Unequal Opportunity in At-Will Employment: The Search for a Remedy

Kathleen C. McGowan
UNEQUAL OPPORTUNITY IN AT-WILL EMPLOYMENT: THE SEARCH FOR A REMEDY

INTRODUCTION

A contract of employment, by its nature, differs from an ordinary business contract for fungible goods and services because people are unique individuals possessing distinct talents, strengths, and weaknesses, not merely inputs to production. Moreover, people earn the necessities of life—food, clothing, and shelter—by working in productive employment and they rely upon their employers to supply and contribute to work-related benefits such as health and life insurance, retirement plans, and Social Security.

---


2 Work is an important element in the stability of society. Thus, an individual's right to employment should be an important state interest and should receive a high degree of protection from the state. See William B. Gould, IV, The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework, 1986 BYU L. REV. 885, 892 (asserting that “in a modern industrialized economy employment is central to one's existence and dignity”).

3 In England and the United States, before the laissez faire attitude of the late nineteenth century, the employer was responsible for employee wages as well as employee welfare. Employment in the United States today usually includes these same kinds of pre-laissez faire benefits. See generally PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 128-29 (1969) (stating that, although duty was not clearly defined, in the master and servant relationship, the master was responsible for the servant's general welfare and for the provision of certain protections for the servant); Jay M. Feinman, The Development of the Employment At Will Rule, 20 AM. J. LEGAL HIST. 118, 119-22 (1976) (discussing the early English law presumption that employment was for one year because, among other reasons, there was a need to protect the servant from being let go in the slow season without the means
A person may believe that working long hours, performing well, behaving ethically, and remaining loyal to an employer will eventually be rewarded with job security, which is valued quite highly because employment is an integral and crucial aspect of one’s life.  The truth, however, is that most employees are at-will, which means they can be terminated by their employer any time, for any reason or for no reason.  When an employee loses a job, especially after years of quality performance and loyalty to an employer, it can be quite a shock.  The loss of a job is not only an economic catastrophe but also a psychological and emotional disaster for both the employee and his or her family.  The negative aspects of unemployment also affect society by idling labor resources and by burdening society’s public welfare systems such as unemployment compensation, welfare, food stamps, and

---

4 See, e.g., Schwartz v. Michigan Sugar Co., 308 N.W.2d 459, 462 (Mich. 1981) (stating that “a mere subjective expectancy ... that an employee doing competent work would be retained as a company asset ... is insufficient to establish a contract implied in fact” and thus, the employee had no cause of action for wrongful discharge).

5 An at-will contract means that “the employment relationship may be terminated by either the employer or employee without notice and for any reason.” ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.27, at 78 (1994). “The actual contract may be oral or written; express or implied by the conduct of the parties; bilateral or unilateral.” Id.

Some employees think they can sue their employer just because they have been fired. This is true if the employee has a term employment contract, a union contract, or a wonderful employee handbook. Most employees do not. They are at-will employees and can be fired for no reason at all. DARIEN A. MCWHIRTER, YOUR RIGHTS AT WORK 59 (1989).

6 Even as companies came out of the recession of the early 1990’s and began to make profits again, workers continued to be laid off. The Wall Street Journal reported that “[l]ast week Mobil Corp. posted soaring first-quarter earnings. This week, it announced plans to eliminate 4,700 jobs.” Matt Murray, Thanks, Goodbye: Amid Record Profits, Companies Continue to Lay Off Employees, WALL ST. J., May 4, 1995, at A1. One laid off employee said “I thought they wanted people like me, who would give up their lives and do anything to keep their jobs’ ... ‘I felt like a rat running on one of those little wheels.’” Id. at A6.

7 See Note, Finding a Place for the Jobless in Discrimination Theory, 110 HARV. L. REV. 1609, 1609 (1997) (stating “the unemployed are subject to a host of difficulties, including identity crises imposed from within and without, social and familial stigmas, and health complications”) (citing SUE GLYPTIS, LEISURE AND UNEMPLOYMENT xi (1989)). See generally NICK KATES ET AL., THE PSYCHOSOCIAL IMPACT OF JOB LOSS (1990) (discussing the biophysical consequences of job loss and the lack of political intervention to seek social policy solution); Shari Caudron, Teach Downsizing Survivors How To Thrive, PERSONNEL J., Jan. 1996, at 39 (stating that even those who survive employment cuts from corporate downsizing experience “pain, guilt, loneliness, depression and job insecurity”).
The relationship that exists between an employer and an employee determines the rights and duties of both parties and should confer a status upon the parties as well as a contractual relationship. A system of employment at-will that subjects a person’s livelihood and status to the whims of an employer is unfair and fosters societal instability. Thus, the legal system that initiated and continues to support this system must remedy the inherent unfairness of the employment at-will doctrine.

---

8 See Donald F. Hastings, Guaranteed Employment, 62 Vital Speeches 691, 691 (Sept. 1, 1996) [hereinafter Hastings, Guaranteed Employment] (stating that fear of job loss causes “stresses and uncertainties [that] can be a major drain on productivity, as well as a force undermining families and communities”). “The stress [of being laid off] can contribute to a range of physical ailments ... from insomnia to ... stomach problems, irritable-bowel syndrome, spastic colon, migraines, [and] sleep disorders.” Murray, supra note 6, at A6.

9 In the employment relationship the law of agency applies. “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Restatement (Second) of Agency § 1 (1996). An employee who is given authority by an employer can bind the employer to business commitments. The employer, on the other hand, through the rationale of respondeat superior is responsible for the actions of an employee while the employee performs his job. “Let the master answer .... Under [the respondeat superior] doctrine an employer is liable for injury to person or property of another proximately resulting from acts of [an] employee done within [the] scope of his employment in the employer's service.” Black's Law Dictionary 1311-12 (6th ed. 1990). Thus, by virtue of the employment relationship status, the law creates certain rights and duties.

In the law this is not unusual. The law combines contract and status in the marriage relationship. See Maynard v. Hill, 125 U.S. 190, 210-11 (1888) (stating that marriage “is something more than a mere contract”). The state has an important interest in marriage as a basis of society. See id. at 204-05. Although a man and a woman can freely enter into a marriage contract, they must obtain a state license and they cannot dissolve the marriage merely by deciding to breach the marriage contract. See id. at 210-14. They must instead invoke state action to do so. See id.

10 “[C]ompanies must remain competitive and profitable, but the way to do that is through encouraging productivity and engineering, not through terrorizing and demoralizing employees and devastating communities. It is a matter of common sense. We cannot have healthy businesses with the context of disruptive families in a decaying society.” Donald Hastings, The Role of Incentives, Profit Sharing, and Employee Participation in the Development of Human Resources in the United States, 22 Can.-U.S. L.J. 135, 139 (1996) [hereinafter Hastings, Role of Incentives].

Law and Economics theorists completely disagree with this point. See Frantz, supra note 1, at 558 (asserting that the at-will presumption should be retained because of its “comparative efficiency.”). See generally Richard A. Posner, Economic Analysis of Law (4th ed. 1992); Peter Stone Partee, Reversing the Presumption of Employment At Will, 44 Vand. L. Rev. 689 (1991); Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment At Will, 92 Mich. L. Rev. 8 (1993). These scholars assert that the principles of economic theory should be ap-
Presently, the at-will rule is so deeply entrenched within this country’s judicial decisions that any deviation from the doctrine is viewed by the courts as a heresy that should not be instituted. However, replacing the at-will principle with a just

plied to the employment relationship. They argue that each party—employer and employee—will look out for his or her own best interest in bargaining for the details of the relationship, will maximize his or her interests and, thus, the outcome will be in the best interests of each party. See Frantz, supra note 1, at 559. However, this argument overlooks the fact that economic models hold all variables constant in order to postulate theory. Law affects real human beings and their individual lives and should not be formulated in abstract models that hold the real world constant. The law must be concerned with the real psychological, emotional, and monetary effects of law on individuals, their families, and society. The Law and Economics group also postulates that "[i]f provision of job tenure did increase productivity enough to offset its costs, employers would provide it without legal compulsion." Id. at 571. If employers were legally required to discharge for cause only, they would find a way to make their organizations efficient and productive. The costs, moreover, that are included in the Law and Economics analysis are only monetary costs to the employer. The societal costs (for example, for increased unemployment insurance, increased taxes for welfare payments, and increased payments of medical benefits due to psychological and emotional trauma of unemployment) that are passed on to individuals and corporations are not figured into the analysis.

The Law and Economics group further argues that if just cause discharge was good for the employment relationship, then employers, looking out for their own best interest, would offer that to employees without being required to do so by the law. See id. Individual companies, nevertheless, present models of cooperative efforts that use guaranteed employment and individual productivity for compensation, which effectively refutes the Law and Economics adversarial self-interest model. See infra Section IV.-C.-4.

Additionally, the Law and Economics group argues that employees would bargain for just cause if they wanted it. See Frantz, supra note 1, at 595. Individual workers, however, are not capable of bargaining for job security. See infra notes 177-181 and accompanying text. There is also no organized group of wrongfully discharged former employees. People do not want to talk about their termination. See generally KATES, supra note 7. Most terminated workers are depressed after being fired or spend most of their time trying to obtain another job, not organizing groups to change the at-will employment rule. See id. This is in sharp contrast to individual groups who have federal statutory legal protection or to an individual employer who has the weight of the law on his side and does not have to explain to anyone why an employee was fired. See infra Part III.

The purpose of law is not primarily economic efficiency but justice. At-will employment does not provide the justice that is guaranteed under our system of law.


cause standard for termination will foster stability of employment, job security for loyal and hardworking employees, and is worth the risks of change.\textsuperscript{13}

Part I of this Note outlines the origin, nature, and judicial adoption of employment at-will in the United States. Part II examines the divergence in application of the employment at-will doctrine among various states. Part III discusses the protected class status of certain groups of employees who are not at-will. Part IV explores a just cause discharge standard, various state statutory remedies, and ultimately recommends federal action to change the employment at-will doctrine.

