

RETALIATORY DISCHARGE AND VERMONT'S NEED FOR AN EXCEPTION TO THE "RULE"

INTRODUCTION

In Vermont, approximately sixty percent of the employed work force presently lacks adequate protection against unjust discipline by their employers.¹ This phenomenon is directly attributable to long-standing acceptance² of the employment at-will doctrine.³ Under this doctrine, an employer may dismiss his employee for good cause, no cause, or even bad cause.⁴ Until recently, this rule was applied throughout the country to legitimize the dismissal of an employee for any reason.⁵ With society's increasing emphasis on employee job security, the courts have intervened to restrict the legal validity of the employment at-will rule and to alter the traditional relationship between an employer and an employee.⁶ This

1. See *infra* notes 26-29 and accompanying text. See also, U.S. BUREAU OF LABOR STATISTICS, *DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS* 1975, at 73-76, Tables 18 and 19 [hereinafter cited as *Directory of National Unions*]; see also, U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1982-83 [hereinafter cited as *STATISTICAL ABSTRACT*] (the *STATISTICAL ABSTRACT* provides a breakdown of Vermont's employment force into such categories as non-agricultural, state and local government employees, teachers, and union membership).

2. See *infra* text accompanying notes 20-29.

3. This Note uses the term "at-will" to encompass a number of situations including oral agreements, letters or memoranda, and written contracts with an express at-will term of duration.

4. See *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915):

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employee at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

81 Tenn. at 518-19. *Payne* is the most frequently cited case in support of this rule.

5. See, e.g., *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Laiken v. American Bank & Trust Co.*, 34 A.D.2d 514, 308 N.Y.S.2d 111, 112 (1970); *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594, 595 (Ala. 1980); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 466, 590 P.2d 513, 514 (1978); *Somers v. Cooley Chevrolet Co.*, 146 Conn. 627, 629, 153 A.2d 426, 428 (1959); *Wynne v. Ludman Corp.*, 79 So. 2d 690, 691 (Fla. 1955); *West v. First Nat'l Bank of Atlanta*, 145 Ga. App. 808, 809, 245 S.E.2d 46, 47 (1978); *Atwood v. Curtiss Candy Co.*, 22 Ill. App. 2d 369, 371, 161 N.E.2d 355, 357 (1959); *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 117, 435 A.2d 952, 953 (1981).

6. See Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer*, 35 VAND. L. REV. 201, 203 (1982). A number of state courts have adopted public policy exceptions to the at-will doctrine. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353

note proposes that Vermont adopt a statute which protects these at-will employees from arbitrary dismissals by their employers. Not only would this statute clearly articulate the statutory protections available to these employees, but it would also counter the stagnant judicial doctrine to which the Vermont courts cling.

The work force in this country can be separated into two classes: those individuals employed in the public sector and those employed in the private sector. Public employees work under contracts that contain civil service provisions which generally allow discharge of a public employee only for just cause.⁷ Constitutional protection from unjust dismissals is also granted to public sector employees.⁸ Similarly, private sector employees covered by collective bargaining agreements are usually shielded from arbitrary terminations by "just cause" clauses in contracts negotiated by their unions.⁹ However, those employees in the private sector who lack such contractual protections do not receive the safeguards enjoyed by public or unionized employees. Instead, these private employees must individually negotiate their employment contracts should they desire assurances against an unjust dismissal. Finally, there are those workers who are employed, but not covered by a contract

(1978); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). These courts have focused on four types of public policy exceptions when scrutinizing the discharge cases. They are: 1) discharges for refusing to violate a criminal statute, 2) discharges for exercising a statutory right, 3) discharges for fulfilling a statutory duty, and 4) discharges in violation of a general public policy.

Under certain circumstances it becomes important to know whether a separation from employment was actually a discharge or whether it was a layoff or voluntary termination. The distinguishing element is that the employer intends to rehire the laid-off employee. If the employer fails or refuses to rehire, the layoff becomes a discharge. The essential feature of a discharge is that the employer must take affirmative action by communicating it to the employee in words which indicate that the employer intends to sever the employment relation completely.

7. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter cited as Note, *Protecting At Will Employees*]. Federal civil service employees are protected under the Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. § 7503 (1982). At the state level, see N.Y. CIV. SERV. LAW §§ 75-76 (McKinney 1973 & Supp. 1983-84) (protected employees cannot be dismissed from their job except for incompetency or misconduct demonstrated by way of a hearing); VT. STAT. ANN. tit. 3, §§ 901-1007 (1972 & Cum. Supp. 1983) (prescribes legitimate rights of Vermont state employees and protects the rights of individual employees in their relations with labor organizations).

8. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972) (both decisions relied on constitutional guarantee of due process under the 5th Amendment).

9. See Note, *Protecting At Will Employees*, *supra* note 7, at 1816.

of any sort. It is this group which forms the great bulk of employees who need this statute. Without this protection, it is probable that the court will find the employment relationship to be terminable at will.¹⁰

Two instances in which an employee's contract¹¹ is terminable at will include: a contract which clearly states it is terminable at will, and a contract which fails to mention that it is for a definite period. In the latter instance, the employment at-will rule is likely to be invoked. Essentially, the rule specifies that an employment contract for an indefinite duration is regarded as a contract terminable at will by either party unless some other provision in the contract expressly limits the right of either party to terminate.¹²

The courts have formulated certain exceptions to this traditional rule in both tort¹³ and contract¹⁴ law. Some courts have cre-

10. See *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 117, 435 A.2d 952, 953 (1981) where the supreme court stated: "[A]n employment contract at will may be terminated by either party, at any time, *with or without cause.*" (emphasis added); see also notes 143-59 and accompanying text.

11. The term "employee contract" is used here to connote an agreement between the employer and employee which creates an obligation on either party.

12. The doctrine of at-will employment is defined in the *Restatement (Second) of Agency* § 442 (1958) as follows: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." See also, 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1017, at 129-30 (3d ed. W. Jaeger 1967).

Several courts have held that an employment contract is terminable at will and have not recognized a cause of action in such cases. See, e.g., *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234 (S.D.N.Y. 1979) (an improper motive does not serve to make an otherwise lawful act unlawful; employees at-will failed to state cause of action in alleging that they were terminated by employer in a cover-up of a kickback scheme); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979) (bad faith, malice, and retaliation as alleged motives for discharge not sufficient to substantiate a clear and compelling policy when there is none); *Criscione v. Sears, Roebuck & Co.*, 66 Ill. App. 3d 664, 384 N.E.2d 91 (1978) (to equate legitimate business reasons with public policy and good faith, and to allow an action by a dismissed employee against his employer solely on that basis, would destroy the mutuality of obligation that exists in an employment at-will relationship); *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976) (liability cannot be predicated only upon characterization of the employer's conduct as malicious).

The gravity of the employees' situation is exemplified when one contrasts these judicial decisions, which leave employees completely exposed to arbitrary or malicious discharge, with the wide variety of arbitration awards which provide employees covered by collective agreements extensive protection against unjust discipline. See Summers, *Individual Protection Against Unjust Dismissal*, 62 Va. L. Rev. 481, 506 (1976) [hereinafter cited as Summers].

13. See *infra* notes 121-25 and accompanying text.

14. See *infra* notes 67-77 and accompanying text.

ated public policy exceptions to the employment at-will rule to protect against arbitrary dismissals. These courts have based many of their decisions on a tort for wrongful discharge which permits employees to sue when their dismissal violates public policy.¹⁵ In addition, Congress has reacted with the passage of a number of laws that protect employees from unjustified discharges.¹⁶

One justification for both statutory and judicial exceptions is the need to protect the employee who does not have the bargaining power comparable to that of his employer.¹⁷ Such an imbalance puts at-will employees in a situation subject to the whims of their employers via wrongful discharges.¹⁸

These exceptions to the employment at-will rule could be incorporated in a statutory mandate which calls upon the employer to show "good cause" in order to discharge an employee. This mandate would certainly change long-accepted practices in the employer-employee relationship by placing substantial burdens upon the employer. In order to remedy the serious consequences which this old common-law rule has brought upon thousands of employees each year,¹⁹ the legislature must take action to provide statutory protection for these at-will employees.

