrongful discharges of public employees.[102] In *Perry v. Sindermann*,[103] the Court accepted a state junior college professor's contention that he had been denied procedural due process by the failure of the college to grant him a hearing before deciding not to renew his teaching contract.[104] Accepting the proposition that no hearing is required unless there has been a deprivation of "liberty" or "property," the Court held that in this case the professor had to be given the opportunity to prove such a deprivation.[105] Although state law did not authorize the college explicitly to grant tenure, the Court reasoned that the existence of a de facto tenure policy, "the equivalent of tenure" which created an expectancy of continual employment, may be a sufficient "liberty" or "property" interest to require a hearing before dismissal.[106] The Court recognized that there was a possibility of Sindermann establishing a property interest in job tenure.[107] Moreover, the Court directly compared the use of an implied contract analysis in the university context to its previously adopted position that collective bargaining arguments in private industry may be supplemented by "the common law of a . . . particular plant."[108] This analysis suggested that the Court might be willing to look at an entire employment picture in a particular case, whether public or private employment, in terms of an implicit property interest of a job holder.

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100. *Id.* at 738-39.

101. *Id.* at 785.

102. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* Comment, *Due Process and the Non Tenured Professor: A Comment on Roth and Perry*, 8 GONZ. L. REV. 99 (1972); *Board of Regents v. Roth: Procedural Rights of Non-Tenured Teachers*, 73 COLUM. L. REV. 882 (1973).

103. 408 U.S. 593 (1972).

104. *Id.* at 597-98.

105. *Id.* at 601-03. The Court affirmed Sindermann's right, upon proof of a property interest to a hearing on his first amendment claim and on the issue of violation of rights under the college's informal job security system. *Id.*

106. *Id.* The Court noted the possibility of an employee establishing "the existence of rules and understanding, promulgated and fostered by state officials, that . . . [would] justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Id.* at 602.

107. *Id.* at 602-03.

108. *Id.* at 602 (quoting Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579 (1960)).

In the companion case of *Board of Regents v. Roth*,[109] however, the Court found no basis for the claim of a non-tenured assistant professor to a hearing before the state university declined to renew his contract. The *Roth* opinion reiterated the proposition that unless a "liberty" or "property" interest was at stake, a hearing was not required. The majority opinion stated that "to have a property interest in a benefit, a person clearly must have more than an abstract need or a desire for it;" property interests are "created and . . . defined by existing rules or understandings that stem from an independent source such as state law."[110] Unlike *Perry*, the *Roth* Court found no independent source of a property right, such as contact terms or past custom, and therefore no property interest was found.[111]

An apparent difficulty in establishing a property interest in one's job can be observed in *Bishop v. Wood*[112] which seems to depart from the *Perry* and *Roth* holdings. This case involved a chief of police who had been employed under an ordinance classifying him as a "permanent employee."[113] The police chief challenged his discharge from employment without a hearing.[114] Despite the explicit contractual language, the Court agreed with the trial judge's decision that the chief of police held his job at the pleasure of the city and, therefore, that he did not have a property interest which could be protected by due process.[115] The Court did not follow the analysis outlined in *Perry* since it did not look at the circumstances surrounding the employment relationship. Instead, the Court used a narrow reading of *Roth* to determine the existence of property rights. The Court looked *solely* to state law rather than the totality of the circumstances surrounding the employment relationship which includes such "independent sources as state law *and* the terms of the employment contract."[116]

The Court's holding in *Bishop* may be justifiable for several reasons. Although the language of the contract in *Bishop* provided an apparently absolute claim to "permanent employment," the contract departed from a conventional analysis of rights which views them as restricted by the conflicting rights of employers to dismiss for cause. Moreover, the political nature of the office of police chief provides a further basis for distinguishing this case from that of a more conventional employee. It seems clear, however, that this line of cases clearly establishes the proposition that the Court will recognize a right to retain one's job where such a right is explicitly established by state statutes.[117]

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109. 408 U.S. 564, 579 (1972).
110. *Id.* at 577.
111. *Id.* at 577-79.
112. 426 U.S. 341 (1976).
113. *Id.* at 343.
114. *Id.*
115. *Id.* at 349-50.
116. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
117. The *Roth* and *Sindermann* decisions have been used in two recent cases as the basis for the proposition that the plaintiffs did not have a property interest in their jobs. In Wotten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981), the court concluded that the plaintiff had not shown a property interest in employment under either his contract or state law. *Id.* at 554-55. In Ogilbee v. Western District Guidance Center, Inc., 658 F.2d 257 (4th Cir. 1981), the court held

This brief consideration of federal legislative developments and judicial interpretation of legislation in the field of employment leads to the conclusion that Congress has departed from the rigidity of the employment-at-will doctrine. Moreover, the courts have upheld the constitutionality of Congressional legislation protecting employees. The courts have found a property interest in employment when such a right is clearly established by statute, and even where there is a "valid" expectancy in continued employment.

3. *State Statutory Developments*

There are various state legislative enactments which offer substantial protections to employees from abusive employers. For instance, a number of states have specifically provided protection from employer reprisal against employees who file workmen's compensation claims.[118] These statutes are consistent with independent judicial decisions providing such protection.[119] Also, several states have made it a crime for employers to coerce their employees into engaging or refraining from certain political activities.[120] Most of these statutes, however, do not provide specific civil remedies for the wronged employees. Additionally, many states have passed legislation that prohibits the use of lie detectors or stress evaluation tests as a condition for or continued employment.[121] These statutes have been given broadened significance as a result of liberal judicial construction.[122] Finally, an important state enactment is the Michigan "whistle blower" statute which aims to protect employees who report to governmental officials or make known to the public the illegal and other socially harmful or abusive activities of their employers.[123] This statute provides protection apparently unavailable under common law; the ramification of this type of legislation will be discussed more fully later in this Article.[124] These state enactments provide a sound precedent for establishing broader protection for employees' rights in their job by the adoption of specific legislation so providing.

C. *Judicial Modifications*

This Article has sought to identify the scope and breadth of legislative coverage afforded to employees against the totally discretionary dismissal

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that since the plaintiff alleged no facts indicating that his employment was not an at will employment and had not identified any implicit or explicit provision in his contract that would indicate his entitlement under state law to continued employment, he could not implicate a protected property interest. *Id.* at 260.

118. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-379 (West Supp. 1982); ILL. ANN. STAT. ch. 48, § 138.4(h) (Smith-Hurd Supp. 1982-83); TEX. STAT. ANN. art. 8307c (Vernon Supp. 1979).

119. *See infra* text accompanying notes 144-49.

120. *See, e.g.*, CAL. LAB. CODE 1102 (West 1971). *See generally* 4 LAB. REL. REP. (BNA) 1:48 (1981) (gives a complete list of these states).

121. *See, e.g.*, CAL. LABOR CODE § 432.2 (West 1971); CAL. PENAL CODE § 637.3 (West Supp. 1982); MICH. COMP. LAWS ANN. § 37.2205(2) (West Supp. 1980); OR. REV. STAT. §§ 659.225, -.227 (1981).

122. See *infra* notes 165, 168.

123. MICH. COMP. LAWS ANN. §§ 15.361 to -.362 (West 1981).

124. *See infra* text accompanying notes 150-200.

power which employers enjoyed under the employment-at-will doctrine. Moreover, it has indicated judicial recognition of a need to limit the doctrine by recognizing the fundamental role employment plays in the lives of contemporary Americans, and that a right to one's job under certain circumstances should be recognized and be given judicial protection.[125] Commentators continue to urge courts to adopt such a posture and to recognize that continued maintenance of the doctrine of employment-at-will is unfair in light of today's economic realities.[126] Attention will now be directed to the various courts' decisions considering the employment-at-will doctrine including those which adopt a departure from the rule in order to protect wrongfully dismissed employees. Additionally there will be a discussion of decisions which continue to uphold the employment-at-will doctrine on the basis of traditional contract analysis.

1. *Public Policy Exception*

The theory most widely adopted by courts in recent years to carve out exceptions to the employment-at-will doctrine is that employers should not be allowed to terminate employees for reasons which are clear violations of some established public policy.[127] Nevertheless, the concept of public policy is by its nature nebulous and difficult to define or interpret.[128] One state court review of the history and content of the public policy concept suggested difficulty in defining and limiting it.[129] It was observed by this court that the classical formulation of the public policy doctrine was set out as that "principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good;"[130] however, it was observed that beyond this relatively indeterminate description of the doctrine, jurists had been unable to fashion a very workable definition of public policy.[131]

An early decision involving the public policy limitation was rendered by the California Court of Appeals in the case of *Petermann v. International Brotherhood of Teamsters*.[132] In *Petermann*, a former business agent of the Teamsters Union brought a wrongful discharge suit against his employer-union, alleging that he had been fired because of his refusal to com-

125. *See, e.g.*, *infra* notes 172, 184 & 216.

126. *See, e.g.*, Blades, *supra* note 2, at 1416; Peck, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 42-46 (1979); Note, *supra* note 46, at 1828-29; Note, *supra* note 58, at 767-69; Comment, *Recognizing the Employee's Interest in Continued Employment—the California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69, 95-96 (1980).

127. *See* Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Palmateer v. International Harvester Co., 82 Ill. 2d 24, 421 N.E.2d 876 (1981); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); Harless v. First National Bank, 246 S.E.2d 270 (W. Va. 1978).

128. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L. J. 467, 473 (1980). *See also* Olsen, *Wrongful Discharge Claims Raised by at Will Employees: A New Legal Concern for Employees*, 32 LAB. L.J. 265, 268-78 (1981).

129. Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 605-07, 386 A.2d 1216, 1228-29 (1978).

130. *Id.* at 605, 386 A.2d at 1228 (citing Egerton v. Earl Brownlow, 4 H.L. Cas. 196 (1853)).

131. *Id.*

132. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

mit perjury at his employer's request.[133] The court held that Petermann had stated a claim for relief and that the considerations of public policy might limit the employer's right to discharge.[134] The court observed that it would be odious to the interests of the state and contrary to public policy to permit an employer to discharge *any* employee on the grounds that the employee declined to commit perjury, an act specifically enjoined by statute.[135] The court reasoned that continued employment made contingent upon commission of a felonious act at the instance of an employer "would be to encourage criminal conduct" and "would be patently contrary to the public welfare."[136] For almost a decade, the California court stood alone in its recognition of rights of employees to protection from at will discharge.[137] Since the early 1970's, however, a number of courts have adopted the public policy theory as a bar against abusive discharges, and more generally as a means of reducing the inequities of the employment-at-will rule.[138] Nevertheless, other courts have not adopted such a public policy limitation on an employer's right to dismiss an employee and have upheld the traditional common law employment-at-will doctrine.[139]

a. *Workmen's Compensation Cases*

One frequently litigated employment-related right is an employee's right to seek and receive workmen's compensation. In a 1973 landmark decision, *Frampton v. Central Indiana Gas Co.*,[140] the Supreme Court of Indiana held that a discharged employee had alleged a sufficient legal claim for relief when she contended that she was discharged by the defendant without reason, one month after she obtained a settlement of a workmen's compensation claim. The court based its decision upon a state statute which provided that no "device" would operate to relieve an employer from any obligation under the state workmen's compensation code.[141] The court held that a discharge or a threat of discharge is such an unlawful device.[142] The court went on to observe that permitting employers to penalize employees for filing workmen's compensation claims, would undermine an important public policy because fear of being dis-

133. *Id.* at 187, 344 P.2d at 26.

134. *Id.* at 188-90, 344 P.2d at 27-28.

135. *Id.* at 188-89, 344 P.2d at 27.

136. *Id.* at 189, 344 P.2d at 27.

137. *See* Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 795, 13 Cal. Rptr. 769, 771 (1961).

138. *See, e.g.*, Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); Howard v. Dorr Woolen Co., 414 A.2d 1273 (N.H. 1980). *See generally infra* text accompanying notes 144-221.

139. *See, e.g.*, Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959); Lekich v. International Business Corp., 469 F. Supp. 485 (E.D. Pa. 1979); Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978); Kelsay v. Motorola Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Ohio Table Pad Co. of Indiana v. Hogan, — Ind. App. —, 424 N.E.2d 144 (1981); Edwards v. Citibank, N.A., 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980).

140. 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973).

141. *Id.* at 252, 297 N.E.2d at 427-28. *See* IND. ANN. STAT. § 40-1215 (1965).

142. 260 Ind. at 252, 297 N.E.2d at 428.

charged would discourage exercise of this statutory right.[143] Thus, both public policy considerations and an explicit right to maintain a workmen's compensation claim gave rise to limitations on an employer's right to dismiss an employee and gave implicit recognition to an employee's right to retain his or her job absent good cause providing a basis for dismissal.