I. EMPLOYMENT AT-WILL

A. Origin of Employment At-Will in the United States

The traditional English master and servant employment relationship consisted of mutual duties of both servant and master.\textsuperscript{14} The servant customarily served his master with fidelity and loyalty\textsuperscript{15} while the master provided care and the security of employment for the faithful servant. Under this regime, the servant could not be terminated except for just cause.\textsuperscript{16} These pro-

\textsuperscript{13} If you can't offer workers job security, how can you expect them to be committed to the future of the company? How can you be serious about empowering them when, at any moment, you may rob them of their livelihoods?" Ronald Henkoff, Getting Beyond Downsizing, FORTUNE, Jan. 10, 1994, at 62.

\textsuperscript{14} See ROTHSTEIN, supra note 5, \S 1.2, at 5.

\textsuperscript{15} See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT \S 83, at 166 (1877).

\textsuperscript{16} See id. \S 116, at 220.
scribed duties differed, however, within the agricultural setting. The English rule for agricultural employees who did not possess a specific employment contract was deemed to be one year—the specified time of an agricultural season.

The United States rejected the English master and servant model, and instead adopted an employment at-will doctrine. The employment at-will standard, formally enunciated by H. G. Wood in "A Treatise on the Law of Master and Servant" in 1877, stated: "the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." The rule provides that a contract for an indefinite term is presumed to be at-will with the result that employment can be terminated at any time by either party for any reason.

B. Nature of Employment At-Will

The traditional driving force in the employment at-will pol-

---

17 See ROTHSTEIN, supra note 5, § 1.4, at 9.
18 See id.
20 WOOD, supra note 15, § 134, at 272.

"The traditional view is that the English annual hiring rule was brought to this country during colonial times and remained unchanged until the late-nineteenth century when U.S. courts adopted the employment at will doctrine." Ballam, supra note 19, at 86. Deborah Ballam, Associate Professor at Ohio State University, Fisher College of Business, argues that the employment at-will rule developed because of economic conditions: a great supply of free land, labor shortages, and high labor costs. See id. at 87-88 n.86. Workers obtained jobs to acquire capital for farms of their own and they did not want long term commitments to one master. See id. Employers, on the other hand, did not want to be locked into long term high labor costs. See id. "In addition, employers who did want permanence in their labor force used either slaves or indentured servants ... [who] would [not] have been affected by an automatic rule of annual hiring because slavery was not a contractual relationship and indentured servants had express contracts for specified durations." Id.

This analysis, however, is not the last word on the subject. There is considerable debate on the reasons for judicial adoption of employment at-will into the common law. Some scholars argue that changes in U.S. legal doctrines were influenced by the judiciary's desire to foster a favorable climate for the development of business. See id. at 77-81. Jay Feinman, a Marxist scholar, asserted that the employment at-will doctrine "is the ultimate guarantor of the capitalist's authority over the worker." Id. at 83 (quoting Jay Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 132-33 (1976)).

The reasons why courts adopted the rule of employment at-will is not critical to this Note. The consequences of the rule, however, are important.
icy is the law of contracts. When an employer-employee relationship is not determined by an express contract and there is a dispute as to an employer's right to fire an employee or an employee's right to quit, employment at-will is the "gap filler" or "default rule." "Gap-fillers" are those terms that contracting parties would have inserted in the contract had they bargained for them. In the event of a dispute between the parties, a court simply fills in the gaps within a contract (or, in this context, the employment relationship) with these "gap-fillers," the terms the parties presumably intended when making the contract. Although employment at-will has been deemed the default rule, it is debatable whether the employee would actually agree to be at-will if he or she had the knowledge and power to bargain for the terms of employment.

C. Judicial Adoption of At-Will Employment

The first judicial statement regarding the employment at-will doctrine was made in 1884 by the Supreme Court of Tennessee in Payne v. Western & Atlantic Railroad Co. All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. The sufficient and

---

21 Even where there is a contractual employment relationship, the remedy for breach cannot be specific performance because it is violative of public policy to force any person to work for another, even for compensation, because it is too much akin to involuntary servitude. See Edward Yorio, Contract Enforcement § 14.2, at 357-58 (1989).


23 See Corbin, § 4.1, at 533. "If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intentions if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left." Id.; see also Howard O. Hunter, Modern Law of Contracts, § 13.02, at 13-10 (1987).

24 Unionized employees always bargain for job security and can attain it because of the collective power of the unions. See J. Hoult Verkerke, An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate, 1995 Wis. L. Rev. 837, 890 (declaring that "[o]ne of the many distinguishing features of union employment is the fact that virtually all collective bargaining agreements include just cause protection").

25 81 Tenn. 507 (1884).
conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employees. The law cannot compel them to employ workmen, nor to keep them employed.26

United States courts followed the employment at-will philosophy almost without exception until the 1974 seminal New Hampshire case of Monge v. Beebe Rubber Co.,27 involving a worker who was fired because she resisted her foreman's sexual advances. Since that time, exceptions to the doctrine have been carved out in both federal and state anti-discrimination statutes.28 The states eventually came to recognize three major exceptions: first, breach of an express or implied promise;29 second, wrongful discharge in violation of public policy;30 and third,

26 Id. at 519-20.
27 316 A.2d 549 (N.H. 1974) (upholding the jury verdict which found that the employer acted maliciously in terminating an employee).
28 See infra text Part III-A.
29 "Under the implied contract doctrine, employer representations regarding the job security of employees and/or the manner in which termination decisions are to be made are treated by courts as enforceable, contractual provisions, even though an express contract is absent and employment would otherwise be at will." David J. Walsh & Joshua L. Schwarz, State Common Law Wrongful Discharge Doctrines: Update, Refinement, and Rationales, 33 AM. BUS. L.J. 645, 646-47 (1996). These exceptions, based on contract law, include contracts implied from employee applications, handbooks, and oral promises. See Maureen S. Binetti, The Employment-At-Will Doctrine: Have Its Exceptions Swallowed the Rule? Common Law Limitations Upon An Employer's Control Over Employees-At-Will, in WRONGFUL TERMINATION CLAIMS 1997, at 499 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5257, 1997). "Today, most states' courts have ruled that these instruments [employee handbooks] may articulate terms of employment that constitute implied contracts to which the employer is legally bound." Berta Esperanza Hernandez-Truyol, Employee Handbooks/Personnel Manuals, in WRONGFUL TERMINATION CLAIMS 1997, at 149, 163-64 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5257, 1997).
30 "The doctrine [public policy exception] recognizes that the private interests of employers may come into conflict with the public good, and that in order to effectuate public policy, it is necessary that employers be prohibited from retaliating against employees for acting as citizens ought to act." Walsh and Schwarz, supra note 29, at 646.

The types of public policy exceptions include discharges for (1) employee refusal to perform illegal actions, (2) employee reporting employer's illegal activity, (3) employee exercising personal rights under state law such as filing workers' compensation claims, and (4) performing a civic duty such as jury duty. See id. Included in this category are state enacted "whistle blower" statutes that protect employees who disclose illegal employer activity from retaliatory discharge by their employers. See Binetti, supra note 29, at 549. These whistleblowing statutes, however, vary from state to state in their level and kind of protection. See id. at 549-50.
breach of an implied covenant of good faith and fair dealing. Each of these exceptions is received by some states but not by others, therefore, the at-will doctrine is not applied with any consistency.

II. DIFFERENCES IN APPLICATION OF EMPLOYMENT AT-WILL AMONG THE STATES

The 1980's ushered in an era in which state courts began recognizing the aforementioned exceptions to the at-will employment relationship. Most states now recognize the public policy and implied contract exceptions, however, not the covenant of good faith and fair dealing. The acceptance and application of these exceptions varies considerably from state to state. The disparate enforcement of the at-will doctrine and its exceptions among the states runs the gamut from a liberalized at-will policy with several legislative exceptions in California to public policy exceptions sound in contract or tort and "find as their bases a public expression of policy that can be constitutional (federal or state), statutory, or judicially articulated." Hernandez-Truyl, supra note 29, at 165.

The implied covenant of good faith and fair dealing can sound in either tort or contract. "While this exception does not create a 'for cause' limitation to the at-will rule, its underpinnings in the parties' commitment not to do anything to impair the rights of the other result in analysis that seeks to ensure that the intent of the parties is carried out." Hernandez-Truyl, supra note 29, at 166.

The majority of jurisdictions continue to categorically refuse to accept the covenant of good faith and fair dealing with respect to at-will employment. Indeed, some extreme jurisdictions refuse to accept the covenant not only in the at-will setting, but in the entire employment context. Other jurisdictions acknowledge the covenant in the at-will setting only where the employee states another claim, such as a violation of public policy or breach of an implied contract.

Binetti, supra note 29, at 576.

See Walsh & Shwarz, supra note 29, at 647 n.7, 675.

See id. at 675.

See id.

See id. at app. I (outlining state by state the type of doctrine adopted or rejected, the cases deciding state law, and the dates of adoption of the exception). The authors observed, however, that

[Deciding whether states have recognized or rejected particular doctrines in their case law is not entirely straightforward, and there is noticeable disagreement among ... sources. These discrepancies are likely accounted for by differing dates of publication, use or non-use of federal court decisions interpreting state law, substantial ambiguities within many of the decisions themselves, and a tendency for the courts to fail to acknowledge conflicting rulings.

Id. at 647 n.7.

See, e.g., CAL. LAB. CODE § 1102 (West 1989) (titled "Employer prohibition of disclosure of information by employee to government or law enforcement agency;
a very strict enforcement policy in New York. Most states, like Michigan, are somewhere in between geographically, philosophically, and legally. An examination of the most significant developments in states on either end of the spectrum as well as those in the middle represents the range of the application of the at-will doctrine in the United States.

A. California

The California legislature codified the employment at-will doctrine in California Labor Code section 2922. However, despite this statute, the California courts decided to recognize the three common exceptions to the at-will doctrine.