The problem requires cautious consideration in balancing the interests of employers against those of employees. While protec-

15. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (discharge for refusing sexual advances of foreman); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (Dismissal for disregarding company directive to test new medication on human subjects where employee believed drug dangerous to health); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (Dismissal for refusing to take part in price-fixing violations prohibited by Sherman Act and California Cartwright Act—a state antitrust law).

16. For example, the National Labor Relations Act of 1935, 20 U.S.C. §§ 157, 158(a)(3) (1976), prohibits discharges in retaliation for union organizing activity; Title VII of the Civil Rights Act of 1967, 42 U.S.C. § 2000e-2(a)(1) (1976), prohibits employee terminations which discriminate on the basis of color, religion, sex, or national origin; the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1976), stating discharge of those exercising rights under the Act is illegal; and the Occupational Safety & Health Act, 29 U.S.C. § 660 (c), prohibits discharge for exercising safety rights guaranteed by OSHA.

17. See, e.g., *Palmtree v. International Harvester Co.*, 85 Ill. 2d 124, 127, 421 N.E.2d 876, 878 (1981).

18. It is the fear of being discharged which essentially makes the great majority of at-will employees susceptible to employer coercion. *Blades, Employment At Will v. Individual Freedom: On Limiting The Abusive Exercise Of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) [hereinafter cited as *Blades*].

19. See *Peck, Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1, 9-10 (1979) [hereinafter cited as *Peck, Unjust Discharges From Employment*].

tions must be granted to the employees, the burden of justifying each and every employee discharge in a court of law must not be imposed upon employers. Inserting a "good cause" standard in the proposed statute may be an appropriate solution, but it also raises considerable problems for the employer. It may unreasonably restrict an employer from exercising discretion in the hiring of his work force. With such a statute in force, nearly all instances of discharge may be litigated and the courts and/or administrative agencies will have to wade through all the claims and defenses to discern the actual reason for the dismissal. It will be an expensive and lengthy process for an employer to discharge an employee who does not perform well on the job. As a result, not only will the employer forego the process in order to remove an inefficient employee, but he will only hire those applicants whom he foresees as causing no problems whatsoever. This diminishes the employer's pool of prospective employees. Therefore, when drafting this proposed statute, it is important to balance both the needs of at-will employees, with the appropriate limitations to prevent the placement of overburdening duties upon the employers.

The need for legislative resolution of employment practices under the at-will doctrine cannot be overemphasized. The number of employees in this country subject to dismissal at-will is enormous. For example, in 1982, the total work force in the United States numbered approximately 112,400,000,²⁰ of whom 91,000,000 were employed in the non-agricultural sector.²¹ Union membership in the same year totalled 21,000,000.²² Federal civilian employees accounted for 2,910,000 members of the work force in 1981.²³ Thus, between thirty and thirty-five percent of the non-agricultural work force in the United States has substantial job protection against discharge without cause while between sixty-five and seventy percent are employed in positions that are terminable at will.²⁴ Based upon statistics gathered by the Federal Mediation and Conciliation Service, it has been estimated that between 6,000 and 7,500 em-

20. See STATISTICAL ABSTRACT, *supra* note 1, at 375, Table 624.

21. *Id.* at 394, Table 659.

22. *Id.* at 408, Table 680.

23. *Id.* at 264, Table 450. One commentator estimates that over 90% of federal civilian employees are tenured and have procedural safeguards via the Civil Service Commission, which protect them against adverse action by superiors. See, Peck, *Unjust Discharges From Employment*, *supra* note 19, at 9-10; see also Merrill, *Procedures for Adverse Action Against Federal Employees*, 59 VA. L. REV. 196, 198 (1973).

24. Peck, *Unjust Discharges From Employment*, *supra* note 19, at 9.

ployees under contracts terminable at will are dismissed each year for causes that arbitrators would find unreasonable.²⁵

In Vermont, the number of non-agricultural employees was 202,000 in 1981,²⁶ with 31,000 workers employed in state and local government in 1981,²⁷ and 14,000 employees in Vermont's educational system in 1981.²⁸ Total labor union membership in Vermont numbered 36,000 in 1980—approximately eighteen percent of the non-agricultural work force.²⁹ According to these figures, approximately forty percent of Vermont's work force is covered by some form of collective bargaining agreement or civil service provision. Therefore, sixty percent of Vermont's work force remains susceptible to at-will terminations.