While some courts have reached the same conclusion as the *Frampton* court because of clear state statutes prohibiting discharges in retaliation for the filing of workmen's compensation claims,[144] other courts have adopted the same theory in the absence of statutes similar to the Indiana statute.[145] For example, in *Kelsay v. Motorola, Inc.*,[146] the Illinois Supreme Court recognized a tort action against an employer who discharged an employee in retaliation for filing a workmen's compensation claim, even though the state workmen's compensation act did not specifically provide for civil remedies for retaliatory discharges.[147] The court held that the termination, if allowed to stand, would contravene established public policy, and the court maintained that the workmen's compensation program would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the act.[148]

In *Kelsay*, the Illinois Supreme Court carved out a new exception to the common law termination-at-will doctrine.[149] This decision constitutes an important step towards judicially providing some measure of job security protection for employees who do not have sufficient bargaining power to protect themselves from such discharge. The *Kelsay* decision gives important recognition to the existence of exceptions to the at-will doctrine which are necessitated by specific compelling circumstances.

The cases discussed in this section provide significant protection against discharges prompted by an employer's desire to retaliate against an employee exercising a specific right, fulfilling a legally-imposed duty, or refusing to perform an unlawful act. Also, these cases provide a basis for civil recovery against employers making such abusive discharges by recognizing the appropriateness of relief including enforcement of claims to reinstatement. To the extent that employers are thus prohibited from

143. *Id.* at 251-52, 297 N.E.2d at 427. The court noted the obvious danger of such penalization resulting in discouragement of valid claims with the result that the statutory right would become a nullity: "Employees will not file claims for justly deserved compensation-opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation." *Id.*

144. *See, e.g.*, Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980); Lo Dolce v. Regional Transit Serv., Inc., 77 A.D.2d 697, 429 N.Y.S.2d 505 (1980); A.J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W.2d 445 (Tex. Civ. App. 1979).

145. *But see* Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978). *Accord* Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980); Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 457 (Iowa 1978).

146. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

147. *Id.* at 185, 384 N.E.2d at 358-59.

148. *Id.*

149. *Accord* Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976). *See generally* Note, Kelsay v. Motorola, Inc. — *Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act*, 1980 U. ILL. L.F. 839.

dismissing employees on bases which are found to contravene public policy, the right to dismiss at will is explicitly limited. Given these limitations the courts have implicitly recognized employees' right to retain their jobs absent a just cause basis for dismissal.

b. *Professional Responsibility: "Whistle Blower" Cases*

Courts have attempted the difficult task of striking a balance between the employer's independence of action and the employee's claim of right. This balancing is particularly difficult in those cases where dismissed employees claim that their termination resulted from their efforts at protecting the public interest at the peril of their own job security.[150]

In *Geary v. United States Steel Corp.*,[151] the Pennsylvania Supreme Court considered the claim of a steel salesman that he was maliciously discharged for pointing out to his superiors the unsafe nature of tubular products sold to the oil and gas industry. When Geary's immediate superior was not responsive to Geary's efforts, Geary presented his misgivings to the vice-president in charge of the product's sales.[152] Apparently the management recognized the dangerousness of the product because it was later withdrawn from the market.[153] Nevertheless, Geary was discharged and the state court recognized no right of redress for him.[154] Geary contended that he made his remarks for the public good, therefore he should be recompensed for his discharge.[155] Unpersuaded, the court responded to Geary's public policy argument by remarking that "the praiseworthiness of Geary's motive does not detract from the company's legitimate interest in preserving its normal operational procedures from disruption."[156] The court apparently felt that the impact of recognizing the claimed tort of abusive discharge on these facts would adversely affect corporate organizational procedures.[157]

The *Geary* court attempted to assimilate the problem of "whistle blowers" into the general public policy doctrine discussed above.[158] Accordingly, only when dismissal is for complaints or public statements that parallel recognized state policy would an employee obtain protection in his

150. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (recognizing tort action for wrongful discharge where plaintiff-employee fired because of attempts to have employer comply with state law); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (recognizing a need for a balance between the interests of the employees in knowing that they would not be discharged for exercising their legal rights and those of the employers in running their businesses as they saw fit).

151. 456 Pa. 171, 319 A.2d 174 (1974).

152. *Id.* at 173, 319 A.2d at 175.

153. *Id.* at 173-74, 319 A.2d at 176.

154. *Id.* at 180, 319 A.2d at 178.

155. *Id.* at 181, 319 A.2d at 178-79.

156. *Id.* at 183, 319 A.2d at 180.

157. *Id.* at 184-85, 319 A.2d at 180. The court recognized that there might be areas of an employee's life in which an employer has no legitimate interest; moreover, the state might extend protection to an employee in such areas as a matter of public policy. *Id.* However, absent a showing of a clear mandate of public policy protection along with the establishment of a legitimately protected interest, the court refused to recognize any legal basis for wrongful discharge. *Id.*

158. *See supra* notes 132-43 and accompanying text.

continued employment. A strong dissent, however, was written in *Geary* stating that it was shocking that "today's jurisprudence is so lacking in awareness and vitality that our judicial process is incapable of affording relief to a responsible employee for an arbitrary and retaliatory discharge from employment."[159] The dissent maintained that the public interest was served by Geary's action and that the law should give recognition to a right of redress in the form of a tort action for abusive discharge.[160]

A similar public policy approach was taken by the Eighth Circuit in *Percival v. General Motors Corp.*[161] The complainant was an executive engineer for General Motors from 1947 to 1973.[162] At the time of his termination he was head of the company's mechanical development department.[163] He alleged that he was discharged for refusing to give the government false information at the behest of his employer, for undertaking to correct certain alleged misrepresentations made to the government, and for legitimately complaining about certain of General Motor's allegedly deceptive practices.[164] In sustaining the trial court's grant of summary judgement in favor of the employer, the Eighth Circuit adopted a balancing approach, weighing arguments for an employer's right to discharge against arguments for recognizing a claim of right in an employee's job.[165] The court concluded that here such a balance should be struck in favor of the employer.[166] The court observed that while there were strong policy arguments that could be made in support of protecting the employee's job, there were also strong policy arguments that could be made against it.[167] The court stressed a large corporation's need to have latitude in determining who will occupy "high and sensitive managerial positions."[168] The approach in this case, similar to that taken in *Geary*, emphasizes the importance of the terminable-at-will rule to the independence of employers. These decisions are founded on the employment-at-will doctrine, and evidence the reluctance of courts to act unilaterally in abandoning it. While these holdings do not depart from the traditional employment-at-will doctrine, the courts issuing these decisions do seem to be prepared to recognize an exception to the rule based on a finding that an employee has acted in furtherance of a public policy mandated by statute.[169]

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159. 456 Pa. at 185, 319 A.2d at 180-81.
160. *Id.* at 190-94, 319 A.2d at 183-85.
161. 539 F.2d 1126 (8th Cir. 1976).
162. *Id.* at 1127.
163. *Id.*
164. *Id.* at 1128.
165. *Id.* at 1130.
166. *Id.*
167. *Id.*
168. *Id.* Despite its narrow definition of public policy, the *Percival* decision may be justified on its facts. It should be noted that Percival did not prove that he was fired. Percival v. General Motors Corp., 400 F. Supp. 1322, 1323-24 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976). There was substantial evidence tending to prove that he resigned after disagreement with General Motors and that the suit may have been brought to uncover the alleged misdeeds of General Motors rather than to prosecute a wrongful discharge claim. *Id.* at 1324.
169. In a footnote in Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), the court commented that its decision did not necessarily reject other court decisions based on a statu-

These two cases represent the increasing number of alleged wrongful discharge cases where private sector, at-will-employees, have been discharged for "blowing the whistle" on their employers.[170] These cases almost invariably follow a general pattern: The employee objects to work that he or she believes is violative of state or federal law or otherwise improper as against the public interest. Based on this objection, the employee expresses his intention not to assist the employer in furtherance of such work and generally protests that such work should not be performed. Finally, in some cases, the "responsible" employee engages in certain activities outside the workplace to halt the work such as complaining to public officials or providing information to others who disclose the practices to the public.[171] Because of this behavior, the employer discharges or demotes the employee for either refusal to work or incompatibility with management.

Illustration of such a scenario may be found in *Pierce v. Ortho Pharmaecutical Corp.*[172] In this case, Dr. Grace Pierce, who was director of medical research in charge of therapeutic drugs at Ortho Pharmaceutical Corp., differed with the management of the corporation on the proposed testing of loperamide, a new liquid treatment for acute and chronic diarrhea in children and the aged.[173] Dr. Pierce, the only physician on the research team, refused to approve the testing of this new drug on children because of the excessively high concentration of saccharin it contained which posed a potential health hazard to the children on whom the drug was tested.[174] She claimed her refusal was justified by the Hippocratic Oath.[175] Following her refusal, Dr. Pierce was removed from the project, demoted, and told that she was considered unpromotable.[176] As a conse-

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torily based public policy: "It is not necessary to reject the rationale of these decisions in order to defend the result we reach here. In each case where a cause of action was found, the mandates of public policy were clear and compelling; that cannot be said of the instant case." *Id.* at 184 n.16, 319 A.2d at 180 n.16. See also Trombetta v. Detroit, Toledo & Irontown R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978), where the court: "[R]ecognized exceptions to the well established rule that at will employment contracts are terminable at any time for any reason by either party. These exceptions were created to prevent individuals from contravening the public policy of this state." *Id.* at 492, 265 N.W.2d at 388. *See generally* Blackburn, *supra* note 128, at 477; Glendon & Lev, *supra* note 32, at 468.

170. *See, e.g.*, McNulty v. Borden, 474 F. Supp. 1111 (E.D. Pa. 1979) (the court held that the plaintiff had stated a cause of action for wrongful dismissal because he alleged that his discharge was caused by his refusal to acquiesce to special pricing arrangements in violation of the Clayton Act); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (the Supreme Court of California held, that the plaintiff had a cause of action for wrongful discharge for allegedly being fired for not participating in a price-fixing scheme); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (the court held that the public policy exception applied to the plaintiff who was discharged because of his attempts to protect borrowers from the bank's violation of the Consumer Credit and Protection Act). *See generally* Olsen, *supra* note 128, at 275; Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 799.

171. *See* Walters, *Your Employee's Right to Blow the Whistle*, 55 HARV. BUS. REV. 26, 33 (July-Aug. 1975); *see also* Cook, *Whistle Blowers Friend or Foe?*, INDUSTRY WEEK 51 (Oct. 5, 1981).

172. 84 N.J. 58, 417 A.2d 505 (1980).

173. *Id.* at 62-63, 417 A.2d at 506-07.

174. *Id.* at 63, 417 A.2d at 507.

175. *Id.*

176. *Id.*

quence, she tendered her resignation and instituted suit against her former employer.[177] In deciding the case, the New Jersey Supreme Court took a radical departure from the traditional employment-at-will doctrine.[178] The *Pierce* court held that:

> [A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy . . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations. An employer's right to discharge an employee-at-will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy.[179]

The *Pierce* decision is significant in several respects: (1) it abrogated the long-standing common law rule that an employer has an absolute right to discharge with impunity on the basis of the employment-at-will rule;[180] (2) it broadened the concept of public policy to include the substantive provisions of professional codes of ethics;[181] (3) it expressly recognized that professionals "owe a special duty" to uphold the codes of ethics of their professions, as well as federal and state law, and that they may, on occasion, be obliged to refuse to perform acts required of them by their employers;[182] and (4) it adopted a balancing approach in which the interests of the employer, the employee and the general public were equally weighed with the result that the public interest became determinative.[183]

Similarly, in *Tameny v. Atlantic Richfield Co.*,[184] the California Supreme Court ruled in favor of a so-called "whistle blowing" employee by concentrating on the elements of the employment relationship and the proper scope of the employee's power. The court held that the plaintiff had sufficiently alleged a wrongful discharge tort claim when he contended that he was fired after fifteen years of satisfactory job performance because he refused to take part in alleged price fixing violations prohibited by the

177. *Id.* at 64, 417 A.2d at 508.

178. *Id. But see, e.g.*, Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (employee's allegation that she was discharged after refusing to falsify medical records does not justify the creation of a new tort based on public policy as an exception to the at will rule); Campbell v. Eli Lilly & Co., — Ind. App. —, —, 413 N.E.2d 1054, 1061 (1980) (court denied plaintiff recovery for dismissal allegedly related to plaintiff's questioning of his employer's practices regarding the safety of some drugs and irregularities in filing with the FDA, deferring to the "venerable" at will employment doctrine).

179. 84 N.J. at 72, 417 A.2d at 512.

180. *Id.* at 72, 75, 417 A.2d at 512, 514.

181. *Id.* at 72, 417 A.2d at 512.

182. *Id.* at 71, 417 A.2d at 512.

183. *Id.* at 71, 417 A.2d at 511. *See also* O'Sullivan v. Mallon, 160 N.J. Super. 416, 418, 390 A.2d 149; 150 (1978) (X-ray technician's dismissal for refusal to perform an illegal act was improper); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 480, 427 A.2d 385, 389 (1980) (dismissal of an at-will employee in retaliation for his insistance that the employer comply with a state law governing the labeling and licensing of the employer's products was improper and supported a tort action because an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment).