1. Implied Contract

Wayne Pugh was fired by See's Candy, Inc. after thirty-two years during which he worked his way up from a dishwasher to Vice President. His career was punctuated by promotions, salary increases, and expanding responsibilities until the day he was called into the office of the President and summarily discharged without a reason. The employer asserted that Pugh was an at-will employee who could be fired at any time, for any or no reason, while Pugh countered that his employment relationship involved an implied contract requiring just cause discharge. The court held that Pugh had offered a prima facie case of wrongful termination in violation of his implied-in-fact contract because of the following: 1) plaintiff's length of service; 2) the promotions the plaintiff received; 3) the lack of any criticism suspected violation or noncompliance to federal or state law; employer retaliation); CAL. GOV'T CODE § 12653 (West 1996 & Supp.) (entitled "Employer interference with employee disclosures; liability of employer; remedies of employee"); see also infra notes 39-97 and accompanying text.

57 See infra notes 125-155 and accompanying text.
58 See infra notes 98-124 and accompanying text.
59 "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." CAL. LAB. CODE § 2922 (West 1989).

Other states that have codified the at-will doctrine include Georgia in GA. CODE ANN. § 34-7-1 (West, WESTLAW through 1997 sess.); Louisiana in LA. CIV. CODE ANN. art. 2747 (West 1996); Montana in MONT. CODE ANN. § 39-2-503 (1997); North Dakota in N.D. CENT. CODE § 34-03-01 (1987); and South Dakota in S.D. CODIFIED ANN. § 60-1-4 (Michie 1978).

41 See id. at 919.
42 See id. at 918.
regarding the plaintiff's work over the entire course of his thirty-two years; 4) assurances of continued employment by the employer; and 5) the employer's known policies. The court, thus, considered the totality of the employment relationship in determining that an implied-in-fact contract existed.

The Supreme Court of California in Foley v. Interactive Data Corp., affirmed the Pugh ruling stating "that Pugh correctly applied basic contract principles in the employment context" and that "the totality of the circumstances determines the nature of the contract." Moreover, the California Supreme Court supported an employee's "reasonable expectation[s]" of job security from oral assurances, promotions, and salary increases, as well as reliance upon personnel policies and manuals, as factors in determining whether an employee was at-will or subject only to just cause discharge. These factors extend far beyond the explicit written personnel manuals and employment applications defining factors of just cause discharge that are required for implied contracts in other jurisdictions.

The California Supreme Court revisited the issue of the wrongful discharge in violation of an implied contract in 1995 in Scott v. Pacific Gas and Electric Co. There the court reiterated its holding in Foley that the at-will presumption found in California Labor Code section 2922 could be overcome by an implied-in-fact contract based upon an "employer's course of conduct and oral representations." Thus, there is no doubt that the law in California supports an implied employment contract that may arise from the "employer's official and unofficial policies and practices."

2. Public Policy

As early as 1959, California declared a public policy excep-

---

43 See id. at 927.
44 See id. at 926-27.
45 765 P.2d 373 (Cal. 1988) (deciding that the jury could find an implied-in-fact contract from the plaintiff's employment relationship).
46 Id. at 384.
47 Id. at 388.
48 Id.
49 For an example of a strict implied contract jurisdiction, see the New York case of Weiner v. McGraw-Hill, infra notes 129-32 and accompanying text.
50 904 P.2d 834 (Cal. 1995).
51 Id. at 838.
52 Id. at 839.
tion to employment at-will in *Petermann v. International Brotherhood of Teamsters*. The plaintiff, a business agent for the defendant union, was instructed to provide false testimony before a committee of the California legislature. The union fired the plaintiff the day after he told the truth. While recognizing the statutory right of an employer to discharge an employee at any time for any reason, the court said that “[t]o hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs.” Thus, California established a public policy exception.

In 1980, the Supreme Court of California, in *Tameny v. Atlantic Richfield Co.*, interpreted the *Petermann* holding to prohibit discharge of an employee who complied with a legal duty even if not required to do so by a particular statute. The *Petermann* court rested its decision on various California statutes prohibiting perjury and the solicitation of perjury. In *Tameny*, the defendant-employer requested that the plaintiff engage in violations of anti-trust laws by coercing Atlantic Richfield Company (“ARCO”) franchised retail gasoline stations to fix prices. When the plaintiff refused, he was fired by Atlantic Richfield.

---

64 See id. at 26.
65 See id.
66 Id. at 27.
67 The court admitted that “public policy” is difficult to define but it cited case law and treatises for definitions. See id. at 27. “By ‘public policy’ is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.” Id. (citing Safeway Stores v. Retail Clerks Int’l Ass’n, 261 P.2d 721, 726 (Cal. 1953)) (quoting Noble v. City of Palo Alto, 264 P.2d 529, 530 (Cal. Dist. Ct. App. 1953)) (emphasis added). “[P]ublic policy is the principles under which freedom of contract or private dealing is restricted by law for the good of the community.” Id. (quoting 72 C.J.S. Policy, at 212 (1955)).
68 610 P.2d 1330 (Cal. 1980) (deciding that an employee could bring a tort action for wrongful discharge in violation of public policy).
69 Id. at 1333-34 (stating “fundamental principles of public policy and adherence to the objectives underlying the state’s penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act”).
70 *Petermann*, 344 P.2d at 27.
71 *Tameny*, 610 P.2d at 1331.
72 See id. at 1332.
The court held that an at-will employee who is discharged for refusing to commit an act that contravenes public policy and who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge. In both *Petermann* and *Tameny* there were no specific statutes prohibiting an employer from discharging an employee who refused to act unlawfully, but both courts recognized a rule that did not allow an employer to discharge a person who fulfilled a legal duty.

In *Foley v. Interactive Data Corp.*, the California Supreme Court restricted the cause of action for “tortious discharge in contravention of public policy” by deciding that if the disclosure of information to an employer about illegal conduct “serves only the private interest of the employer” then the discharged employee has no tort cause of action against his employer. In *Foley*, the plaintiff, employed by the defendant subsidiary of Chase Manhattan Bank, reported to his former supervisor that his new immediate supervisor was under investigation by the FBI for embezzlement at his previous job with Bank of America. The court acknowledged in a footnote that, after Foley’s discharge but before adjudication of his suit, his supervisor pled guilty in federal court to the charge of embezzlement. The court, nevertheless, concluded that the employee’s disclosure served only the employer’s interest. Since, however, this supervisor embezzled money from a national bank and was working in a subsidiary of another national bank, the court could have concluded that the disclosure served to protect the financial security of the public and to maintain the integrity of our national banking system. Instead the court held that the employee had no legal duty to disclose this information to the employer, thus, the embezzling supervisor could discharge Foley who had

---

63 See *id.* at 1336-37.
64 765 P.2d 373 (Cal. 1988).
65 *Id.* at 376 (capitalization omitted).
66 *Id.* at 380.
67 See *id.*
68 *Id.* at 375.
69 See *id.* at 375 n.1.
70 See *id.* at 380.
71 See *id.* at 375.
72 See *id.* at 380 (“Whether or not there is a statutory duty requiring an employee to report information relevant to his employer’s interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty.”).
no recourse to a cause of action sounding in tort.\textsuperscript{73}

The Supreme Court of California again addressed the question of public policy exceptions to the at-will employment doctrine in \textit{Gantt v. Sentry Insurance}.\textsuperscript{74} The court found that most public policy exceptions are grounded in an employee's refusal to violate a statute, perform a statutory obligation, exercise a statutory right or privilege, or report an alleged violation of a statute of public importance.\textsuperscript{75} The court acknowledged that, since it was difficult to precisely define public policy, the best solution was to ground public policy in legislative enactments and constitutions.\textsuperscript{76} In \textit{Gantt}, the plaintiff supported a fellow employee's allegations of sexual harassment by her manager, and testified in an interview with the Department of Fair Employment and Housing in California on behalf of the employee against the interests of the employer.\textsuperscript{77} The employer retaliated by changing Gantt's prior performance evaluation, demoting him, and not providing him with a sufficient number of accounts to perform his new position, resulting in constructive discharge.\textsuperscript{78} The \textit{Gantt} court found that this case fell within the Petermann-Tameny exception because the employee, despite coercion by the employer, testified truthfully in an administrative investigation.\textsuperscript{79}

Thus, the public policy exception to the at-will presumption recognized in California must be based upon a constitutional or statutory obligation benefiting the public at large.\textsuperscript{80} It seems that if Gantt had reported the sexual discrimination of a fellow worker to a manager so that the manager could correct the situation, but was not called to testify before an investigating public agency, his actions would not have been protected against retaliatory discharge by the employer.\textsuperscript{81} This situation seems

\textsuperscript{73} See \textit{id.} at 374.

\textsuperscript{74} 824 P.2d 680 (Cal. 1992).

\textsuperscript{75} See \textit{id.} at 684.

\textsuperscript{76} See \textit{id.} at 687-88 ("A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public.").

\textsuperscript{77} \textit{Id.} at 682-83.

\textsuperscript{78} See \textit{id.}

\textsuperscript{79} \textit{Id.} at 689.

\textsuperscript{80} See generally \textit{supra} notes 64-73 and accompanying text.

\textsuperscript{81} See \textit{Gantt}, 824 P.2d at 689. The court emphasized the need to protect employees who testify against their employer: "Nowhere in our society is the need greater than in protecting well motivated employees who come forward to testify truthfully
anomalous because it means that an employee cannot be protected for doing the "right thing" if he or she just reports wrongdoing to the employer. An employee must testify before a government organization about an employer's wrongdoing before he or she can be protected.

3. Covenant of Good Faith and Fair Dealing

In Cleary v. American Airlines, the California Court of Appeals found that there was a covenant of good faith and fair dealing inherent in all contracts, including employment contracts. The Ninth Circuit Court of Appeals in a 1988 case enunciated two different approaches for the tort of breach of covenant of good faith and fair dealing in the context of California employment law. Where an employee was terminated, the first approach considered the length of the employee's service and the expressed policy of the employer. The second recognized that an employer who breached a contract and who also denied the existence of a contract acted in bad faith and was, therefore, subject to tort liability.

In 1988, the California Supreme Court in Foley v. Interactive Data Corp., held that "tort remedies are not available for breach of the implied covenant [of good faith and fair dealing] in an employment contract to employees who allege that they have been discharged in violation of the covenant," thus, the plaintiffs had a cause of action but could not receive tort damages.

in an administrative investigation of charges of discrimination based on sexual harassment." Id.