This note will trace the origins and historical development of the employment at-will rule in Part I. The various protections against unjust dismissal which emerge as principles of American law will be discussed in Part II. In Part III, the cause of discharge and allocation of the burden of proof among the respective parties will be analyzed. Finally, Part IV will propose a statutory solution intended to accommodate the interests of both the employee and the employer.

I. HISTORICAL DEVELOPMENT

The English common law rule of employment at-will emerged in the late nineteenth century. Under the English rule, fixed notice requirements constituted an implied term of any employment contract; the employer who sought to avoid payment of wages during the notice period was required to have good cause when discharging an employee.³⁰ The American rule evolved from its English predecessor with some modifications. This rule was greatly influenced by the principles of contract law and laissez-faire economics that were prevalent in the late nineteenth century. As a result, the employment relationship became more impersonal, and employers were no longer subjected to obligations based on their status as

25. *Id.* at 9-10.

26. See STATISTICAL ABSTRACT, *supra* note 1, at 395, Table 660.

27. *Id.* at 307, Table 506.

28. *Id.* at 306, Table 505.

29. *Id.* at 409, Table 682.

30. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-20 (1976) [hereinafter cited as Feinman]; see also, Note, *Employer Discipline: ILO Report*, 18 RUTGERS L. REV. 446 (1964).

employers.³¹

The English common law origin of employer-employee rights is found in the Statute of Labourers,³² which provided that "no master [could] put away his servant" and that apprentices were to be dismissed only on "reasonable cause."³³ Upon repeal of the Statute of Labourers, the English courts held that when a contract for employment contained a provision for an annual salary, the employer impliedly agreed to a one-year term of employment.³⁴ Liability was imposed for breach of this employment contract if the employee was discharged without good cause at any time during the year.³⁵ If the employment had already continued for longer than one year, it could only be terminated at the end of an additional year.³⁶ By the nineteenth century, the English rule allowed dismissal only upon provision of notice customary in the trade, and in the absence of custom, reasonable notice.³⁷

Although initially adopted, the English rule was never fully embraced by the courts in this country.³⁸ In the late 1800's, the

31. See Note, *Protecting At Will Employees*, *supra* note 7, at 1825.

32. *Statute of Labourers*, 23 Edw. III, c.1 (1349); *Statute of Labourers*, 5 Eliz. I, c.4 (1562). The Statute of Labourers provided that if the hiring of a servant was general—that is, with no specific time limitation—the law would construe it as a hiring for a year. In addition, "no master could put away his cause" during the term of employment "unless upon reasonable cause, to be allowed by a justice of peace;" and the master could not terminate the relationship at the end of the term "without a quarter's warning." However, apprentices could be discharged "on reasonable cause" at the request of the master in the quarter sessions court.

33. *Id.*

34. See *Fawcett v. Cash*, 110 Eng. Rep. 1026 (K.B. 1834); *Beeston v. Collyer*, 130 Eng. Rep. 786 (C.P. 1827). W. Blackstone clarified the policy with a statement of the rule as follows:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not.

1 W. BLACKSTONE, COMMENTARIES 425-26 (1966). See also, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 (1974).

35. Feinman, *supra* note 30, at 119-20. See *Baxter v. Nurse*, 134 Eng. Rep. 1171 (C.P. 1844) (employer dismissed plaintiff before the termination of one year; the court ruled an indefinite hiring to be for a year).

36. *Beeston v. Collyer*, 130 Eng. Rep. 786, 788 (C.P. 1827).

37. See Feinman, *supra* note 30, at 121; *Fawcett v. Cash*, 110 Eng. Rep. 1026 (K.B. 1834) (for domestic servants, "the rule is well established" that the term of hiring depends upon custom). See also C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 156 (1913); FRANCIS BATT, THE LAW OF MASTER AND SERVANT 63-64 (5th ed. 1967).

38. See *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891) (employee under contract for year's service, at yearly salary, remaining employed after expiration of that year,

American courts drifted from the English approach and developed their own common law rule for deciding the duration of a questioned employment contract.³⁹ This deviation is attributable to changes in the law of contracts and the economic advancements of industrialization which were occurring at the time.⁴⁰ The American courts turned to the employment at-will doctrine, often referred to as "Wood's Rule."