184. 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).

Sherman Act and the California antitrust statute.[185] Consistent with *Petermann*,[186] the California court held that an employer cannot claim a right to order an employee to engage in criminal conduct, and concomitantly an employer cannot try to coerce an employee to engage in such conduct under a threat of discharge; where an employer attempts such coercion and discharges a noncomplying employee, that employee may maintain an action for wrongful discharge and establish a claim for damages.[187] In support of its holding, the court acknowledged the recent trend recognizing "a common law tort action for wrongful discharge in cases in which the termination contravenes public policy."[188]

Most recently, the Maryland Court of Appeals decided *Adler v. American Standard Corp.*[189] Adler claimed that he was discharged by the defendant after an investigation he conducted had uncovered various financial improprieties in the corporate employer's operation.[190] The court held that Maryland recognizes "a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy."[191] The court, however, concluded that the plaintiff failed to present sufficient factual support for such a violation of public policy in this case.[192] Nevertheless, this case suggests that an alternate rationale which leads to a modification of the employment-at-will doctrine, is a finding that public policy which lies at the foundation of the doctrine has come to require its modification because of an employer's abuse of the power to discharge. Public interests are served by limiting the employer's discharge power and ultimately public policy requires the recognition of the employee's claim on his or her job. Nevertheless, the "whistle blower" cases may be rationalized as nothing more than an outgrowth of the rule enunciated long ago in *Petermann*, that an employee should not be forced to choose between the loss of employment and the commission of an illegal act to benefit his employer.[193]

Today the climate for "whistle blowers" is more favorable than it was a decade ago.[194] To a certain extent this new concern with the employee's freedom reflects a recognition of a need to publicly disclose complaints and critical observations of those who are in a position to observe abuse and wrongdoing. As a practical matter this means that employees must be permitted, if not encouraged, to reveal such abuses. One commentator suggests that the protection aspect will be less of a motivating factor than

185. *Id.* at 178, 164 Cal. Rptr. at 846, 610 P.2d at 1336-37.
186. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *See supra* notes 132-36 and accompanying text.
187. 27 Cal. 3d at 178, 164 Cal. Rptr. at 846, 610 P.2d at 1336-37.
188. *Id.* at 178, 164 Cal. Rptr. at 845, 610 P.2d at 1336.
189. 291 Md. 31, 432 A.2d 464 (1981).
190. *Id.* at 34, 432 A.2d at 466.
191. *Id.* at 47, 432 A.2d at 473. *Accord* Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (allegations by former manager of defendant's consumer credit department of employer's intentional and illegal violation of the West Virginia Consumer Credit and Protection Act supported plaintiff's cause of action for wrongful discharge because of a clear public policy to protect borrowers under the Act).
192. 291 Md. at 47, 432 A.2d at 472-73.
193. *See supra* notes 127, 132-37 and accompanying text.
194. One business commentator predicts that "the 1980's will be a decade of employee rights" and that whistle blowing will lead the way. Cook, *supra* note 171, at 52.

the employee's conscience, and that in fact many companies no longer consider retribution a management tool.[195] Presently, there is no federal legislation providing relief for discharge following an employee's disclosure of an employer's wrongdoing. State legislation, however, has been enacted and a model for such legislation is provided by the Michigan Whistle Blower's Protection Act.[196] This statute makes it illegal for a Michigan employer to discharge, threaten, or discriminate against an employee who "reports or is about to report" a suspected violation of federal, state or local law to a public body.[197] The statute further provides that an employee who believes he or she has been the victim of retribution can file a claim in court within a ninety day period[198] and upon a finding of such wrongful discharge, *a court can reinstate the worker with back pay*.[199] The law does not provide protection for employees who make claims which they know to be false or where allegations do not involve a violation of the law.[200] While courts can independently develop such protection, a more effective and satisfactory approach vindicating the public interest and providing needed job security is provided by this type of legislation.

c. *Other Public Policy Cases*

In addition to the public policy areas already discussed, some employees have invoked a broad public policy exception to the at-will rule and have convinced a minority of courts that such protection is required by public policy in the construction of various statutes and in the interpretation of prior judicial opinions. This potpouri of public policy exceptions to the employment-at-will doctrine will be discussed in the remainder of this section of this Article.

One legal duty which has been relied upon by the courts to create a public policy exception is jury service. The leading case in this area is *Nees v. Hocks*[201] decided by the Oregon Supreme Court in 1975. Here, the plaintiff contended that she was discharged by her former employer because she willingly performed jury duty.[202] The court held that the plaintiff could recover compensatory damages, including damages for emotional distress, because her discharge violated public policy against discharge for "a socially undesirable motive" such as discouraging jury duty.[203] The court found that the jury system would be adversely affected if employees could be freely discharged for serving on jury duty.[204]

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195. *See generally* A. WESTIN, WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION (1981).
196. MICH. COMP. LAWS. ANN. §§ 15.361 to .364 (1981).
197. *Id.* § 15.362.
198. *Id.* § 15.363.
199. *Id.* § 15.364.
200. *Id.* § 15.362.
201. 272 Or. 210, 536 P.2d 512 (1975).
202. *Id.* at 211-12, 536 P.2d at 512-13.
203. *Id.* at 218, 536 P.2d at 515.
204. *Id.* at 219, 536 P.2d at 516. *See also* Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978). Some jurisdictions have statutorily created causes of action to protect employees who are dismissed for serving on a jury. *See, e.g.*, COLO. REV. STAT. § 13-71-118(1) (1973).

While a clear showing of public interest in an employee's activity may result in a limitation on an employer's power to discharge, to the extent that such public interest is merely parasitic on an employee's assertion of a personal interest in conflict with an employer's interest in discharging the employee, public interest may be insufficient to override the presumption created in favor of the employer's power to discharge which follows from the employment-at-will doctrine. The limited extent of the protection afforded to employees by the public policy exception is illustrated by a decision rendered by the same court which decided *Nees*. In *Campbell v. Ford Industries, Inc.*,[205] the plaintiff, Albert Campbell, was a stockholder of the company as well as a former employee. Campbell alleged that he had requested certain corporate information from Ford regarding the value of its stock, and had further sought to discover whether the management had engaged in any corporate misdealings.[206] After his inquiry Campbell was terminated.[207] The Oregon court ruled against the plaintiff and reconciled its holding in *Nees* by distinguishing between the public and private interests involved in the termination of an at-will employee. The court reasoned that Campbell's motives in seeking information about the corporation were based primarily on his private proprietary interests and not the advancement of public policy.[208] Campbell's demands, the court concluded, were part of his rights as a stockholder and did not have a sufficiently direct relation to any corresponding public interest or to his interests in his job.[209] This latter point may be significant in limiting this case to its facts. Where, however, the employee can broaden the basis of his action from mere shareholder to that of employee-shareholder by showing that his claim arises from a status based on stock bonuses, stock options, or stock participation, it can be argued that the employee has established a protected status from which he has asserted his rights. Campbell's attack on his dismissal then implicitly raises the issue of whether an employer should be able to terminate an employee who also has the status of a stockholder as a consequence of his employment and who asserts stockholder's rights which are regarded as hostile by the employer.

The special significance of public policy considerations in affording job security to employees by state statutory schemes is represented by cases which have dealt with dismissal of employees who refuse to submit to polygraph testing. Recognition of the importance of such protection of job security is represented by *Perks v. Firestone Tire and Rubber Co.*[210] In *Perks*, the plaintiff refused to take a polygraph test during the course of an investigation of charges that he had accepted gifts from company suppli-

205. 274 Or. 243, 546 P.2d 141 (1976).

206. *Id.* at 246-47, 546 P.2d at 144.

207. *Id.* at 247, 546 P.2d at 144.

208. *Id.* at 249-50, 546 P.2d at 145-46.

209. *Id.* at 250-51, 546 P.2d at 146. *See also* Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Scroghan v. Krafco Corp., 551 S.W.2d 811 (Ky. App. 1977); Kenealy v. Orgain, — Mont. —, 606 P.2d 127 (1980).

210. 611 F.2d 1363 (3d Cir. 1979); *see also* Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1971).

ers.[211] Subsequently, Perks was fired for violating company policy regarding receipt of gifts from suppliers.[212] The court held that there was sufficient evidence indicating that the plaintiff had been discharged for his refusal to take the polygraph examination.[213] Relying upon a state statute which declares employers guilty of a second degree misdemeanor for requiring their employees to undergo a polygraph test as a condition for employment or continuation of employment,[214] the court held that state public policy would be contravened if the employer were permitted to dismiss the employee.[215]

While the public policy analysis has been developed as a principal limitation on the employment-at-will doctrine, two observations are in order. First, an ambiguity exists whether the policy at issue is one which has been adopted to provide the employee with job security or whether it involves a policy to provide an incentive or at least a removal of disincentive to an employee to act in the public interest or to make information at his disposal available to the public. A second issue is the inherent ambiguity as to the source of the public policy exception, whether it is implicit in the law's general interest to protect the public or whether it must be rooted in some specific statute providing the public with protection. This uncertainty as to required source gives the courts difficulty in providing explicit application based on public policy interests.

A recent decision by the Illinois Supreme Court illustrates the courts difficulty in applying the public policy exception.[216] In *Palmateer v. International Harvester Co.*,[217] the plaintiff alleged that he had been dismissed after supplying local law enforcement authorities with information as to possible criminal activities by another of the defendant's employees and agreeing to assist in the investigation and trial of the other employee.[218] The court recognized that "the Achilles heel of the [public policy] principle lies in the definition of public policy,"[219] because there is no specific answer to the question of "what constitutes clearly mandated public policy."[220] The court concluded that there is no public policy more important to our society than enforcement of a state's criminal code and the effective protection of its citizens and their property.[221] Based on this rationale, the court declared that Palmateer had stated a cause of action for retaliatory discharge.[222]

The *Palmateer* case reaches a new plateau in the analysis of the public policy exception because it did not find the source of the public policy in a

211. 611 F.2d at 1364.
212. *Id.*
213. *Id.* at 1366.
214. *Id.* at 1365.
215. *Id.* at 1366. *Contra* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977).
216. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
217. *Id.*
218. *Id.* at 127, 421 N.E.2d at 877.
219. *Id.* at 130, 421 N.E.2d at 878.
220. *Id.*
221. *Id.* at 132, 421 N.E.2d at 879.
222. *Id.* at 133, 421 N.E.2d at 880.

statutory provision, but rather found its content implicit in the general law and emanating from the best interests of the citizenry. *Palmateer*, therefore, constitutes a radical departure from the employment-at-will doctrine because it establishes a definite barrier to the employer's absolute discretion in dismissing the employee. The *Palmateer* court observed that the law is weak if it allows employers to retaliate against employees who aid in enforcement of the law.[223] The limitation of the employer's power to terminate an employee was found not in a specific statutory grant of protection, but in the needs of the law generally to provide protection to the public.

2. *Contract-Based Exceptions*

The above analysis of the public policy exception to the employment-at-will doctrine indicates that most courts consider the notion of the public policy concept as limited to a narrow range of cases where the courts determine that there has been an abusive discharge in a termination case. The restricted public policy concept also indicates the very constricted recognition of an employee's right to an interest in job retention. Most courts adopting the public policy exception, consider the paradigm case where an employer discharges an employee for engaging in some socially protected activity, preferably one that has legislative sanction or support.[224] As a result of these limitations, employees characterized as at-will employees, who seek recovery in wrongful dismissal cases, must develop other legal bases for their job retention claim. An alternative to this approach, a contract theory, may provide an independent legal basis for a cause of action to retain an individual's job.[225]

One of the most important developments in the line of employment contract cases is the emergence of the malice and bad faith exception to the employment-at-will doctrine.[226] This concept was introduced in the 1974

223. *Id.*

224. *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973) (court said that the Indiana Workmen's Compensation Act expressed a strong public policy which could not be effectuated unless employee could exercise his right, without retribution). *See generally* Blackburn, *supra* note 128, at 481; Olsen, *supra* note 128, at 277.

225. In Fortune v. National Cash Register Co., 373 Mass. 96, 102, 364 N.E.2d 1251, 1256 (1977), the court said that there is a remedy, in lieu of a wrongful discharge tort, under the employment contract itself because such contracts require parties to "act in good faith toward one another." The breach of employment contract cause of action has also been used by employees who have alleged that they have given sufficient consideration to the employer in exchange for a definite employment contract. *See* Scott v. Lane, 409 So. 2d 791, 794 (Ala. 1982) (court states that giving up employment for new employment is valuable consideration for a new contract); Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939) (giving up present employment by prospective employee constitutes consideration for the new contract of employment). *Contra* Page v. Carolina Coach Co., 667 F.2d 1157, 1158 (1982) (relinquishment of prior job insufficient to provide consideration for lifetime contract); United Security Life Ins. Co. v. Gregory, 281 Ala. 264, 266, 201 So. 2d 853, 855 (1967) (day-to-day services rendered by plaintiff was insufficient to provide consideration for indefinite employment contract).