62 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (finding the length of service and the employer's policy "operate[d] as a form of estoppel, precluding any discharge of such an employee by the employer without good cause").

63 Id. at 729.

64 See Huber v. Standard Ins. Co., 841 F.2d 980 (9th Cir. 1988) (denying summary judgment to the defendant insurance company for an alleged wrongful discharge).

65 See id. at 983-84.

66 See id. at 984 (following the Foley approach that was later reversed by the California Supreme Court).


68 Id. at 401 n.42 (stating that "Cleary ... and its progeny accordingly are disapproved to the extent that they permit a cause of action seeking tort remedies for breach of the implied covenant").
The court, however, did allow contract damage recovery for a wrongfully discharged plaintiff who could prove an express or implied contract.93 In reinterpreting its Foley decision, the California Supreme Court, in Lazar v. Superior Court,90 clarified assertions in Foley that any extension of tort remedies for an implied covenant should come from the legislature and not the courts.91 The plaintiff in Lazar claimed Rykoff induced him to enter into an employment contract with representations of the company's financial soundness and personal job security and advancement.92 Relying on these representations, Lazar quit his New York job and moved his family to California.93 Two years later Lazar did not receive the bonus compensation to which he was entitled and was discharged.94 He then brought suit against Rykoff for fraudulent inducement of an employment contract.95 The defendant employer asked the court, under a Foley analysis, to restrict the plaintiff to contract remedies.96 While granting a tort remedy in Lazar, the court distinguished Foley by stating that "Foley was a contract case in which we declined to expand the availability of tort remedies for breach of contract" while Lazar is "a tort case in which we are being asked by [the] defendant to constrict traditional tort remedies."97 Thus, tort remedies, except for a breach of covenant of good faith and fair dealing, are available for breach of an employment contract in California.

B. Michigan

Michigan recognizes a cause of action for wrongful discharge in violation of public policy as well as a limited right to an implied contract for just cause discharge based on written representations by employers. However, it completely denies any cause of action based on a covenant of good faith and fair dealing.

93 See id. at 400-01.
90 909 P.2d 981 (Cal. 1996).
91 Id. at 989 (exercising "judicial restraint" by deferring to the legislature).
92 Id. at 983.
93 See id. at 984.
94 See id.
95 See id.
96 See id. at 990.
97 Id. at 991 (emphasis omitted).
1. Implied Contract

The Supreme Court of Michigan first recognized a cause of action for wrongful discharge based on an implied contract in *Toussaint v. Blue Cross & Blue Shield*, a case combining the appeals of two separate decisions of the Michigan Court of Appeals that found opposite results on factual circumstances. The Michigan Supreme Court stated that the two cases were indistinguishable. The plaintiffs in both cases inquired into the company's job security policy before accepting their positions and the interviewers assured them that they would be employed as long as they performed their jobs. However, each plaintiff was terminated without cause after he had worked for a number of years for his employer. The court stated that it was a factual question for the jury to decide whether these employment relationships were at-will or whether they constituted contracts for employment that allowed only just cause discharge.

The court held that "an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract," even if the term of the contract is indefinite, the provision of just cause was an oral representation, or the provision was "a result of an employee's legitimate expectations grounded in an employer's policy statements." Several decisions by Michigan courts since *Toussaint* have limited its expansive holding.

In 1987, the United States Sixth Circuit Court of Appeals asked the Supreme Court of Michigan to certify the question whether an employer may change a written just cause discharge

---

53 292 N.W.2d 880 (Mich. 1980) (finding that an employer's oral assurances in hiring an employee that discharge is for just cause only is enforceable even where the contract is not for a definite term).


100 See *Toussaint*, 292 N.W.2d at 884.

101 See id. at 890.

102 See id. at 884.

103 Id. at 890.

104 Id. at 885. While both appeals were decided in the employee's favor, the court stated that Toussaint had a stronger case than Ebling because Toussaint "was handed a manual of Blue Cross personnel policies which reinforced the oral assurance of job security." Id. at 884. It was not necessary, however, for Toussaint to prove reliance on policies stated in the manual to prevail on his claim of wrongful discharge. See id. at 885.
policy to an at-will policy without having reserved the right to do so. The Supreme Court responded in the affirmative. Thus, an employee hired with specific oral and written assurances of just cause discharge may become an at-will employee at the sole discretion of the employer who subsequently issues a new handbook.

In Rowe v. Montgomery Ward & Co., the Michigan Supreme Court further limited Toussaint by finding that there must be mutual assent by the employer and the employee to a provision for permanent employment and that oral statements are “insufficient to rise to the level of an agreement providing termination only for just cause.” The Rowe court distinguished Toussaint, by stating that: 1) the plaintiff, Toussaint, inquired about job security; 2) he engaged in pre-employment negotiations pertaining to job security; 3) there was a meeting of the minds regarding the terms of his employment; and 4) since Toussaint sought a unique position, his terms of employment were specifically negotiated. Thus, in Michigan, language in an employer’s manual stating that all employees are at-will may abrogate any other language or agreements that imply a just cause discharge policy or any reasonable expectations an employee may have had based on an employer’s previous policies.

In the 1993 case of Rood v. General Dynamics Corp., the court found that an employee handbook implied a discharge for just cause only, but found that “where an employer establishes a policy of discharge for cause, it may become part of an employment contract only when the circumstances ... clearly and unambiguously indicate that the parties so intended.” The court

---

105 See In re Certified Question (Bankey v. Storer Broad. Co.), 443 N.W.2d 112, 114 (Mich. 1989) (“Toussaint modified the presumptive rule of employment-at-will by finding that a written discharge-for-cause employment policy may become legally enforceable in contract.”).
106 See id. at 121.
108 473 N.W.2d 268, 274 (Mich. 1991) (finding that an employer's handbook that sets forth an at-will relationship, if distributed to employees, is proof of employment at-will).
109 Id. at 274. While the Michigan Supreme Court limited Toussaint, the court did not overrule its prior decision. Id. at 278.
110 See id. at 276-77.
111 507 N.W.2d 591 (Mich. 1993).
112 Id. at 606 (stating that the court must use an objective test in evaluating whether an employer had a just cause or an at-will employment policy).
decided that a plaintiff's subjective belief that he had job security as a truck driver because he received assurances that he would be with the company until retirement, as an inducement for him to relinquish his seniority and accept a transfer, did not rise to the level of an implied contract for just cause discharge.\(^{113}\)

2. Public Policy

In *Sventko v. Kroeger Co.*,\(^{114}\) the plaintiff was injured on the job and was terminated after receiving short term disability payments under workers' compensation.\(^{115}\) The plaintiff claimed that she was fired in retaliation for filing a workers' compensation claim.\(^{116}\) The Michigan workers' compensation statute prohibited employers from discharging employees before they qualified for compensation but did not deal with retaliatory discharge for filing a claim.\(^{117}\) While the court found that the plaintiff was an at-will employee, it stated that an employer may not terminate an employee when the employer's reason for discharge "contravene[s] the public policy," even where a statute does not prohibit such retaliatory discharge.\(^{118}\) The court concluded that since employers benefit from the workers' compensation statute by avoiding liability for employee injuries, employers cannot use the statute's omission of a specific provision against employees by asserting a right to terminate those employees who claim benefits under the statute.\(^{119}\)

3. Covenant of Good Faith and Fair Dealing

Michigan clearly does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing for an at-will employee.\(^{120}\) The Michigan Court of Appeals, in *Cockels v. International Bus. Expositions*, 406 N.W.2d 465 (Mich. Ct. App. 1987) (deciding there is no cause of action for a breach of the covenant of good

\(^{113}\) See id. at 599-601.

\(^{114}\) 245 N.W.2d 151, 153 (Mich. 1976) (finding that an employer may not terminate an employee at-will when the reason for the discharge violates the state's public policy).

\(^{115}\) See MICH. COMP. LAWS. ANN. § 418.125 (West 1997) (stating that an employer "who consistently discharges employees within the minimum time specified ... and replaces such [workers] ... will be presumed to have discharged them to evade the provisions of this act ... ").

\(^{116}\) See Sventko, 245 N.W.2d at 152.

\(^{117}\) See id. at 154.

\(^{118}\) Id. at 153.

\(^{119}\) See id. at 153-54.

els v. International Business Expositions, stated that "an employer may terminate an employee arbitrarily and capriciously absent a violation of public policy or an agreement to the contrary." Moreover, Michigan refused to recognize a covenant of good faith and fair dealing for employees who have a guarantee of just cause discharge. However, judicial inquiry into an implied duty of good faith may be relevant when an employee may be entitled to damages for an alleged breach of a "just cause employment contract" by an employer.

C. New York

One of the strictest jurisdictions for at-will employment enforcement is New York. In 1895, the New York Court of Appeals, in the case of Martin v. New York Life Insurance Co., inscribed the doctrine of employment at-will into the law of New York. After considering the legal effect of a "general hiring," the court adopted the doctrine of Horace Wood and enforced the "inflexible" rule that a "general ... hiring is, prima facie, a hiring at will."

1. Implied Contract

Until the 1982 case of Weiner v. McGraw-Hill, the New

faith and fair dealing in Michigan).

121 Id.
122 Id.
123 See Dahlman v. Oakland Univ., 432 N.W.2d 304, 306 (Mich. Ct. App. 1988) (stating that recognition of a claim would be a "radical departure from the common law and Michigan precedent [and, therefore,] should come only from the Supreme Court").
125 See Gary Minda & Katie R. Raab, Time For An Unjust Dismissal Statute in New York, 54 BROOK. L. REV. 1137, 1209 (1989) (stating "common-law remedies for unjust dismissal have been largely nonexistent in New York for nearly one hundred years").
126 42 N.E. 416, 417 (N.Y. 1895) (rejecting the plaintiff's argument that a yearly or monthly salary mandates continued employment for the particular time period mentioned and declaring that the time period merely establishes a rate of compensation in an employment contract that remains terminable at the will of either party).
127 See id. at 417; see also supra text accompanying notes 15, 20.
128 Martin, 42 N.E. at 417 (emphasis omitted).
129 443 N.E.2d 441 (N.Y. 1982) (distinguishing Martin v. New York Life Insur-
York courts strictly adhered to the at-will doctrine and did not allow any exceptions. In Weiner, the plaintiff, relying upon various oral representations, his employment application, and the employer's handbook, claimed that he suffered from a breach of contract without "just and sufficient cause" when he was discharged. The New York Court of Appeals, considering the "totality of all ... the attendant circumstances," found that McGraw-Hill had made oral assurances in soliciting Weiner as an employee, had given him an employee handbook stating that the dismissal policy was only for cause, and had used wording on the employment application that, taken together, showed an implied contract. Weiner's reliance upon these 'promises' induced him to quit his job and to join McGraw-Hill. Thus, in New York, an employee must show that he or she received promises from the employer regarding just cause discharge and relied on these assurances in accepting employment for the court to imply an employer's guarantees to dismiss for cause only.

2. Public Policy

In Murphy v. American Home Products Corp., an accountant, an employee with a twenty-three year tenure, brought a wrongful discharge action against his employer after allegedly being fired in retaliation for disclosing corporate accounting improprieties to top management. The New York Court of Appeals held that the plaintiff was an at-will employee and the employer could fire him at any time for any reason. The court recognized that other jurisdictions allow a cause of action for terminations that violate public policy, especially where employees disclose their employer's illegal activities. The court, however, declared

ance Co. by finding it was a case that was decided in the time of laissez-faire economic and legal policy).

130 Id. at 442.
131 Id. at 446.
132 See id. at 445.
133 448 N.E.2d 86 (N.Y. 1983).
134 See id. at 90.
135 See id. at 89. Murphy, an accountant, who was obligated by the very nature of his job to report any irregularities, was fired for doing what was expressly required. This was a violation by the employer of good faith. In his dissent, Judge Meyer argued that "[t]he at-will rule was created by the courts and can properly be changed by the courts but, more importantly, ... the rule has for at least a century been subject to the 'universal force' of the good faith rule." Id. at 97; see also Verkerke, supra note 24, at 862 (noting "Murphy illustrates nothing more than the oft-repeated position of the New York Court of Appeals that employees must look to the
that any adoption of this cause of action should come from the legislature.\footnote{125}

In response to the perceived injustice in \textit{Murphy}, the New York state legislature passed a ‘whistleblower’ statute prohibiting retaliatory action by an employer against an employee who discloses an illegal employer practice.\footnote{127} The courts, however, have narrowed the scope of this law. In \textit{Easterson v. Long Island Jewish Medical Center},\footnote{138} the Appellate Division in New York upheld the firing of a nurse who refused to violate state laws by handing over the medical records of another employee to a supervisor.\footnote{139} The court held that “[e]ven assuming that the disclosure of the medical records was in violation of the cited provisions of the Education Law and regulations, the defendant’s alleged wrongdoing did not threaten the health or safety of the public at large.”\footnote{140} Even though the nurse was fired for refusing to violate state law, the court refused to give her recourse against her employer. Consequently, New York’s whistleblower law only protects employee disclosure of employer conduct that threatens public health or safety, such as environmental pollut-
ing or tainting the public blood supply. The statute, therefore, did not help Easterson and would not have shielded Murphy's ethical actions from employer retaliation.

In the 1987 case, Sabetay v. Sterling Drug, Inc., an employee, a Director of Financial Projects, brought suit against his employer claiming his refusal to participate in allegedly illegal financial activities resulted in his wrongful discharge. To overcome the presumption of employment at-will, the plaintiff claimed he was following practices required by the company's personnel manual and the "Accounting Code." The court held that "the 'Accounting Code' and statement on the employment application requiring Sterling employees to abide by company rules do not, taken together, rise to an express agreement that Sterling would not dismiss an employee for following its policies of full disclosure of business improprieties." Professional employees in New York are left to decide whether to act ethically or retain their jobs by not reporting illegal activity and thereby opening the door to professional disciplinary action or possible criminal and civil liability.

In a 1992 opinion, the New York Court of Appeals carved out an exception to the at-will rule for Skala, an associate in a law firm, who claimed that he was fired for insisting that his firm report to the appellate division violations of the Code of Professional Responsibility by another associate in the firm. The alleged violations involved the neglect by another associate of Skala's personal real estate deal. The court distinguished Murphy and Sabetay from Weider by finding that Murphy and Sabetay both worked for large corporations and had accounting responsibilities that were only part of their larger managerial jobs, whereas associates in a law firm, as duly admitted members of the bar, "remain independent officers of the court responsible in a broader public sense for their professional obliga-

142 Id.
143 Id. at 920 (citing Sterling's Code of Corporate Conduct and Internal Control Guide (together referred to as the "Accounting Code").)
144 Id. at 923.
145 See Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (finding an exception to the at-will employment for a law firm associate fired in retaliation for reporting an ethical code violation of another associate).
146 See id. at 106.
Thus, the court allowed a claim by plaintiff, Skala, for breach of contract based on an implied-in-law obligation with his employer law firm. It seems inequitable, however, for the court to carve out an exception for a lawyer that reported unethical conduct that affected him personally and financially affected him—the situation in Wieder, whereas the court in Murphy and Sabetay permitted the discharge of managerial employees who behaved ethically in the context of a corporation.

3. Covenant of Good Faith and Fair Dealing

New York has never recognized a cause of action in either tort or contract for wrongful discharge based upon a covenant of good faith and fair dealing. While recognizing that such a covenant may be found or implied in a contract, the court specifically stated in Murphy that in the at-will context, it would not make sense to imply an obligation of good faith when an employer has an "unfettered right to terminate the employment at any time."

III. PROTECTED CLASSES

Several groups of American workers receive protection from discharge by their employers: statutorily protected classes of workers, unionized workers, employees with contracts, and government employees. Although these groups have secured a measure of protection in their employment, the negative aspects of providing protection for certain persons, while leaving others in society are totally unprotected, should not be ignored. Employers are reluctant to hire persons in protected classes because it will be more difficult to terminate their employment, even for cause, in contrast to their ability to freely terminate at-will employees. Additionally, unprotected workers tend to resent those with protection. Finally, justice requires an examination of the at-will doctrine in a legal system that purports to have equality under the law for all, yet allows and enforces protection for some workers and no protection for others.

147 Wieder, 609 N.E.2d at 108.
148 See id.
149 Murphy, 448 N.E.2d at 91.
150 See Estlund, supra note 1, at 1679.
A. Classes Protected by Anti-Discrimination Statutes

In the last thirty five years, employment legislation in the United States has changed dramatically. Large powerful corporations had the financial resources to lobby Congress and the state legislatures to maintain employment at-will. Large groups of non-unionized workers, however, who wanted jobs and were excluded from obtaining and advancing in the labor market organized in the 1960's. Federal and state governments transformed the employment climate by enacting civil rights legislation that gave special status to classes of persons who were subject to past discrimination. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. Later, the Age Discrimination in Employment Act ("ADEA") outlawed discrimination on the basis of age and the Americans With Disabilities Act ("ADA") guaranteed employment opportunities to the disabled. State governments also have passed similar statutes prohibiting discrimination.

As these groups obtained jobs and a measure of financial success they were able to work toward the expansion and enforcement of those laws prohibiting employment discrimination. The National Organization for Women continuously lobbies

---

192 See infra note 155, identifying similar state statutes.

"All fifty states have enacted statutes or ordinances prohibiting employer discrimination on the basis of race, color, gender, national origin, or religion." Eric Mills Holmes, Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma In Light of The Human Genome Project, 85 KY. L.J. 503, 628 (citing MARVIN F. HILL, JR. & JAMES A WRIGHT, EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION 105-15 (1993)).
196 See generally MYRA MARX FERREE & BETH B. HESS, CONTROVERSY AND
Congress for modification of these laws and supports women in various legal battles regarding employment-related discrimination. The American Association of Retired Persons\textsuperscript{157} whose membership age requirement is only fifty, lobbied to have the ADEA revised and enforced for older workers. The National Association for the Advancement of Colored People\textsuperscript{158} and similar organizations seek enforcement of Title VII for racial minorities and have developed the power to enforce economic boycotts against corporations that discriminate.\textsuperscript{159}

Resentment of the various minority groups by the "unprotected" arises when such groups are shielded from various employment setbacks while others are still subjected to the unbridled whims of their employers.\textsuperscript{160} Minorities, including women, who are members of protected classes and who work side by side with workers who have no protection, seem to be unfairly privileged to those who have no protection and cannot bargain for protection.\textsuperscript{161} The protections, however, for women and minorities "may in fact be only an inadequate remedy for discrimination and superficial efforts by the employer to avoid litigation and liability."\textsuperscript{162} Yet, these protections create feelings of distrust and resentment among workers who have been divided into protected and unprotected classes by the law.\textsuperscript{163}

\begin{itemize}
\item[{\textsuperscript{158}}} See generally JACK GREENBERG, CRUSADERS IN THE COURTS, HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).
\item[{\textsuperscript{159}}} Corporate executives of the Texaco Corporation were accused of making racially discriminatory remarks and discriminating unlawfully in promotion practices in the corporation. The Reverend Jesse Jackson organized a nationwide boycott of Texaco oil products. See Bettina Boxall, Black Activists Press for Continued Boycott of Texaco Bias, L.A. TIMES, Nov. 17, 1996, at B3; Stephania H. Davis, Blacks Still Plan Boycott of Texaco, CHI. TRIB., Nov. 17, 1996, at 24.
\item[{\textsuperscript{160}}} See Estlund, supra note 1, at 1679 (admitting that these observations are her opinion).
\item[{\textsuperscript{161}}} See id.
\item[{\textsuperscript{162}}} See id. This Note does not advocate for the abolition of laws that try to alleviate the barriers and discrimination found in employment, but advocates for a just cause basis for discharge for all workers so that there is a basic fairness in the employment relationship. The laws that are necessary to prevent specific instances of societal discrimination and that attempt to compensate for past systemic discrimination against specific groups of workers must be retained.
\item[{\textsuperscript{163}}} There is controversy regarding the affirmative action programs in place today. See generally Deborah C. Malamud, Values, Symbols, and Facts in the Affirma-
[T]o the extent that employers see some identifiable classes of employees ... as posing the risk of a costly discrimination charge in case of discharge, a rational response is to discriminate—illegally but probably undetectably—at the hiring stage. Conversely, the antidiscrimination laws may thus increase the incentive to discriminate in hiring .... [I]t is not the antidiscrimination laws alone that generate these incentives; it is the gap between the protection those laws afford to some identifiable groups and the lack of protection that at-will affords to other groups.164