226. In discussing this development in the state of California, one commentator remarked that every employment contract contains "an implied-in-law covenant of good faith and fair dealing that neither party will do anything to injure the other party's right to the benefits of the agreement." Comment, *supra* note 126, at 92; *see also* W. MALLONE, *supra* note 69, at 572; Note, *supra* note 46, at 1821.

landmark case of *Monge v. Beebe Rubber Co.*[227] The New Hampshire Supreme Court held that there was sufficient evidence for the jury's finding that the plaintiff, a female press machine operator, was discharged because of her refusal to be "nice" to her foreman.[228] The court held that termination 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 should therefore be construed to be a breach of the employment contract.[229] The *Monge* decision does not completely abrogate the employer's right to discharge, but importantly, the case expressly does recognize an interest of the employee to retain his job. In attempting to strike a balance, the *Monge* court attempted to provide "the employee a certain stability of employment" and at the same time adopt a rule which "does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably."[230] This approach attempts to balance the interest of the employer to be free to discharge where appropriate and the interest of the employee to retain his job absent good cause for dismissal. These cases are distinguishable from the public policy cases where the court can identify a third interest, the general public interest, which will resolve the conflict in interest between the employer and employee. Instead the court must resolve the competition of interests by considering the reason for discharge, and more particularly whether the employer has exercised his power to discharge in good faith.

The powerful effect of the good faith requirement as a limitation on the employer's freedom to discharge can be observed in *Fortune v. National Cash Register*.[231] The plaintiff, Fortune, was a salesman employed under a written at-will employment "salesman's contract" and was terminated after almost twenty-five years of service.[232] The discharge took place one day after a customer in Fortune's territory placed a five million dollar contract with him.[233] According to the terms of the contract, Fortune would have been entitled to a considerable sales commission absent the discharge.[234] The Supreme Judicial Court of Massachusetts held that the facts of the case indicated that the employer, National Cash Register (NCR), dismissed the employee in violation of the "covenant of good faith" contained in every contract[235] and therefore, NCR breached the contract of employment with Fortune.[236] The incorporation of the re-

227. 114 N.H. 130, 316 A.2d 549 (1974).
228. *Id.* at 131, 316 A.2d at 550.
229. *Id.* at 133, 316 A.2d at 551.
230. *Id.* at 133, 316 A.2d at 552.
231. 373 Mass. 96, 364 N.E.2d 1251 (1977).
232. *Id.* at 100, 364 N.E.2d at 1254.
233. *Id.* at 98-99, 364 N.E.2d 1254.
234. *Id.* at 97-98, 364 N.E.2d at 1253.
235. *Id.* at 101, 364 N.E.2d at 1256.
236. *Id.* at 104, 364 N.E.2d at 1257. *Contra* Gram v. Liberty Mut. Ins. Co., 1981 Mass. Adv. Sh. 2287, 2296, 429 N.E.2d 21, 28 (1981) (court declined to adopt a general rule that the discharge of an at-will employee without cause is alone a violation of an employer's obligation of "good faith and fair dealing"); Keneally v. Orgain, — Mont. —, 606 P.2d 127 (1980) (summary judgment granted to defendant in case where plaintiff alleged that discharge was motivated by a desire to minimize commissions, because no public policy was involved); Feola v. Valmont Indus., Inc., 208

quirement of good faith into the employment contract with the consequent limiting of the employer's power to discharge reflects an implicit recognition by the court of the interest of the employee in retaining his job, and provides a basis for establishing a qualified right of an employee to retain his job.

In *McKinney v. National Dairy Council*,[237] the United States District Court of Massachusetts applied *Fortune* to the facts before it, not only to limit the power of an employer to discharge, but also to limit the employer's ability to invoke the legal limitation on lifetime contracts as a basis for voiding an employment contract. The plaintiff McKinney, claimed that he was wrongfully terminated by the employer.[238] In 1953, McKinney placed an advertisement in a newspaper seeking employment as a sales representative for the rest of his working life.[239] During the hiring interview, McKinney reiterated the fact that he was interested primarily in job security rather than in salary and would be willing to forego a higher paid position to secure a stable position.[240] The prospective employer, the National Diary Council, represented the job as meeting the applicant's expectations, and McKinney therefore, decided to join the defendant company, thereby forfeiting the opportunity to earn an additional one thousand dollars a year with a competitor.[241] In December 1972, the National Diary Council forced McKinney into "early retirement," approximately five years prior to his projected retirement.[242] McKinney filed suit in the federal district court based on the contention that he and the defendant had entered into an oral contract in 1953 which guaranteed his employment until 1977.[243] The jury accepted this theory and found that the defendant breached its contract with the employee and that he was dismissed specifically because of his age.[244] Upon a defendant's motion for judgment notwithstanding the verdict, the *McKinney* court determined that there was sufficient evidence to support the jury's finding that McKinney and the National Diary Council had entered into a contract that *expressly* provided for McKinney's employment until retirement. The court, however, observed that this contract was within the statute of frauds and therefore invalid,[245] and that McKinney was only an employee at-will.[246] Notwithstanding this conclusion, the court invoked *Fortune*[247] for the proposition

Neb. 527, 304 N.W.2d 377 (1981) (employee not entitled to receive year-end bonus although discharge occurred just one month before the end of the year); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934 (Tex. Civ. App. 1974) (plaintiff not entitled to recover bonus although discharge occurred just prior to payment because such a bonus is within the discretion of the employer).

237. 491 F. Supp. 1108 (D. Mass. 1980).

238. *Id.* at 1111.

239. The advertisement read: "interested in change which would be the third and *must be the last*." *Id.* (emphasis added).

240. *Id.* at 1110.

241. *Id.*

242. *Id.* at 1109 n.1.

243. *Id.*

244. *Id.* at 1109.

245. *Id.* at 1116.

246. *Id.* at 1117.

247. *Id.* at 1118 (citing Fortune v. National Cash Register Co., 373 Mass. 96, 354 N.E.2d 1251 (1977)).

that there existed a convenant of "good faith and fair dealing with respect to a decision to terminate the employment,"[248] and the district court reasoned that the plaintiff's dismissal constituted a breach of the employment contract.[249] The court concluded that under Massachusetts law, the employer's decision to terminate McKinney constituted a decision based primarily on age and that to terminate an at-will employee at the age of sixty, after nineteen years of service, violated the implied obligation of good faith and fair dealing.[250]

What the court did here is clear enough. In implicitly recognizing an employee's right to employment, the court explicitly restricted the employer's freedom to terminate and at the same time abrogated the rule against lifetime contracts. Basically the court read into the employment contract a requirement of good faith as a limitation on the employer's power to discharge and it did this on a public basis which implicitly recognized the right of an employee to his job. The *McKinney* decision goes beyond the *Fortune* holding in that it restricts the employer's perogative in managing its business and it extends the concept of "good faith dealing" to situations where recovery is not otherwise provided for by either the terms of the employment contract or under statutory protection.[251] This decision reflects the analysis adopted in recent cases which appears to indicate a trend in the interpretation of employment contracts which would include minimum standards of fairness as part of employment contract.[252]

Potentially the most far-reaching case in limiting an employer's freedom to dismiss without good faith is *Cleary v. American Airlines, Inc.*[253] In this case, the plaintiff alleged that he had been wrongfully discharged from his employment by the defendant company after eighteen years of satisfactory service.[254] The complaint alleged that the employee had been falsely accused by the employer of various work rule infractions, that he was discharged in violation of the employer's personnel procedures, and that the termination violated the implied convenant of good faith and fair dealing.[255] Rather than adopt the negative analysis of *McKinney*, that good faith limited an employer's freedom to discharge, the California Court of

248. *Id.* at 1121-22.
249. *Id.* at 1122.
250. *Id.*
251. This extension of *Fortune* in *McKinney* has been recognized by commentators. *See* Comment, McKinney v. National Dairy Council: *The Employee at Will Relationship in Massachusetts*, 16 NEW ENG. L. REV. 285 (1981), where the author observed:

> The *McKinney* court expanded the *Fortune* court's definition of bad faith by holding that bad faith was implicated when an employer terminated an at will employee because of his age . . . . The extension of *Fortune* was necessary if McKinney were to recover against NDC because McKinney had neglected to satisfy the statutory requirements which might have afforded him a remedy. Absent a statutory remedy, McKinney's only chance of recovery was the . . . approach adopted by the *McKinney* court.

Id. at 294.
252. *See* Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978); A. John Cohen Agency, Inc. v. Middlesex Ins. Co., 394 Mass. 158, 392 N.E.2d 862 (1979); Cheney v. Automatic Sprinkler Corp. of America, 391 Mass. 179, 385 N.E.2d 961 (1979); Madaloni v. Western Mass. Bus Lines, Inc., 422 N.E.2d 1379 (Mass. App. 1981).
253. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
254. *Id.* at 447, 168 Cal. Rptr. at 724.
255. *Id.* at 447-48, 453, 168 Cal. Rptr. at 725, 727-28.

Appeals adopted a positive approach which recognizes an employee's right to his job, and which requires an employer to establish good cause before an employee can be terminated.[256] The court explicitly held that an employer can only discharge a long term employee for just cause and that an employer is liable for compensatory and punitive damages for any unjust dismissals.[257] The court said the termination without just cause violated the "implied-in-law covenant of good faith and fair dealing" found in all contracts and that the employer had a duty not to harm the employee's position.[258] While *Cleary* gives apparent recognition to the continued existence of the at-will employment doctrine,[259] the opinion effectively eliminates the common law rule as it has heretofore been applied to long-term employees.[260] Here the court has explicitly recognized the employee's expectation and interest in the right to retain his job. The very terms used by the courts, "deprive" and "benefit," are representative of the language of a rights analysis. Ultimately, this court's decision rests on a recognition of the right to one's job.

As apparently innovative and direct as the *Cleary* opinion is, it pales in comparison with *Toussaint v. Blue Cross & Blue Shield of Michigan*,[261] in which the Michigan Supreme Court found the basis for a right to one's job on both express and implied contract terms,[262] and that such a right was not against public policy.[263] In *Toussaint*, the Michigan Supreme Court held that an employer's unilateral statement of policy could give rise to the right to one's job in an indefinite employment context.[264] The plaintiff in this case had been employed in a middle management position with defendant Blue Cross and was dismissed after five years of service.[265] The plaintiff filed suit against the employer alleging that the termination violated his employment contract which permitted discharge only for cause.[266] The employee-plaintiff had asked about his job security pros-

256. *Id.* at 456, 168 Cal. Rptr. at 729.
257. *Id.*
258. *Id.* at 450, 168 Cal. Rptr. at 726.
259. *Id. Accord* Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980) (employee's allegation that even though he was a model employee for 13 years, he was terminated solely to deprive him of his pension benefits stated a cause of action for abusive discharge); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee who was terminated after 32 years of employment demonstrated a *prima facie* case of wrongful termination in violation of the implied promise in contract of employment that employers would not act arbitrarily in dealing with employees, as evidenced by the totality of the employment relationship).
260. The *Cleary* court held that "the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729. *Contra* Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959); Shaitelman v. Phoenix Mut. Life Ins. Co., 517 F. Supp. 21 (S.D.N.Y. 1981); O'Neill v. ARA Serv., Inc., 457 F. Supp. 182 (E.D. Pa. 1978); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1979); Ohio Table Pad Co., — Ind. App. —, 424 N.E.2d 144 (1981); Schwartz v. Michigan Sugar Co., 106 Mich. App. 471, 308 N.W.2d 459 (1981); Edwards v. Citibank, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980). In these cases the courts have continued to use the traditional at-will analysis and have upheld the doctrine.
261. 408 Mich. 579, 292 N.W.2d 880 (1980).
262. *Id.* at 598, 292 N.W.2d at 885.
263. *Id.* at 611-12, 292 N.W.2d at 891.
264. *Id.* at 614-15, 292 N.W.2d at 892.
265. *Id.* at 595, 292 N.W.2d at 883.
266. *Id.*

pects when he was first hired and the defendant-company told him that he "would be with the company as long as [he] did [his] job."[267] In addition, the employee was given a "Blue Cross Personnel Policies Manual" which stated that it was the "policy" of the company to terminate employees "for just cause only."[268] In deciding this case, the court held that a provision of an employment contract providing that there will not be a discharge except for cause is a legally enforceable term even though the contract is not for a definite term and that such protection may become part of the contract either by express agreement, oral or written, or as *"a result of an employee's legitimate expectations grounded in an employer's policy statement."*[269] The court easily read the requirement of "for cause" dismissal into the employment contract, and simply rejected the assertion that the employer had a right to dismiss an employee at will. The court found the limitations on the employer's freedom to be implicit in the contract and observed that even without a definite term in an employment contract, an employee can obtain a binding agreement providing for job security which requires the employer to establish cause for discharge, if when seeking employment, the employee inquired as to job security and the employer offered a permanent job as long as the employee did a good job.[270] The court concluded that under such circumstance, an employee who is discharged without good or just cause, may maintain an action for wrongful discharge.[271] Moreover, in analyzing the obligations imposed on the employer by the policy statements published in the employee manual, the court held that this document could give rise to "contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create [such] rights in the employee."[272]

The most interesting point in the *Toussaint* decision is its affirmance of the right and need for judicial review of discharges for "unsatisfactory work" in cases where the employer has agreed to discharge for cause only. The court reasoned that an employer's promise to discharge for good cause only would be illusory "if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge."[273] This case appears to constitute a complete break with the employment-at-will doctrine[274] and it recognizes the right of an employee to retain his job based on the establishment by an employee of a reasonable expectation that he will retain his job absent the establishment of cause for dismissal. Thus, the employer's right

267. *Id.* at 597, 292 N.W.2d at 884.
268. *Id.*
269. *Id.* at 598, 292 N.W.2d at 885 (emphasis added).
270. *Id.* at 610, 292 N.W.2d at 890.
271. *Id.*
272. *Id.* at 614-15, 292 N.W.2d at 892.
273. *Id.* at 621, 292 N.W.2d at 895.
274. The Michigan court said that "a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is 'indefinite'. . . ." *Id.* at 598, 292 N.W.2d at 885. *Contra* Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 895, 568 P.2d 764, 769 (1977) (employee's own personal understanding that he would be employed as long as he did his job in a satisfactory manner was insufficient to establish implied employment agreement which allowed employer to discharge employee only for just cause).

to discharge is similarly viewed as a qualified right. According to the *Toussaint* opinion, the decision to terminate must now meet a new legal standard, that of "just cause."