Finally, when an at-will employee in a protected class is fired for lawful, though unfair reasons, he or she may have no recourse against the employer except to sue on a protected class status.165 "So the gap between the protections of the antidiscrimination laws and the non-protections of at-will may push employees to claim discrimination in response to perceived unfairness of any kind."165 This increases the number of employment discrimination cases while not providing the true needed remedy: protection from the at-will rule.167

B. Unionized Workers

Unions represent groups of workers and negotiate with employers for benefits including but not limited to job security.168
Thus, unionized workers generally are guaranteed the right to organize and the freedom from arbitrary discharge, and they are protected from the at-will rule by a collective bargaining agreement between the union and the employer. Many groups of employees, including managerial employees, however, are specifically excluded from protection under our national labor laws. Moreover, as economy has shifted from labor intensive to service based, unions represent fewer workers. While most service industry employees work at-will without contracts, a few exceptions exist.

C. Contractual Employees

Individuals possessing special skills have the bargaining power to obtain a written contract of employment. Executives invariably can demand an employment contract. Companies that need a manager with a special talent try to lure individuals from their current jobs by offering not only salary incentives but also guaranteed compensation and a specific term of employment. Sales personnel who have loyal clients and who work on commission have the ability to bargain for their terms of employment. Additionally, individuals possessing unusual skills

---


171 The emphasis [in corporate hirings] now has to be placed on identifying good managers, developing them and keeping them as long as possible.” JOHN TARRANT, PERKS AND PARACHUTES 23 (1997) (describing the reasons for executive contracts and the process of negotiating them).

172 Self-protection is the fundamental reason why employers ask employees to sign contracts. The company wants to be protected against the employee's revealing confidential information or becoming a competitor. The company also wants to be protected against 'corporate anorexia,' the talent-starvation that can be a side effect of downsizing and intensive cost-cutting. See id. at 75. Some of the contract guarantees for an employee may be profit sharing, bonuses, stock options, life and health insurance, retirement qualification, and penalties if the company decides to terminate the contract early. See generally id. at 29.

173 See ROTHSTEIN, supra note 5, at § 9.2.
can demand employment contracts if such skills are in great demand but short supply.\textsuperscript{176} If the employee's contract term is for a specific period of time he or she cannot be discharged except in accordance with the terms of the contract. It seems, however, that those persons who do not have special skills, experience or education and, those who cannot bargain for a contract, need protection from their employer, who perceives them as merely dispensable inputs to production of a commodity or service.

\section*{D. Government Employees}

Federal, state, and local government workers, known as civil servants, enjoy protection from arbitrary discharge by the government\textsuperscript{176} and a merit system rather than political patronage determines promotion in their ranks.\textsuperscript{177} State government employees have a property right in their jobs guaranteed under the Fourteenth Amendment.\textsuperscript{178} The question, thus, that arises is why one group of workers should have a property interest in their jobs while another group has none.\textsuperscript{179} While it might be argued that civil servants need job protection, including property rights in their jobs, because of possible changes in elected political leadership, there is comparable risk in the private employ-

\begin{itemize}
\item \textsuperscript{176} See id.
\item \textsuperscript{178} See 5 U.S.C. § 7503 (1994) (requiring the government to give employees notice for suspension and a reasonable time to respond). Federal or state employers are specifically excluded from coverage under the National Labor Relations Act, see 29 U.S.C. § 152(2) (1994).
\item \textsuperscript{179} See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (stating that in the area of state public employment, a tenured college professor has a property interest in continued employment under the U.S. Constitution's Fourteenth Amendment procedural due process guarantees); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (stating that the Ohio statute requiring just cause for termination of state employees and an administrative review of discharge created a property interest protected by the U.S. Constitution due process requirements).
\item \textsuperscript{180} At-will employees have no property interest in their jobs and some at-will employees are not protected if they try to organize. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (excluding managerial employees from the coverage of the National Labor Relations Act); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (excluding full-time university faculty members who have decision making authority from coverage under the NLRA).
\end{itemize}
ment sector where managers can promote their friends or corporate takeovers result in job survival for the corporate winners who may not necessarily be the best employees.

IV. POSSIBLE REMEDIES FOR THE UNFAIRNESS OF EMPLOYMENT AT-WILL

The at-will presumption favors employers because they have superior knowledge, resources, and access to the law and to the labor markets. The courts responsible for the common law at-will doctrine, nevertheless, assert that if the at-will presumption needs modification, the change should come from the legislature. Thus, the courts are unwilling to change the rule and the state legislatures, despite years of court decisions stating change must come from the legislature, also have refused to make any changes. Employers continue to use the at-will presumption to terminate unprotected employees for any reason. The situation of discharge for cause only or a type of limited guaranteed employment in which both employers and employees are winners presents a worthwhile alternative to the harshness of employment at-will, but it must come from another source: the federal government.

A. Just Cause Discharge As a "Gap-filler"

As previously noted, when a default rule or gap-filler is used in contracts, the court imposes a meaning in the contract that the parties would have wanted if they could have or would have

---

180 See, e.g., Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983); supra note 136 and accompanying text. But cf. J. Wilson Parker, At-Will Employment and the Common Law: A Modest Proposal To De-Marginalize Employment Law, 81 IOWA L. REV. 347, 355 n.33 (1995) (stating "[i]t is disingenuous for a court to shrink from declaring the public policy of a state in the absence of legislation when it blithely does so if that policy favors employers. The presumption of employment-at-will and its development into a 'rule' is entirely judge-made law"); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) (stating that "[b]ecause the courts are a proper forum for modification of the judicially created at-will doctrine, it is appropriate that we [the courts] correct inequities resulting from harsh application of the doctrine") (citation omitted).

181 "A reversal of traditional employment-at-will practices could go a long way toward inducing greater commitment to the organization and its real-world problems among professional employees." Joseph A. Raelin, Job Security for Professionals, PERSONNEL, July 1987, at 41. “[C]ommitment to job security will be viewed as a commitment to the individual, who will probably respond in turn with increased loyalty to the company." Id. at 42.
contracted for it. In the employment context, at-will is the gapfiller. Thus, the law presumes that if the employer and employee had negotiated for the terms of their contract, they would have wanted employment at-will. It seems unlikely, however, that an employee with free choice would agree to be fired for any or even no cause simply at the whim of his or her employer. If an employee could bargain, however, logic indicates that he would not bargain away job security unless the employer offered some very exceptional compensation.

Unfortunately, state courts have not adopted just cause as a gapfiller in the employment relationship. Furthermore, state legislatures have not passed legislation changing the judicial at-will presumption, although advocates have clamored for decades for relief from the harshness of the rule.

B. Existing Statutory Remedies

The Montana Wrongful Discharge from Employment Act and the Model Employment Termination Act are two statutory remedies open to examination.

In 1987, the Montana state legislature passed the Wrongful Discharge from Employment Act ("WDEA") that preempted all

182 Courts imply the default contract term that parties would insert in the contract were they bargaining without costs and with full information. See CORBIN, supra notes 22 and 23 and accompanying text.

183 See Verkerke, supra note 24.

184 See Frantz, supra note 1, at 559.


of Montana's common law decisions and statutorily adopted the employment at-will concept with three express bases for a wrongful discharge action. First, reporting of an employer's violation of public policy is a protected employee activity. Second, the employee cannot be terminated except for "good cause" after completing his or her probationary term of employment. Third, the employer is held to the terms of his or her own written personnel policies and may not violate them in discharging an employee. The law limits damages for wrongful discharge to four years compensation and does not permit punitive damages, except where the employee can prove that the employer used malice or fraud, and does not allow any other damages under any other legal theory. The statute advocates alternative dispute resolution to settle termination claims and employs the award of costs and lawyer's fees as an inducement to the parties to arbitrate not litigate. When arbitration is agreed to by both parties, it becomes the employee's only remedy.

At first glance, the statute seems to provide a remedy for wrongful discharge, however, it should be noted that the law codified employment at-will. The Montana judiciary has re-

---

189 See id. § 39-2-904 (1). This is the whistleblower protection.
190 Id. § 39-2-904(2). "'Good cause' means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4)." Id. § 39-2-903.
191 See id. § 39-2-904(3). Where an employer has written policies about discharge procedure, the employer must give the employee notice and a written copy of the policy within seven days of the discharge. See ROTHSTEIN, supra note 5, § 9.20, at 566.
192 See MONT. CODE ANN. § 39-2-905 (1997). This is seen as a negative provision for older discharged workers who, because of their age, cannot find a new job and thus may remain unemployed. "Indeed, in some cases workers in their forties and fifties may experience an extremely lengthy period of unemployment, particularly in the occupational fields in which they may have devoted most of their working careers." Robinson, supra note 186, at 421-22 n.331 (citing M. Scott Regan, Tonak v. Montana Bank: Preemption, Interpretation, and Older Employees Under Montana's Wrongful Discharge from Employment Act, 56 MONT. L. REV. 585, 599-602 (1995)).
194 See id. § 39-2-914. "A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer." Id.
195 See id. § 39-2-902. The statute states in pertinent part "[e]xcept as limited in this part, employment having no specified term may be terminated at the will of ei-
verted to pre-statute cases with a subjective standard of good faith to interpret the new law.\textsuperscript{196} In\textit{Cecil v. Cardinal Drilling Company},\textsuperscript{197} the Supreme Court of Montana, interpreting the WDEA, relied on case law decided prior to the Act to interpret the Act's definition of "legitimate business reason."\textsuperscript{198} Although the employer asserted that falling prices of crude oil required a reduction in the work force, the plaintiff, a fifty-seven year old executive vice president, showed that his performance was without blemish and that the defendant employer hired a new person to fill plaintiff's job within eight months of plaintiff's termination.\textsuperscript{199} Justifying its grant of summary judgment to the employer, the court stated that "an employer is entitled to be motivated by and serve its own legitimate business interest and must be given discretion [regarding] who it will employ and retain in employment."\textsuperscript{200} Thus, the Act, by eliminating employees' common law tort and contract causes of action and remedies, limiting compensation, and placing the burden of proof on the plaintiff who has little access to the necessary employer documents,\textsuperscript{201} the Act provides less protection for the at-will employee than former common law remedies. Scholars, moreover, looking at the legislative history of the Act, argue that the statute was not passed to protect employees from the harshness of the at-will rule but was proposed and promoted by Montana's big business

\textsuperscript{196} See Parker, supra note 180, at 373 (stating "the Montana Supreme Court erased any hopes of the employee that the statute would provide more protection").

\textsuperscript{197} 797 P.2d 232 (Mont. 1990) (granting summary judgment to an employer who offered a legitimate business reason for the employee's discharge).

\textsuperscript{198} Id. (citing Coombs v. Gamer Shoe Co., 778 P.2d 885, 887 (Mont. 1989); Hobbs v. Pacific Hide & Fur Depot, 771 P.2d 125, 130 (Mont. 1989); Flanigan v. Prudential Fed. Savs. & Loan Ass'n, 720 P.2d 257, 261 (Mont. 1986)). See Buck v. Billings Mont. Chevrolet, Inc., 811 P.2d 537, 540 (Mont. 1991) (defining "legitimate business reason" as "a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business").

\textsuperscript{199} Cecil v. Cardinal Drilling, 797 P.2d at 233.

\textsuperscript{200} Id. at 234 (citing "well-settled ... case law prior to the Act that economic conditions constitute a 'legitimate business reason'").

\textsuperscript{201} See Kestell v. Heritage Health Care Corp., 858 P.2d 3, 8 (Mont. 1993) (stating that an employee has the burden of giving the jury evidence that the employer's reasons for termination were "false, arbitrary or capricious, and unrelated to the needs of the business") (citing Cecil v. Cardinal Drilling Co., 797 P.2d 232, 235 (Mont. 1990)).
lobby that sought relief from the large wrongful discharge settlements of the 1980’s.202

The National Conference of Commissioners on Uniform State Law drafted the Model Employment Termination Act203 in 1991 for proposed state adoption. The Act would extinguish all common law rights and claims of employees against their employers for wrongful termination and would substitute the statutory remedy of good cause discharge after a probationary employment period of one year. Good cause under the Model Act would include “both employee-specific reasons and good faith business judgment reasons,”204 such as shutting down an operation on economic or institutional grounds, but not singling out a particular employee for termination in a general layoff.205 The provisions of the Act would be enforceable through arbitration206 which can award reinstatement, back pay, a lump sum severance pay, and attorney’s fees and costs. The Act permits waiver of the good cause requirement when the employer and employee agree to a liquidated damages provision of one month’s severance pay for each year of service.207

Although the Conference drafted the Model Act for consideration by all the states and the District of Columbia, none have

---

202 See Regan, supra note 192, at 585 (asserting that the Montana legislature passed the WDEA to eliminate large employee awards and costly marginal claims as well as to put certainty into employment law in view of the “Montana Supreme Court’s unpredictable interpretation of the implied covenant of good faith and fair dealing”).


204 ROTHSTEIN, supra note 5, at § 9.20.

205 See id.

206 The critical feature of the Model Act is its creation of an across the board good-cause requirement for termination after one year of employment, enforceable through an arbitration mechanism that is authorized to impose reinstatement as a remedy for a wrongful discharge.” Issacharoff, supra note 1, at 1791 n.28.

adopted it. Instead, the Act has been the subject of much criticism. One criticism is that all of an employee's common law rights are extinguished by the Model Act, thus reducing the employee's protection from at-will discharge. Others question the limitation of damages and argue that the limitation on damages paid by the employer does not provide a deterrence against employer wrongful conduct in the future. A third line of criticism argues against using reinstatement as a favored remedy. In addition, the Model Act is merely a suggested law, which could be adopted differently, if at all, in each of the fifty states and thus it does not alleviate the at-will burden on employees.

The enforcement provisions of the Montana WDEA and the Model Act favor employers over employees, and therefore, are not remedies that should be chosen over the common law protections available in those states that liberally construe employee rights.

C. Limited Guaranteed Employment

Because employers are free to hire or terminate workers at-will, they tend to be less than careful in their hiring, retention, and firing practices. When employers are held only to a standard of "legitimate business decision," any decrease in profits,

---

203 See Dawn S. Perry, Comment, Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act, 67 WASH. L. REV. 915, 915 (1992) (proposing a punitive damages provision to deter an employer's "egregious violation of public policy").

204 Under traditional tort law, we readily compensate victims of legally recognized torts for physical injuries and accompanying pain and discomfort .... Under the Model Act, a wrongfully discharged employee can recover nothing for the physical and/or psychological harm she has suffered. Her recovery is limited to little more than a few dollars back pay. Under the Act, it is the victim of the employer's wrong who bears the non-wage costs of the employer's act, not the employer.


210 See id. at 916.

211 Generally, reinstatement should not be favored for many of the same reasons that the common law will not order specific performance of employment contracts." Id. at 920.

212 This Note's proposed model envisions employer-employee cooperation and trust with congruent goals rather than the union-management adversarial model encompassed in U.S. labor relations statutes. See Roger E. Alcaly, Reinventing the Corporation, N.Y. REV., Apr. 10, 1997, at 45 (discussing changes needed to the National Labor Relations Act to allow employer-employee cooperation in non-union companies).
demand for a product, or general economic change can be used to justify the discharge of workers, even long-term productive ones.\textsuperscript{213}

If companies were held to a higher standard, such as just cause discharge, their focus on employment decisions would be sharper and they would more carefully select, train, and develop the skills of their employees.

1. Advantages

First, if employers were not free to fire employees at any time for any reasons they would be more selective in recruiting workers, which in turn would reduce their costs of turnover\textsuperscript{214} and the retraining of new hires. Second, a probationary period in which the employee and employer get to know each other would be an important part of a limited guaranteed employment program.\textsuperscript{215} This probationary period with no obligation on either party has an advantage over contract employment where both parties legally commit to a term of employment and financial penalties even before the term begins. Third, the emphasis on retention of workers leads to very positive results for the employer, the employee, and the economy.\textsuperscript{216} For example, employers will try to develop employee corporate loyalty and will be more willing to invest in training and development for employees who are committed to the company.\textsuperscript{217} Moreover, employee

\begin{footnotes}
\item[213] As companies have delayered, restructured, and downsized, employees who were already feeling distanced and detached have become more disillusioned and even cynical. Too often, layoffs have been the aftermath of grand corporate visions that promised personal opportunities. Companies tout the 'partnerships' they have with their organization's members, then shower them with pink slips. It's not surprising that employees are unlikely to commit to new goals or values until they're convinced that the future holds new opportunities for them. Christopher A. Bartlett and Sumantra Ghoshal, \textit{Changing the Role of Top Management: Beyond Strategy to Purpose}, \textit{Harv. Bus. Rev.}, Nov.-Dec. 1994, at 87.
\item[214] See Gillian Flynn, \textit{Attracting the Right Employees - and Keeping Them}, \textit{Personnel J.}, Dec. 1994, at 44 (discussing steps, including selective recruiting and training for new employees, that companies such as Texas Instrument, Corning Inc., Deloitte & Touche, and Hallmark have taken to reduce turnover).
\item[215] A probationary period, for example, is provided for in Montana's WDEA. See \textit{Mont. Code Ann.} § 39-2-904(2) (1997).
\item[216] See Henkoff, \textit{supra} note 13, at 62-64 (discussing the positive effects of restructuring jobs rather than laying off employees, on the economy and in the workplace, as evidenced by experiences of such companies as R.R. Donnelly, Raychem, and Honeywell).
\item[217] See \textit{id.} at 62-64.
\end{footnotes}
“[p]articipative, entrepreneurial, and risk-taking behavior seem to flow from a sense of [job] security.”218 Employers will find employees making more contributions and innovations in the work place when employees realize that they are valued in the corporation and have a secure position.219

Some effective methods in limiting discharges include job posting,220 transfer of employees to another geographic location if they have no job opening in the present location,221 and the use of part time help in good times to limit the additions to the workforce.222

2. Disadvantages

First, in the short term, it is more expensive for companies to spend extra time and money on recruiting and hiring the best employe...
workers for the job openings. Second, companies view just cause discharge or limited guaranteed employment as less flexible. They can no longer hire to meet short term demands and then lay off workers when demand slackens. Companies believe that it becomes difficult to terminate workers who perform at a mediocre level. Third, companies believe that workers whose jobs are “guaranteed” become complacent, lack creativity, and are unmotivated. Companies assume people need an ultra-competitive atmosphere to attain high job performance and advancement.

3. The Reality

Companies point to the problems with civil service workers who appear unmotivated because their jobs and salaries are guaranteed whether they perform well or poorly and to increased costs of production for unionized workers whose jobs are not subject to at-will discharge. The real problem, however, is that even where employees are motivated, work diligently, and advance, they can be terminated at any time for no reason in an at-will world.

In reaching their evaluation of motivation in a proposed just cause discharge world, companies overlook profit motive as a key factor. If companies were obligated to give their employees job security, they would adapt their management techniques to obtain all the advantages listed above because they would want to

---

223 See Alex Markels and Matt Murray, Slashed and Burned, WALL ST. J., May 14, 1996, at A1 (estimating that it costs fifty thousand dollars to recruit and train a managerial or technical worker).

224 See ARCHIBALD COX ET AL., LABOR LAW 999-1002 (12th ed. 1996) (discussing the evolution of employment policies and contrasting the vast numbers of “unemployed waiting at the gate” in 1900 with protected status of unionized workers today).