III. THE RIGHT TO DISCHARGE: MANAGEMENT STRATEGIES IN FACE OF THE RECOGNITION OF AN EMPLOYEE'S RIGHT TO HIS JOB

Two consequences follow from the erosion of the employment-at-will doctrine. First, a growing recognition of the employee's right to his job, a right which is qualified by a showing of good cause for dismissal. Second, the gradual recognition of limitations on the previously absolute right of the employer to dismiss an employee-at-will: requirements of good cause and possibly procedural due process. These consequences give rise to a continuing need to resolve conflicts between the exercise of the employer's termination power and the employee's expectation of continued employment. Because a growing minority of courts are favorably disposed toward the claims of terminated employees, it is reasonable to expect that these employees will increasingly contest their termination in wrongful discharge suits filed against their employers. This probability of increased litigation must be a concern to employers and should cause them to develop planning strategies which will establish a justified basis for dismissal where they choose to exercise their power to discharge. Also, employers must be able to counter claims of employees for unjust dismissal by establishing factors which properly limit an employee's asserted right to continued employment. The lack of specificity in the courts' pronouncements regarding the concept of "public policy,"[275] however, complicates the employers development of strategies to meet this challenge. Another complication is that juries, in the future, may be permitted to find public policy exceptions where an employer discharges an employee for the employee's highly publicized political activities, for the employee's arrest and indictment for criminal activities, and for the consumer-employee's criticism of the employer's product.[276] Such cases will likely be tried by juries composed of individuals who are themselves similarly situated employees, and therefore, they will be more sympathetic to the dismissed employee. If the analysis of rights is to be principled, and not simply a matter of self-interest or sympathy, it is incumbent upon legal commentators and employer advocates to delineate a principled account of the proper limits on the employee's right and to establish a principled basis for employers to exercise their right to discharge. Employer liability is not limited to claims for reinstatement based on the right to a job, but may extend as well to damages in wrongful discharge situations. Thus, if the court finds that an employee has been wrongfully discharged, the employee may be permitted to recover both compensatory and punitive damages for a variety of injuries,[277] in-

275. *See generally supra* notes 127-31 and accompanying text.

276. Olsen, *supra* note 128, at 282-83.

277. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

cluding mental anguish and pain and suffering.[278] Potential liability must also be considered as employers develop strategies to deal with employees assertion of their right to continued employment.

The management approaches discussed below will balance the prerogative of the employer in managing his business and retaining the personnel he wants against the rights of the employees to a measure of job security. By establishing a principled basis for such a balance, it is hoped that the continuing need for judicial intervention[279] in corporations' relationships with their employees will be minimized. Such a balance requires recognition that the employment-at-will rule is no longer viable under current economic conditions, and therefore, should be abandoned.[280]

Traditionally, courts have long recognized that employees owe their employers a duty to render obedient, respectful service.[281] Recognition of this duty will continue even with acceptance of the employee's claim to a right is his job. The employees right is not absolute but qualified by the requirement that he fulfill his work obligations and that he not act in such a way as to provide the employer with a legal cause basis for his dismissal. Implied in the employment contract is the employee's promise to obey all the reasonable rules and directions of the employer.[282] The courts, therefore, have proved willing to uphold dismissals based on employee's disobedience or insubordination because these actions amount to rescissions of the employment contract.[283] On the other hand, employees need to know under what circumstances they will be disciplined or ultimately discharged. The employer, therefore, must establish a system whereby workers understand what is expected of them and the manner in which they are

278. Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

279. Commentators and case law have recommended judicial intervention in order to redress the inherent imbalance between the bargaining powers of the employee and employer or to review "just cause" terminations. *See* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 621, 292 N.W.2d 880, 895 (1980); Blades, *supra* note 2, at 1433-34.

280. Because of the need for increased specialization, the employee's mobility in changing jobs has been severely curtailed. Blades, *supra* note 2, at 1405. Over two decades ago, Professor Corbin gave recognition to this need in his treatise on contracts:

> The relations between . . . employer and employee have been subject to constant evolution during this history of Anglo-American law. It is not too much to say that this is the most important and far reaching manifestation of the evolution of society, of human civilization, of the legal, social, political, and economic relations of men and women with each other. There are no longer the old relations of owner and slave . . . [W]e are in the midst of a period in which the pot boils hardest and the process of change fastest.

3 A. CORBIN, CONTRACTS ch. 674, at 205-06 (1960).

281. *See* Thomas v. Houston, Stanwood & Gamble Co., 146 Ky. 156, 159, 142 S.W. 214, 215 (1912) (employee's obedience needed for orderly expedition of employer's business); Von Heyne v. Tompkins, 89 Minn. 77, 81, 93 N.W. 901, 903 (1903) (obedience to employer's reasonable orders is employee's main duty). *See generally* Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279 (1971); Stevens, *The Legality of Discharging Employees for Insubordination*, 18 AM. BUS. L.J. 371 (1980).

282. Thomas v. Houston, Stanwood & Gamble Co., 146 Ky. 156, 142 S.W. 214 (1912); MacIntosh v. Abbot, 231 Mass. 180, 120 N.E. 383 (1918); Lee v. Missouri Pac Ry. Co., 335 S.W.2d 92 (Mo. 1960).

283. *See, e.g.*, Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (refusal to obey an order to discontinue a lawsuit against employer); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (employee ordered not to serve on jury). *But see* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (defendants could not terminate employee because she agreed to jury duty).

expected to fulfill their contractual obligations. This objective can be accomplished through a system of performance standards derived from careful job analyses. These performance standards should limit as much as possible the opportunities for subjective evaluation by the employer or his agent.[284]

There are, generally, two approaches to establishing a basis for identification of reasonable limitations on the exercise of conflicting rights by employer and employee. The first approach may be characterized as substantive, to the extent that it calls for the specification of duties of employees and for an employer's statement of the grounds for dismissal. A second approach may be characterized as procedural, as it calls for the establishment of neutral persons or basis to determine the validity of alleged bases for dismissal. This approach requires the establishment of procedures to ensure that aggrieved employees have some recourse to challenge an employer's action as arbitrary or capricious. What is required is the establishment of an effective grievance-handling procedure. A 1977 *Harvard Business Review* survey of corporate executives indicates recognition by businessmen of the desirability of such procedural safeguards.[285] This survey indicates that a number of industrial employers thought that there should be a steady broadening of methods assuring "due process" who feel they have been wronged by management; that there should be increased opportunity for employees to speak out on controversial issues; that there should be increased recognition and protection of a right of privacy for employees; and that there should be protection for dissenting employees, including "whistle blowers."[286] To the extent that these managers are representative of contemporary employers, there is recognition of a need to establish and follow grievance procedures or mechanisms which provide some measure of "due process' to employees who feel themselves to be the victims of "retaliation from arbitrary and unethical bosses."[287] Specifically, there is recognition of a need to establish an open door policy by managers to employees who think they have been wronged; that there is a need to appoint personnel executives who will investigate and report to top management on employee grievances; that there is a need to establish management grievance committees including senior executives who will investigate grievances and report to top management; that there is a need to establish corporate "ombudsmen" or "ombudswomen";[288] and

284. This conclusion was derived from cases involving disparate impact charges. For example, Sandia Corporation's employee performance evaluation procedures were shown to have been the main basis for layoff decisions affecting a disproportionate number of older employees. Mistretta v. Sandia Corp., 649 F.2d 1383, 1387-88 (10th Cir. 1981); Equal Employment Opportunity Comm'n v. Sandia Corp., 639 F.2d 600, 612-20 (10th Cir. 1980). The trial court commented that the appraisal system "was extremely subjective and had never been validated." 639 F.2d at 614. That court also stated that there was "sufficient circumstantial evidence to indicate that age bias and aged based policies appear throughout the performance rating process . . . ." *Id. See generally* Holley, *Performance Appraisals and the Law*, 26 LAB. L.J. 423 (1975); Winstanely, *Legal and Ethical Issues in Performance Appraisals*, 58 HARV. BUS. REV. 186 (1980).

285. Ewing, *What Business Thinks About Employee Rights*, 55 HARV. BUS. REV. 81 (1977).

286. *Id.* at 82.

287. *Id.* at 83.

288. This is a preferred grievance procedure, Winstanely, *supra* note 284, at 192, because it

finally, that there is a need to establish hearing procedures that allow employees to be represented by attorneys or other persons, with a neutral party deciding on matters of evidence and rendering a final decision.[289]

The establishment of such grievance procedures would also be useful in dealing with the previously discussed problem of "whistle blowers." There is a concern that if employers do not provide a means for employees to speak up and if employers do not exercise self-restraint in dismissing those who do speak out in the public interest, the government will intervene more vigorously to provide employees with protection in their jobs.[290] A creative approach to employees' grievances may be found in IBM's "Speak-Up" program which IBM claims has resulted in management giving "considerable attention to listening to its workers and acting on their suggestions."[291] This program is founded on both a policy of encouraging employees to speak out with a guarantee of job security when they do speak out and on procedures which are designed to efficiently process complaints and to protect the identity of the complainant. IBM's stated policy is to regard "whistle blowers" as loyal employees whose constructive criticisms are encouraged in an effort to improve the product or the corporation, and therefore, these employees are viewed as making a valuable contribution to the company.[292]

Employers seeking to maintain, to the greatest extent possible, their right to dismiss employees who fail to perform or conform to reasonable expectations, must themselves contribute to the definition of the content and limits on the increasingly recognized right of the employee to his or her job.[293] Employers, therefore, must assure employees that they will not interfere with basic political freedoms. Employers should encourage an open environment in which employees freely express their views, including ones which are deemed controversial. Employers should develop streamlined grievance procedures so that employees can get direct and impartial hearings on issues on which they are likely to blow the whistle if their complaints are not heard quickly and fairly. A great deal of whistle blowing occurs because the organization is unresponsive to early warnings from its employees. A firm commitment to an "open door" policy would make much whistle blowing unnecessary.

Employers should give formal recognition and openly declare to employees a respect for their individual conscientious activity. It is clear that in dealing harshly with whistle blowing employees, employers inevitably become the subject of adverse public reaction and publicity. Respecting an employee's right to differ with organizational policy on some matters, even beyond what the law requires, is in the long run in the best interest of employers.

"can be very effective in raising the level of objectivity, ensuring a measure of justice, and advancing perceptions of management's fairness."

289. Ewing, *supra* note 285, at 83.

290. Cook, *supra* note 171, at 52.

291. *Id.* at 53.

292. *Id.*

293. *Id.* at 55-56; Ewing, *supra* note 285, at 91; Walters, *Your Employees Right to Blow the Whistle*, 55 HARV. BUS. REV. 34, 161-62 (1975).