226 See Raelin, supra note 181, at 40. Guaranteed employment is so highly valued in the union sector that unions have routinely made “wage, benefit, and work-rule concessions for no-layoff provisions.” Id.

227 See Kent R. Davies, Is Individual Responsibility A Radical Idea in American Business?, TRAINING, Nov. 1988, at 63 (opining that the disappearance of the American work ethic is due to the worker perception that they are dispensable commodities regardless of their performance).
stay in business and make a profit. Motivators such as incentive bonuses, compensation related to production, and advancement tied to individual performance will encourage employees to increase their productivity and improve their skills. Moreover, many companies, especially large manufacturing companies, have been unionized for decades and are still in business. They handle their employee relations and job security through a collective bargaining agreement and arbitration.

4. A Model: Lincoln Electric

Lincoln Electric Company, established in 1895 and headquartered in Cleveland, Ohio, is the world's largest manufacturer of arc-welding equipment. The history of the company demonstrates an attitude of caring for employees both in training them to perform excellently on the job and in giving them life-enhancing benefits. Lincoln Electric provided employees with a paid life-insurance policy in 1915, an association for health benefits in 1919, two weeks paid vacation yearly in 1923, a suggestion system in 1929, a profit-sharing bonus plan in 1934, and a no-layoff policy in 1959.

Lincoln hires new employees with extreme care. The turnover rate in the first three months during a probationary period is twenty percent, however, after probation, long-term turnover

---

229 One such motivator may be cooperation throughout the business cycle. While employees are guaranteed job security they will share profits in good times but also be obliged to cut back on compensation in lean times. See generally Raelin, supra note 181.
231 "The higher productivity [in unionized establishments] is due in part to the lower rate of turnover under unionism, improved managerial performance in response to the union challenge, and generally cooperative labor-management relations at the plant level." Cox, supra note 224, at 91 (citing a 1984 study by R. Freeman and J. Medoff, What Do Unions Do?).
232 See Raelin, supra note 181, at 46.
233 See Hastings, Role of Incentives, supra note 10, at 137 (discussing founder James J. Lincoln's endorsement of a management system that promotes employee efficiency and results in employees who "work ... enthusiastically, have fun at their jobs, and ... [who are] loyal and secure").
234 See Wiley, supra note 230, at 88.
235 See id. at 87. Workers accustomed to conventional benefits such as paid holidays or sick days, seniority preferences for promotions or reserved parking spots need not apply for employment because Lincoln's merit-based system includes none of these traditional perks. See id.
is an extremely low two percent. Lincoln constantly retrains its employees so that they not only can do their own jobs, but also can rise to higher skilled and better paying jobs in the future. Thus, Lincoln encourages promotion from within its own ranks. Lincoln values the work experience of its employees, which is evidenced by the fact that one-third of Lincoln's employees have worked there for more than twenty years.

A major thrust of strategic policy at Lincoln Electric is promoting guaranteed employment "[n]ot as a right or entitlement, but as a reward, a mutually beneficial agreement that tightens the bond between the company and the employee, recognizing the value of good hard work and loyalty, and advancing the prospect for further contributions in the future." While not guaranteeing absolute lifetime employment, the company does guarantee that any employee with three years of service will work at least thirty hours per week, regardless of how slow business might be. Lincoln uses incentive bonuses, piecework pay, and compensation tied to individual production. Each employee must take responsibility for his or her own work. Any component that is returned by a customer goes back to the original employee who worked on it. Lincoln then requires this employee to fix the component on his or her own time without any compensation; thus, there is a great incentive to do quality work the first time.

Chairman of the Board and CEO of Lincoln Electric, Donald Hastings, said in a recent speech that "[t]he only way we'll have

\[
\begin{align*}
\text{See id.} \\
\text{The company has 94 different training programs to prepare people "to do a better job for themselves and the company." Hastings, Guaranteed Employment, supra note 8, at 692.} \\
\text{"The firm posts all promotional opportunities (including many senior positions), and bases promotions on merit only." Wiley, supra note 230, at 87.} \\
\text{See Hastings, Role of Incentives, supra note 10, at 138.} \\
\text{"Lincoln guarantees work to employees with three years' experience. No one has been laid off since 1948, and turnover is less than 4% among those with at least 180 days on the job." Zachary Schiller, A Model Incentive Plan Gets Caught in a Vise, BUS. WK., Jan. 22, 1996, at 89.} \\
\text{Hastings, Guaranteed Employment, supra note 8, at 692.} \\
\text{See Wiley, supra note 230, at 90.} \\
\text{See Hastings, Guaranteed Employment, supra note 8, at 693.} \\
\text{See Wiley, supra note 230, at 89 (discussing the quality assurance department's function of identifying and returning defective parts to the responsible employee as an integral part of the employee's twice yearly review).} \\
\text{See Davies, supra note 228, at 65.}
\end{align*}
\]
any kind of widespread job security in today’s business environment is if we change our thinking as to what makes good management. Instead of praising corporations that downsize, we need to look at their actions as admissions of failure, which is what they really are.\footnote{Hastings, Guaranteed Employment, supra note 8, at 693. But see Norman Halpern, Introduction: Challenges In Human Resources Utilization and the Impact on Other Stakeholders From Globalization, Technological Advances, Restructuring, and Downsizing, 22 CAN.-U.S. L.J. 309, 309-10 (stating that the other view is that “downsizing, whether it be driven by restructuring, re-engineering, technology, merger, or deregulation, is a sound, long-term strategy with due consideration for the victims [and] [t]his helps a company compete effectively in the global economy or in some cases even survive”).}

Lincoln Electric has prospered with guaranteed employment for its workers, has double the productivity rate of workers in comparable businesses, and has satisfied customers.\footnote{See Hastings, Role of Incentives, supra note 10, at 137-38.} In 1996 Lincoln had its forty-eighth consecutive year of operating without a single layoff.\footnote{See id. at 137.} Even in 1992 when an expansion in Europe created corporate losses and pressure to layoff workers, management resisted because they thought “it would destroy trust on the part of [their] people.”\footnote{Id. at 138.} Instead, Lincoln used the creativity and skill of its workers to find ways to cut costs and increase production.\footnote{See id.; see also Wiley, supra note 230, at 91. Ten years earlier when demand lagged behind production, Lincoln recruited fifty-four factory workers for the sales force. See id. The experiment paid off handsomely, resulting in ten million dollars in new sales. See id.}

Lincoln Electric has a specific corporate culture that is dedicated to a limited guaranteed employment with a specific incentive system.\footnote{See generally Hastings, Guaranteed Employment, supra note 8.} The Lincoln Electric model provides proof that guaranteed employment can be a workable, highly successful program when the management of a company commits itself to the concept. Companies, however, have shown reluctance to change on their own and have resisted change even when challenged by models like Lincoln Electric.\footnote{See Alcaly, supra note 212, at 44-45 (stating “[w]hat is clear is that management opposition to collaborative arrangements is widespread ... [and] limited government action could help overcome these barriers”).} Clearly, any change in the use of at-will employment will not be voluntary.
5. Proposed Federal Remedy

This Note proposes a federal statute that will require a just cause standard for termination of any permanent employee. The exact formulation of the statute, while beyond the scope of this Note, could be modeled on federal anti-discrimination statutes like Title VII. It would not be one akin to Montana's statute that codifies the employment at-will standard but rather a statute that codifies just cause discharge. The Commerce Clause of the United States Constitution certainly gives the Congress the right to legislate in this area. Small local and state businesses could be exempt as they are in Title VII. Moreover, since states have followed the federal government in prohibiting discrimination, it is reasonable to believe that states would adopt laws similar to a federal law for just cause discharge.

A probationary period of employment that allows an at-will termination should be permitted. However, after a reasonable time period set for probation the just cause standard should apply. The statute should require the employer to prove that he or she had just cause to terminate an employee because the employer is the party who has access to the documentation necessary for proof. The burden of persuasion should remain with the employer.

Employers and employees would not be permitted to con-

---

There are a number of scholars who have proposed federal statutes for just cause discharge. See Ann C. McGinley, Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy, 57 OHIO ST. L.J. 1443, 1509-24 (1996) (proposing a statute similar to the one in the Virgin Islands that requires just cause discharge after a probationary period); Sprang, supra note 209, at 921 (proposing a federal statute modeled on Title VII requiring just cause discharge). But see Parker, supra note 180, at 405 (arguing for expanded judicial protection for at-will employees under tort and contract law interpretation).

See supra notes 188-200 and accompanying text.


See supra note 155.
tract around the just cause discharge requirement just as they cannot contract around the ERISA benefits requirements or the OSHA worker safety requirements. Temporary and part-time employees, however, could be exempt from the statute.

To make the discharge adjudication process efficient, the statute could provide for arbitration, a hearing before a Commission such as the EEOC, and appeal to federal court. Remedies should include back pay and benefits, reinstatement, if the employee wishes, arbitration costs to be paid by the employer, and punitive damages for an employer's egregious violation of public policy.

Above all, the statute should promote all reasonable efforts to afford a hard working employee the job security that is needed and deserved over his or her lifetime.

CONCLUSION

State court judges, given the time and opportunity, have not changed the employment at-will doctrine and have stated that the legislatures should effect any modification of the law. State governments have refused to change the at-will presumption and several states have even codified the rule. While the common law in many states recognizes exceptions to at-will employment, there exists little consistency in doctrine or application from one state to the next. At the same time, employers, adopting adversarial and hierarchical management models, have adhered to the convenience of at-will employment. The federal government through legislation has given employment protection to numerous groups of workers including federal employees, union members, and persons subject to past discrimination on the basis of race, sex, color, religion, national origin, disability, and age. The result is that some workers have job security, some workers have legal job protection from unlawful discrimination, and some workers are totally unprotected. Since there are no other avenues available for change, it is time for the federal government to remedy the inequity of the employment at-will doctrine with appropriate legislation.

Kathleen C. McGowan*

* The author wishes to express her gratitude to Professor Susan J. Stabile for her guidance and encouragement.