While employers are not required by law to establish and promulgate general personnel policies, where an employer does establish such procedures, they should be made known to their employees. Notice to the employees enhances the employment relationship and the respective rights of employer and employee are set out in a way which gives them presumptive legitimacy. Not only is there a formal recognition of respective rights and duties, but by such actions the employer increases the likelihood that it will secure an orderly, cooperative and loyal work force. For their part employees gain a measure of peace of mind which is the object of and is associated with job security, that is, the expectation that they will be treated fairly. It is in the employer's interest to create an environment in which his employees know that, whatever the personnel policies and practices, there are established standards and procedures which govern the employer's employment decisionmaking and that these standards purport to be fair and are to be applied consistently and uniformly to each employee.[294] Finally, managers in an environment where meaningful "due process" is guaranteed, will most likely need instruction in the employer's policies and procedures in addition to training in certain skills such as rating employees and feedback communication. While such an approach will not eliminate all disputes, it is clear that the potential for legal complaints will be diminished.

IV. UNJUST DISMISSAL LAW IN OTHER COUNTRIES

This Article has discussed judicial and legislative trends in the United States toward providing recognition and protection of rights of an employee in his job. It remains true, however, that the United States has trailed behind other highly industrialized countries in providing statutory or judicial protection against unjust employment dismissals.[295] This section will briefly examine how various European countries have dealt with the issue of wrongful dismissal through legislative enactments in order to provide a basis for consideration of ways in which the right to a job can be given more substantive definition and more effective procedural implementation in the United States.

A. *International Labor Organization Recommendation*

International organizations have taken the lead in recognizing a worker's right in his job. In 1963, the International Labor Organization (ILO) adopted Recommendation 119, "Concerning Termination of Employment at the Initiative of the Employer,"[296] which stated: "Termina-

294. Toussaint v. Blue Cross & Blue Shield, 408 Mich, 579, 613, 292 N.W.2d 880, 892 (1980); Holley, *supra* note 284, at 429.

295. Steiber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L. 229 (1979); Summers, *supra* note 68, at 508.

296. *See* II ACTS OF FIFTH INTERNATIONAL CONGRESS OF LABOUR LAW AND SOCIAL SECURITY 1963, REGULATION OF DISPUTES CONCERNING THE EMPLOYER'S EXERCISE OF DISCIPLINARY POWERS 571 (1963); I.L.O., DISMISSAL PROCEDURES IN NINE COUNTRIES, 533-49 (1963) [Hereinafter cited as I.L.O. REPORT]. See also Symposium, *Comparative Labor Law and Law of the Employment Relation*, 18 RUTG. L. REV. 233, 446 (1964), which contains extracts of an English translation of the I.L.O. REPORT.

tion of employment should not take place unless there is a valid reason for such termination connected with capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service."[297] Recommendation 119 further provided that a worker who felt that he had been unjustly dismissed from employment should be entitled to appeal the termination to "a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee, or a similar body."[298] According to these procedures, if a discharge is deemed to be unjustified, the appeal body is entitled to order that the employee be reinstated or be paid "adequate compensation" or be provided with other appropriate relief.[299] Under Recommendation 119, except for cases of serious misconduct, a discharged employee should be provided proper and timely notice or compensation where such notice is not given.[300] It is further provided that termination for serious misconduct should be limited to situations where the employer cannot in good faith be expected to take any other course,[301] and an employee accused of serious misconduct should be given an opportunity to state his case promptly, with the assistance of a representative where appropriate.[302] It should be noted, however, that Recommendation 119 does not define the term "serious misconduct"; it thus remains open to interpretation by employers and tribunals in each country. Recommendation 119 reflects a recognition on the part of the international community of an employee's reasonable interest and expectation in a qualified right to his job. At the same time it establishes a principled account of that right, and gives implicit recognition to a right of an employer to dismiss where there is serious failure to meet job requirements. There is a certain hortatory quality to Recommendation 119, and it is therefore useful to consider how various European nations have given legislative or regulatory effect to this claimed right to a job.

B. *European Community Proposal*

Following ILO Recommendation 119, the European Commission in 1976, examined various employment practices, specifically with regard to dismissal, which were in effect in various member countries of the European Economic Community.[303] Subsequently, the Commission advanced proposals to serve as a basis for a European Commission directive on individual discharges from employment. The Commission issued a report containing these proposals in the form of guidelines aimed at providing a uniform standard for employer exercise of the right to discharge, and implicitly providing an effective formulation of the right of an employee to

297. I.L.O. REPORT § 2(a), *in* 18 RUTG. L. REV. 233, 449 (1964).
298. *Id.* § 4, *in* 18 RUTG. L. REV. at 450.
299. *Id.* § 6, *in* 18 RUTG. L. REV. at 450.
300. *Id.* § 7(a), *in* 18 RUTG. L. REV. at 450.
301. *Id.* § 11(b), *in* 18 RUTG. L. REV. at 451. *See generally* T. KENNEDY, EUROPEAN LABOR RELATIONS 386 (1980).
302. I.L.O. REPORT § 11(e), *in* 18 RUTG. L. REV. at 452.
303. Proposed Report, Commission to the Council of European Economic Community, *Protection of Workers in the Event of Individual Dismissals, in the Member States of the European Communities*, *in* EUR. INDUS. REL. REV. NO. 30 (1976) [hereinafter cited as EEC REPORT].

his job.[304]

The guidelines begin by providing that discharge is justified only when based on "serious grounds."[305] "Serious grounds" is defined in terms of "urgent requirements of the firm," that is, an employer is justified in discharging an employee only when it is impossible or unreasonable for economic or technical reasons or for reasons connected with the person or behavior of the worker, for the employer to continue the employment relationship.[306] Such serious grounds reflect the limitations or qualifications on the employees' right to a job, which in turn establishes the legitimate basis for the employer's exercise of its right to discharge. The guidelines provide that personal grounds for dismissal shall be deemed to exist when an employee has, over a long period of time, shown himself to be incapable of carrying out his duties.[307] Similarly, behavioral grounds for dismissal are said to presuppose a serious breach of a worker's obligations under the individual employment contract.[308] Even when such grounds exist, the guidelines provide that dismissal should be a last resort and even when dismissal is unavoidable, employers should take account of an employee's age, length of service, and future job prospects in the terms of the severance.[309] According to the Commission's report, a worker should be entitled to written notice of dismissal, a written statement of the grounds for dismissal upon request, and be advised of his legal rights and remedies.[310] Moreover, consultation with worker representatives should precede dismissal and minimum notice of thirty days should be given except in cases of "summary dismissal."[311] The guidelines provide that "summary dismissal" should be resorted to only if the employee is guilty of such a severe breach of his obligations under the employment contract that the employer cannot reasonably be expected to observe a notice period. Finally, legality of every termination must, at the request of the employee, be examined by an independent body.[312]

The European Commission's recommendations are clearly stated to be minimum standards with the individual member countries being free to adopt more favorable measures to protect employees.[313] While the above standards are only proposed guidelines and have not been adopted by the European Community,[314] they do give specific substantive and procedural content to the concept of a principled right to a job and they specify the corresponding limitations on the employer's right to discharge.

304. EEC REPORT, *supra* note 303, at 25.
305. *Id.* at 10.
306. *Id.* at 15.
307. *Id.* at 17.
308. *Id.* at 23.
309. *Id.* at 24.
310. *Id.* at 25.
311. *Id.*
312. *Id.* at 29.
313. Steiber, *supra* note 295, at 231.
314. These recommendations were based on conclusions drawn from a survey of dismissal law in EEC member countries and this legislation is now outdated. *See* Sherman, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries*, 29 AM. J. COMP. L. 467, 468 n.8 (1981).

C. *Statutory Protection in Individual Countries*

While European Commission guidelines are only recommendations, a number of European nations have in fact given explicit recognition to an employee's right to his job, and have given specific substantive and procedural content to this conception. It will be useful to consider briefly the scope and extent of the protection against unjust dismissal afforded to employees by a select group of European states. It should be observed that employment relations, including dismissals, are statutorily regulated in all Common Market countries and in Sweden and Norway.

1. *Austria*

Austria's employment relations are governed by a Labor Code which went into effect in 1976.[315] The central premise underlying the Labor Code is "codetermination," that is, employee participation in all Austrian industry.[316] This policy of "codetermination" involves the principle of shared decisionmaking by employees and employers. This shared decisionmaking is carried out in the conventional firm by two boards: a Management Board with the function of managing day-to-day operations and a Supervisory Board similar to an American board of directors. Employee representatives are elected to sit on the Supervisory Board, and in Austria one third of the members of this Board are employee representatives.[317]

The Austrian mechanism for providing employees participation in the business of the corporation in the work council system.[318] Works councils are composed of employee representatives who have certain rights and responsibilities which are clearly spelled out in the Labor Code.[319] The councils have the right to inspect wage and salary lists as part of their function to monitor collective agreements.[320] The employer is required to inform the works council on all matters of employee policy and decisionmaking. The works council must come to agreement with the employer on all disciplinary actions before they are initiated as well as on all other types of personnel policy decisions which might affect the status of the company's employees.[321] As a result of this structure, the works council enjoys considerable authority regarding dismissals of employees.[322] Because of

315. Arbeitsverfassungsgesetz [ARBVG] (1976) (Austria), *in* Traub, *Codetermination and the New Austrian Labor Code: A Multi-Channel System of Employee Participation*, 4 INT'L LAW. 613 (1980).

316. The German term is *mitbestimmung* which does not have a precise English translation, but carries the connotation of active participation in the process of decisionmaking. *See generally* THE CODETERMINATION MOVEMENT IN THE WEST: LABOR PARTICIPATION IN THE MANAGEMENT OF BUSINESS FIRMS (S. Pejovich ed. 1978).

317. ARBVG § 4, *in* Traub, *supra* note 315, at 614.

318. *Id.* § 40(1), *in* Traub, *supra* note 315, at 621. *See generally* W. KOLVENBACH, EMPLOYEE COUNCILS IN EUROPEAN COUNTRIES (1979).

319. ARBVG § 40(1), *in* Traub, *supra* note 315, at 621.

320. *Id.*

321. *Id.* § 99, *in* Traub, *supra* note 315, at 623.

322. *Id.* § 102, *in* Traub, *supra* note 315, at 623. *See* AUSTRIAN FEDERAL PRESS SERVICE, NEW LABOUR CODE 14, 15 (1974). The commentary on the statute states: "The employer has to give the council warning of his intention and the workers' representatives then have a certain period within which they can lodge a protest with the Conciliation Board, an independent arbitration body designed to settle labor disputes." *Id.*

the relationship between the works council and dismissal decisions, the employer usually contacts the council at an early stage to discuss all personnel issues thoroughly; special attention is paid to ways to minimize social hardship arising from measures which are not to be avoided. Observers have noted that the "strict legal provisions concerning dismissal, combined with the sense of responsibility felt by Austrian employers for the security of their workers' jobs have meant that major cuts in personnel occur only occasionally."[323]

2. *France*

During the nineteenth century, both French and United States employment law stressed the concept of mutuality as the fundamental doctrine governing the employer-employee relationship with the result that either party had the right to terminate the relationship at will.[324] French courts specifically adopted the employment-at-will rule whereby either party could terminate the relationship at any time for any or no reason.[325] The status of the law started to change towards the end of the nineteenth century, culminating in 1928 with the codification of the principle of *abus de droit* (abuse of right).[326] According to this principle, the employer would be liable for abusive termination of an employment contract if "he acted with malicious intent, culpable negligence, or capriciousness."[327]

Since 1973, when the labor code was amended, the most important regulatory mechanism protecting French employees is the restriction of an employer's right to dismiss. Employers must fulfill both procedural and substantive requirements imposed by specific legislative enactments. The most significant of these is the requirement that the employer possess genuine and serious cause for the dismissal based on something the employee did or failed to do.[328] Employees who believe that they have been wrongfully discharged are required to bring their actions before a labor court, which is a bipartite judicial body composed of equal numbers of employees and employers.[329] These special courts exercise almost absolute jurisdiction over the trial of employer-employee disputes. Practice reveals that

323. AUSTRIAN FEDERAL PRESS SERVICE, *supra* note 322.

324. *See* EUROPEAN COAL & STEEL COMMUNITY, LA STABILITE DE L'EMPLOI DANS LE DROIT DE PAYS MEMBRES DE LA C.E.C.A., 218-24 (1958); *see also* F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY ch. 3 (1964).

325. EUROPEAN COAL & STEEL COMMUNITY, *supra* note 324, at 218-24; *see also* T. KENNEDY, *supra* note 301, at 386; Summers, *supra* note 68, at 509.

326. Summers, *supra* note 68, at 510.

327. *Id.*

328. CODE DE TRAVAILLE [C. TRAV.] arts. L 122-14-2 & L 122-14-3 (1978). *See also* Note, *Termination of French Labor Contracts*, 14 INT'L LAW. 267, 269 (1980). The French Labor Code recognizes four categories of employee misconduct that might lead to dismissal: (1) *Faute lourde* (flagrant misconduct) includes offenses such as theft, breach of professional ethics and other serious offenses. This type of behavior justifies immediate dismissal with loss of all rights to severence or vacation pay; (2) *Faute grave* (gross misconduct) includes behavior less serious than the flagrant misconduct, but still leads to immediate dismissal with loss of severance pay, but not of vacation pay; (3) *Cause rèelle et sèrieuse* (genuine and serious cause) the employer has to maintain the burden to prove that the dismissal was justified; (4) *Faute lègère* (minor misconduct) such as tardiness, absenteeism. T. KENNEDY, *supra* note 301, at 54.

329. C. TRAV. art. L. 511-1 (1978). *See also* Aaron, *The Administration of Justice in Labor Law: Arbitration and the Role of the Courts: International Survey*, 3 COMP. LAB. L. 1, 7 (1979).

these courts are sympathetically disposed towards employees and vigorously implement these laws.[330]

3. *Germany*

Until 1920, German labor law was similar to French and American law in that an employment contract for an indefinite period could be terminated by either party with or without cause.[331] Since 1920, employment has been statutorily regulated, and today German employees enjoy comprehensive protection from wrongful dismissals.[332] The governing statute defines unfair discharge as dismissals that are "socially unwarranted," that is, "not based on reasons connected with the person or conduct of the employee."[333] Grounds justifying summary dismissal without notice include: stealing business secrets, theft of property, fraud, fighting, and insubordination.[334] One commentator has characterized the overall rationale for termination of German employees as requiring a showing that the conduct which serves as the basis for discharge is related to the job and is of such a nature that dismissal is the only means to insure the employer's continued effective operation.[335]

Employers must confer with works councils prior to giving notice of dismissal. The council can object and if it does, the employee must be retained until the Labor Court renders a decision.[336] The courts are tripartite involving a presiding professional judge, representatives of the employer and of the employee.[337] The courts render their decisions regarding dismissals with great expediency, usually in less than a month.[338]

4. *United Kingdom*

The development of the English employment-at-will rule preceded that of American labor law,[339] but was abrogated in 1971, when the Industrial Relations Act was enacted.[340] This Act recognized that every em-

330. Note, *supra* note 328, at 267.

331. I.L.O. REPORT, *supra* note 296, at 58-59; *see also* Summers, *supra* note 68, at 511.

332. Protection Against Unwarranted Dismissals Act of 1951, § 2, 1951 Bundesgesetzblatt, Teil 1 [BGB1] I 499 (W. Ger.). For English translation, see 1951 I.L.O. LEGISLATIVE SERIES (1951 Ger. FR4) (as amended by the Protection Against Dismissal Act of 1969).

333. Protection Against Dismissal Act of 1969, § 1(2), 1969 BGB1 I 19 (W. Ger.); Summers, *supra* note 68, at 511. *See generally* T. KENNEDY, *supra* note 301, at 182.

334. Protection Against Dismissal Act of 1969, § 2(2), 1969 BGB1 I 22 (W. Ger.); Steiber, *supra* note 295, at 232.

335. Summers, *supra* note 68, at 511.

336. Works Council Act of 1972, 1972 BGB1 I 13 (1972) (for English translation, see 1972 I.L.O. LEGISLATIVE SERIES (1972 Ger. FR1)); Summers, *supra* note 68, at 512. *See generally* Aaron, *supra* note 329, at 14.

337. Works Council Act of 1972, 1972 BGB1 I 13 (1972).

338. Benjamin Aaron, who has conducted a comprehensive international survey of labor courts commented favorably on the expediency of German labor courts: "In the Federal Republic of Germany the 'principle of expeditiousness' is effectuated in the labor court system in a variety of ways: there are no court vacations . . . [and] the appellate labor courts may not remand cases to lower courts because of procedural errors . . . ." Aaron, *supra* note 329, at 25.

339. *See supra* note 31 and accompanying text.

340. Industrial Relations Act 1971, §§ 22 & 24, 41 HAL. STAT. §§ 2062, 2088, 2090 & 2091 (1971). *See* INTERNATIONAL LABOUR CONFERENCE, 59th SESS. REP. III (PART 4B) (Act repealed in 1974).

ployee who has been employed for at least six months has the right not to be unfairly dismissed by his employer.[341] Since 1971 there have been several statutes passed in Britain dealing with dismissal.[342] The burden of proof is on the employer to satisfy a tripartite industrial tribunal that he acted "reasonably."[343] The tripartite composition of the tribunal is designed to bring to bear in each case the industrial experience of the employer and the shared job experience of employees as well as the legal background of the chairman. The emphasis in unfair dismissal cases is on accessibility, speed, and informality. Complaints alleging unfair dismissal are first sent to the Advisory Conciliation and Arbitration Service, where a conciliation officer tries to help the parties resolve their disputes without the need for a hearing by an industrial tribunal.[344]

The unfair dismissal law has been subject to considerable criticism, particularly from employers, for several reasons. It is charged that the law has an inhibitory effect by restricting hiring; the employer has been given the burden of proving the dismissal was fair; and that the law is especially burdensome to small employers who do not have formal personnel procedures and therefore, have difficulty proving to tribunals that they acted reasonably in dismissing an employee.[345] However, a 1978 study of employers in manufacturing industries, made by the Policy Studies Institute of Great Britain, found most of the above criticisms to be unjustified.[346] The study indicated that the major effect of the unfair dismissal law has been to encourage the reform or formalization of procedures in disciplinary action and dismissals.[347] Employers are said to now exercise greater care in selecting new employees and in appraising employee performance.[348] There is also evidence that unfair dismissal measures have reduced rates of dismissal, particularly in some firms where levels were relatively high prior to the legislation.[349]

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341. Dismissal is deemed unfair unless it is based on the employee's abilities, qualifications, or conduct. Industrial Relations Act 1971, §§ 22, 24, 41 HAL. STAT. 2062, 2088, 2090-91 (3d ed. 1972).

342. In 1975, the Employment Protection Act was passed, 45 HAL. STAT. 2371 (3d ed. 1976). This statute enlarged the remedies available to employees who have been unfairly dismissed. Employment Protection Act 1975, §§ 71-80, 45 HAL. STAT. 2398-2411 (3d ed. 1976). The provisions of the 1975 Act were later incorporated into the Employment Protection (Consolidation) Act 1978, § 57(c), 48 HAL. STAT. 506 (3d ed. 1979). In 1980, the Employment Act was enacted and it restricted some of the provisions of the 1978 Act. Employment Act 1980, §§ 6-9, 50(1) HAL. STAT. 388-92 (3d ed. 1981).

343. Employment Protection (Consolidation) Act 1978, § 57(3), 48 HAL. STAT. 506 (3d ed. 1979).

344. *Id.* § 67, 48 HAL. STAT. 518.

345. Steiber, *supra* note 295, at 235. Because of some of the criticisms outlined in the text, the provisions of the Employment Protection (Consolidation) Act of 1978 have been restricted in the provisions of the Employment Act of 1980. The 1980 Act does not apply to employers who have 20 or less employees. Employment Act 1980, § 6, 50(1) HAL. STAT. 388 (3d ed. 1981). Also, an employee cannot file a complaint for unfair dismissal if (1) he started his employment on or after October 1, 1980; (2) he was continuously employed for less than two years; and (3) at no time during that period did the number of employees exceed 20. *Id.* §§ 6-9; 50(1) HAL. STAT. 388-92.

346. Daniel & Stilgoe, *The Impact of Employment Protection Laws*, 44 POLICY STUD. INST. No. 577 (June 1978).

347. *Id.* at 6.

348. *Id.* at 9.

349. *Id.* at 8.

5. *Comparison and Evaluation of European Legislation*

The experience of the various European nations which have developed legislation to provide protection for an employees right to his job provides a valuable source of reference for possible legal development in the United States. More particularly, the form of this legal reform, namely legislative protection, suggests the propriety of adoption in the United States of legislative protection for the employee in his or her job.

Until these protection statutes were adopted by the various European nations, employment relations in those countries were governed by the employment-at-will rule based on the concept of mutuality. These protection statutes replace this doctrine with strict legal rules governing dismissal. For the most part these statutes limit dismissal to cases where serious cause is established; in all other cases dismissal is unfair. In Germany unfair dismissal is defined as "socially unwarranted"; in France it is dismissal which is not for "real or serious reasons"; in Austria the standard is "not for objectively valid grounds," and in England an element of equity is inserted into the definition of employee cause which is established as "unreasonably determined in accordance with equity and substantial merits of the case." All of these statutes suggest the need to limit dismissal to cases where valid grounds can be shown which involve a showing that the employee impaired the proper functioning of the employing firm, or at least some serious misconduct on the part of the employee.

Each of these statutes provide for an independent tribunal or arbitration panel to hear cases of contested dismissal. In the various European countries, works councils or labor courts decide either initially or on review whether dismissals are or are not justified with reference to the relevant statutory provisions. These tribunals are generally staffed by a legal expert, an employer representative, and an employee representative. The effort seems to be one directed at obtaining a rule based decision making process while drawing on the expertise of representatives of the employer and employee in order to accommodate special industrial and economic needs.

Finally, the European legislation provides for some formality in procedures with reference to notice, pleading and burden of proof. In all of the European statutes, advance notice is required in the ordinary case. In cases of summary dismissal, however, advance notice is not always required. In France, summary dismissal may be only for "flagrant" or "gross misconduct." In Germany, dismissal without notice is permitted only when it is not reasonable to expect an employer to continue the employment relationship. Fairness suggests the necessity of such advance notice in most cases since such notice permits employees to invoke the judicial or arbitration procedures available, and prevents an employee from being placed in the position of unemployment with consequent lack of resources which would impair the employee's ability to challenge the dismissal.

The procedures for initiating challenges to dismissal and the standard for establishing such dismissal are left open. Except in France, where

there is not a clear onus of proof established by statute, the burden of proof that a dismissal is "fair" rests on the employer. This seems proper given the fact that the employer initiates the dismissal, and is in control of the facts which gave rise to the decision to dismiss the employee.

The European statutes are not explicitly limited to any category or classification of employee. This follows to a large extent from the fact that they do not have a body of separate labor legislation governing unionized workers and civil servants as is the case in the United States. Finally, the European statutes for the most part do not establish a special court nor do they set out specific procedures for hearing challenges to dismissals. This follows from the fact that these countries already have special workers councils and special labor courts which are lacking in the United States. In the absence of such special councils or tribunals to provide for the vindication of a challenge to an unjust dismissal, jurisdiction must either be placed in existing courts or in special tribunals which would need to be established. This latter approach was adopted in the United Kingdom where a special Advisory Conciliation and Arbitration Service has been established to hear complaints of unfair dismissal.

From the European experience, one can observe the need to establish a standard for unjust dismissal, the necessity of providing procedures to govern dismissals, and finally the propriety of establishing independent tribunals or boards to hear complaints of unfair dismissal.

V. MODEL STATUTE PROPOSAL

The previous section illustrates the type of statutory protection against wrongful dismissal which employees generally enjoy in Western Europe. This final section will provide a proposal for a statutory scheme designed to protect the majority of American employees from wrongful dismissal. This suggested statute is aimed at giving procedural and substantive content to the concept of a qualified right of an employee to his or her job, and at the same time delineating the conditions under which an employer may properly exercise its right to discharge an employee.

A number of commentators have suggested that such legislation either cannot or should not be developed to provide a delineation of the respective rights of employer and employee and that such protection can be achieved only through judicial activism.[350] Their rationale for this contention is that employees in need of statutory coverage are not organized, and therefore, do not constitute a sufficient lobby for the passage of such legislation. Moreover, it is suggested that judicial action would provide more flexibility to meet the varying needs of employers as well as accommodating changing social and economic conditions.[351] It has been observed that courts have been called upon in many occasions in the past to "determine what constitutes good public policy . . . in response to changing social and

350. *See* Blackburn, *supra* note 126, at 481; Blades, *supra* note 2, at 1434; Peck, *Some Kind of Hearing for Persons Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313, 317 (1979); Peck, *supra* note 126, at 3.

351. Peck, *supra* note 350, at 325.

economic conditions."[352]

It is true that a number of courts seem to be prepared to meet this call for judicial activism[353] and that they have analyzed the problem of unjust dismissal from the perspective of "the new climate prevailing generally in the relationship of employer and employee."[354] These courts have attempted to balance the "legitimate business interest" of the employer in "deciding whom it will employ"[355] while maintaining "a large amount of control over its work force"[356] with the employees' "interest in job security."[357] Some courts have gone so far as to say that there is an overall societal interest in achieving this balance.[358] A majority of courts, however, have been reluctant to recognize a wrongful discharge cause of action and thus have continued to uphold the employment-at-will doctrine.[359] These courts have taken the position that such radical departure from common law principles requires action by the legislature.[360]

Legislation, therefore, may be the most effective solution in dealing with what is increasingly recognized as an outmoded rule governing employment relations. Several writers have proposed that the present statutory coverage afforded to a minority of employees either by labor law or the civil service law extend to all employees.[361] Another commentator has suggested that the arbitration model which is almost universally accepted by employers and unions in collective bargaining be used as the basis for this legislation.[362] The legislative scheme that is proposed here parallels

352. Blackburn, *supra* note 128, at 481.

353. *See* Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 825 n.3 (1980). The court cites to a total of 13 jurisdictions which have recognized the tort of "abusive discharge" when the termination is violative of some public policy, and six other states which seem to be prepared to do so under appropriate circumstances. *Id.*

354. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

355. Fortune v. National Cash Register Co., 373 Mass. 96, 102, 364 N.E.2d 1251, 1256 (1977).

356. *Id.*

357. Adler v. American Standard Corp., 291 Md. 31, 42, 432 A.2d 464, 470 (1981).

358. *Id.*; Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 67, 417 A.2d 505, 511 (1980).

359. *See* De Marco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980); Feola v. Valmont, Inc, 208 Neb. 527, 304 N.W.2d 377 (1981); Edwards v. Citibank N.A., 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980). *See also supra* notes 151, 161 & 178 and accompanying text.

360. *See* Campbell v. Eli Lilly & Co., — Ind. App. —, 413 N.E.2d 1054, 1066 (1980); Martin v. Platt, — Ind. App. —, 386 N.E.2d 1026, 1028 (1979); Reiter v. Yellowstone County, — Mont. —, —, 627 P.2d 845, 849 (1981).

361. Peck, *supra* note 350, at 323; Steiber, *supra* note 295, at 239-40; Summers, *supra* note 68, at 519-31; Summers, *Protecting All Employees Against Unjust Dismissal*, 58 HARV. BUS. REV. 132, 137 (1980); Note, *A Remedy for the Discharge of Professional Employees who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 829-40 (1975).

362. Professor Summers recommends that "legal protection against unjust dismissal can best be built upon standards and procedures of our existing arbitration system . . . . [O]ur arbitration system has developed a substantial cadre of individuals who are experienced in hearing discipline cases and applying the 'just cause' standard." Summers, *supra* note 68, at 521. *See also* Summers, *supra* note 361, at 137-38.

In Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980), the Supreme Court of Michigan remarked that "[t]he employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could . . . provide for *binding arbitration* on the issues of causes and damages." *Id.* at 624, 292 N.W.2d at 897 (emphasis added). Professor Summers further comments that the solution to the unjust dismissal problem would consist of statutorily articulating "the right of employees not to be disciplined except for 'just cause' . . . . The statute need not . . . attempt to define 'just cause,' for the existing body of precedent has given it a

Title VII of the Civil Rights Act of 1964[363] and the Age Discrimination in Employment Act[364] in its procedural recommendations. According to this approach, the employee must carry the initial burden of establishing a prima facie case of "unjust dismissal" in violation of his contract of employment.[365] Further, after the establishment of such a prima facie showing, the burden of going forward then shifts to the employees to provide evidence that the termination was justified by "business necessity"[366] or for violation of the terms of employment.[367] Finally, an employee may attack the employer's explanation on the grounds that it is merely a pretext by showing that the actual reason for discharge is one prohibited by contract or public policy.[368] Under this approach, the employee bears the ultimate burden of proving that he was terminated wrongfully.[369] The measure of the burden should be determined by the arbitration board on the basis of the conclusions it draws in the specific case as to the nature of the contract between the parties.

The statute being proposed here would cover all employees not presently covered by collective bargaining or by Title VII provisions, who have completed a one year probationary period. The "just cause" standard described above would not be defined, because it should be left up to the arbitrators to interpret it according to the specific job situations. Such an analysis would be conducted by striking a balance between both the employer's and employee's interests and rights. The statute would exclude from coverage top corporate executives such as vice presidents and presi-

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workably defined content while preserving its flexibility . . . ." Summers, *supra* note 68, at 521; *see generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, ch. 15 (3d ed. 1973).

363. 42 U.S.C. § 2000e (1976).

364. 29 U.S.C. §§ 621-634 (1976).

365. The Title VII case law for the establishment of a prima facie case of discrimination is based on the paradigm developed by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), where the court said "[t]he complainant in a Title VII trial must carry the initial burden . . . of establishing a prima facie case of . . . discrimination." *Id.* at 802.

366. Under traditional Title VII analysis, the concept of "business necessity" constitutes a defense to a charge of disparate impact. This judicially created defense was articulated in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). "The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touch stone is business necessity." *Id.* at 431. *See generally* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979); Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEMPHIS ST. U.L. REV. 76 (1972).

367. *See supra* note 366.

368. A California court proposed this scheme for the trial court to apply in analyzing a wrongful termination case:

> We have held that appelant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appelant's termination now shifts to the employer. Appelant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy), or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. [Appellant] bears, however, the ultimate burden of proving that he was terminated wrongfully.

Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917, 927 (1981).

369. In another California decision, the court stated that "[w]e recognize . . . that plaintiff has the burden of proving that he was terminated unjustly and that the employer . . . will have its opportunity to demonstrate that it did in fact exercised good faith and fair dealing with respect to plaintiff." Cleary v. American Airlines, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980); *see also* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917, 927 (1981).

dents, because of the high degree of discretion that companies should be afforded in choosing and retaining employees in these positions. Because this type of statute might impose a hardship on very small employers (less than twenty-five employees), they would be exempted from the reach of this legislation. This statute is addressed solely to incidents of termination, or constructive dismissal. It does not deal with other forms of disciplinary actions, because it is difficult to define the wide ranging basis and the varying nature of such disciplinary action by statute, and thus, a case-by-case judicial analysis should be more productive.

Reinstatement or compensatory damages is the remedy provided by the statute in case of a finding of wrongful dismissal. In cases of "malicious" dismissals, which would be designated to cover employees terminated for refusing to commit illegal acts at the request of the employer, the discharged employee would be awarded punitive damages, in addition to compensatory damages.

Commentators have observed that such a statutory proposal would very likely meet with serious opposition from companies and employers. Some of these potential objections have been identified as including the difficulty in defining and proving the just cause criteria; that the employers' personnel retention policies might be negatively affected by restrictions on dismissal of unproductive employees, or employees with whom they have personality conflicts; that in general such a scheme would hamper employers' ability to maintain employee discipline and to manage and control the enterprise; and that arbitrators with no industrial experience would be placed in a position to second-guess management decisions.[370] Nevertheless, a most compelling response to these objections is that recommendations contained in this statute are already incorporated in all collective bargaining agreements without the feared consequences for either the business community or the economy. Moreover, the force of these objections is diminished when one recognizes the strength of the employee's interest in having a right to continue in his job where just cause for dismissal does not exist, and by the fact that this statutory scheme, by providing a basis for cause dismissal, is a powerful tool for management to control the work force.

CONCLUSION

The death knell is sounding for the employment-at-will doctrine; the unfettered right of an employer to discharge an employee is being replaced by recognition of a scheme of qualified rights and duties of employer and employee. The days of total discretion over employee discharge are over. A minority of jurisdictions have recognized the need for fair treatment of employees and have consequently taken steps to provide principled protection for workers from unjustified and arbitrary employer actions. In dealing with this problem, either through judicial activism or through statutory reform, a balancing analysis between two competing interests must take

370. Summers, *supra* note 361, at 138.

place. On the one hand, the employer must be free to conduct and manage his business as he sees fit; on the other hand, the employee must be assured of freedom from unjust dismissal, with a consequent measure of job security. The result is a recognition of a qualified right of an employee to his or her job and a qualified right of an employer to discharge. The employee's right is qualified by his or her obligation to perform. The employer's right to discharge is qualified by a requirement to show cause and the provision of procedural due process.

Employers can avoid litigation or legislative intervention by establishing performance standards and by improving their internal complaint procedures. Many employers must change some of their procedures to meet this challenge. They must give closer scrutiny to their hiring and training practices in order to ensure that they have the best personnel possible. Additionally, they will have to establish a system of performance standards which is fair and equitable of all employees. Employer managers must be trained in the techniques required to implement this system of substantive standards and procedural requirements as well as to be able to evaluate and rate the employees according to the relative standards which are established. An internal disciplinary procedure mechanism should be created that will prevent employees from being deprived of the "property a man has in his labor, his trade or profession," without "due process."[371] Courts can and are giving recognition to the claim of employees to rights in their job by developing exceptions to and limitations on the employment-at-will doctrine. Ultimately, however, the most effective way in which the rights of employer and employee can be recognized and reconciled is through the establishment of a statutory scheme which limits dismissal to "just cause" and which provides procedures for the fair determination of the existence or lack of just cause.

371. The concept of a property interest is not new in the context of job rights. In Jones v. Leslie, 61 Wash. 107, 112 P. 81 (1910), while holding that the defendant interfered with the plaintiff's property right by attempting to prevent him from leaving his employment for a better job, the court stated:

> It would be well to remember . . . that it is fundamental that man has a right to be protected in his property. This was the doctrine of the common laws, is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government . . . . For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is then, the right of employment in a laboring man property? That it is, we think cannot be questioned. The property of the capitalist is his gold and silver . . . for in these he deals and makes his living . . . . And *every man's trade or profession is his property, because through its agency, he maintains himself and family . . . . Can it be said, with any degree of sense of justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of citizens of our country, is not property; or, at least, not that character of property which can demand the boon of protection from the government?* We think not.

Id. at 110, 112 P. 81, at 82 (emphasis added).

Appendix
Model Statute: Employees Protection Act

PREAMBLE

Employees increasingly find themselves subject to arbitrary and capricious dismissal from employment. The loss of employment resulting in economic dislocation and long-term unemployment leads to deterioration of job skills, demoralization of the affected employee, and eventually to a decrease in overall industrial productivity. Therefore, the lack of a legally recognized property right in employment and job security has direct and indirect economic consequences which when present in industries affecting commerce, burden commerce and the free flow of goods in commerce.

The purpose of this Act is to protect employees from arbitrary and capricious dismissal from employment by prohibiting discharge without good cause, therefore insuring that employees have a legally enforceable property right in employment, with a subsequent measure of job security. This Act will aid both employers and employees to devise impartial dismissal guidelines based on recognized standards of performance, and equitable procedures to insure that employees are given a fair hearing when faced with dismissal.

This Act is designed to cover employees not currently protected by provisions of Title VII of the Civil Rights Act of 1964 or of the National Labor Relations Act.

SECTION 1: DEFINITIONS

As used in this Act:

(A) The term "person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

(B) The term "employer" means a person engaged in industry (affecting commerce) who has twenty-five or more employees on the date this Act becomes effective. Employer includes an agent of an employer, but the term does not include the state or a political subdivision of the state, the United States, or a corporation wholly owned by the government of the United States.

(C) The term "employee" means an individual employed by an employer. Employee does not include any person employed by the state or a political subdivision of the state (United States government) and employees subject to the civil service laws of the state's governmental agencies or political subdivisions.

(D) The term "top corporate executive" means employees who are either officers of the employer or are employed in management jobs for setting the course of the employer.

(E) The term "probationary period" means the first year of employment of an employee.

(F) The term "industry affecting commerce" means any activity, business, or industry in commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Disclosure Act of 1959.
(G) The term "arbitration board" means the State Board of Mediation and Arbitration.

SECTION 2: PROHIBITION OF UNJUST DISMISSAL

(A) Employer Practices

It shall be unlawful for an employer to discharge an employee who has completed the statutory probationary period, without good cause.
(B) Opposition to Unlawful Practices; Participation in Investigations, Proceedings, or Litigation

It shall be unlawful for an employer to discriminate against any of his employees because such an individual has opposed any practice made unlawful by this section, or because such individual has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under this legislation.
(C) Lawful Practices

It shall not be unlawful for an employer—

(1) To take any action otherwise prohibited under Subsection (A) of this section where the affected employee is a top corporation executive

(2) To discharge an individual for good cause.

SECTION 3: ARBITRATION PROCEEDINGS

(A) A person who alleges a violation of this act may refer the matter to the arbitration board within 90 days after the occurrence of the alleged violation. Whenever the board is notified of the alleged violation, a panel of the said board, as directed by its chairman, shall proceed with as little delay as possible to the locality of such dispute and shall inquire into the causes thereof. The parties shall thereupon submit to the Panel complaints and the causes thereof. The Panel shall fully investigate and inquire into the matters in controversy, and take testimony under oath in relation to the alleged violation. The Panel shall render a decision with due speed and diligence, but within a period not to exceed 90 day investigation and hearing.
(B) The decision of the arbitration panel shall be final and binding on all parties.
(C) The arbitration panel may order reinstatement and/or damages for injury or loss caused by violation of the act, including reasonable attorney's fees.

SECTION 4: CIVIL ACTION

Suits for violation of arbitration agreements between an employer and employee may be brought in the circuit court for the county where the

alleged violation occurred, the county where the person against whom the civil complaint is filed resides, or in any district court of the United States where the defendant has their principal place of business.