Wood announced this principle in his treatise on master-servant relationships:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.⁴¹

In accord with this rule, the American courts concluded that all employment contracts could be terminated at will for any reason, unless the respective parties articulated a specific period of employment.⁴² This rule allowed the employer to dismiss an employee for good cause, for no cause, or even for bad cause, unless the employer had waived his right by inserting a contract provision for a

held to constitute assent to continuation of service for another year at same salary); *David v. Gorton*, 16 Y.S. 255 (1857) (unspecified term of employment held to be from year to year, with wages payable at same time). See also P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 133 (1969).

39. See *Haney v. Caldwell*, 35 Ark. 156 (1879); *Lord v. Goldberg*, 81 Cal. 596, 22 P. 1126 (1889); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. (1 Penne.) 581, 43 A. 609 (1889); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887). See Note, *Implied Contract Rights to Job Security*, 29 STAN L. REV. 335, 340 (1974); see also Feinman, *supra* note 30, at 127-28.

40. See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 464-68 (1973); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 130-37 (1969). See generally, GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

41. H. WOOD, *MASTER AND SERVANT* § 134 (1st ed. 1877). According to one commentator, although Wood cited four American cases as authority, none supported his position. See Feinman, *supra* note 30, at 126. Those cases cited by Wood in support of the rule were recently distinguished by the Michigan Supreme Court for failing to explain what result would occur when an employer expressly promised a good cause for discharge. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 601-03, 292 N.W.2d 880, 886-87 (1980). Feinman points to a few misconceptions by Wood in his treatise: 1) no American court in recent years had approved the English rule; 2) the employment at-will rule was rigidly applied in the United States; and 3) the English rule was applied only to yearly hirings where there was no mention of notice. Wood offered no policy grounds for this rule which he proclaimed in the absence of valid legal support. Feinman, *supra* note 30, at 126.

42. Feinman, *supra* note 30, at 126.

definite term of employment.⁴³

The employment at-will rule first became substantive law in a New York Court of Appeals case in 1895,⁴⁴ and soon became the general rule throughout the United States.⁴⁵ The terminable at-will concept received constitutional support in *Adair v. United States*.⁴⁶ In *Adair*, the United States Supreme Court overturned a federal statute which prohibited the dismissal of a railroad employee for union membership because the statute obstructed both the liberty to contract and property rights guaranteed by the fifth amendment.⁴⁷

As the United States emerged from the Depression in the late 1930's, the Court finally began to relax its position on the rigid terminable at-will doctrine. In *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁸ the Court upheld Congress' power to protect union activity.⁴⁹ The Court placed various restrictions on the employers' privileges despite the recognition that employers had substantial interests in the efficient operation of their businesses.⁵⁰ The Court justified these restrictions by pointing out that employees must re-

43. *Id.*; see also Note, *Protecting At Will Employees*, *supra* note 7, at 1825-26.

44. *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). The court cited Wood's Rule as the maxim whereby a contract for services at a specified rate per year which fails to designate the duration of employment is not a contract for a year. Rather, the contract is to pay for services actually provided at the specified rate. The court ruled such contract to be terminable at the will of either party. *Id.* at 121, 42 N.E. at 417.

45. See, e.g., *The Pokanoket*, 156 F. 241, 243-44 (4th Cir. 1907); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. (1 Penne.) 581, 43 A. 609, 610-12 (1899); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176, 178-79 (1887).

46. 208 U.S. 161 (1908).

47. *Adair*, 208 U.S. at 172. The Court reasoned that:

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

Id. at 174-75. See also *Coppage v. Kansas*, 236 U.S. 1, 9-13 (1915).

48. 301 U.S. 1 (1937).

49. *Id.* at 43 (the Court upheld the Wagner Act's prohibition of discharge of employees on account of union activity, and provision for reinstatement of such employees with back pay). See also *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). Both *Phelps Dodge* and *Jones & Laughlin* rejected the *Adair* Court reasoning that federal and state statutes should not be permitted to regulate the employment relationship. The *Phelps* court noted that *Adair* had been sapped of its usefulness over the years. *Phelps*, 313 U.S. at 187. This was largely due to the Wagner Act, which prohibited discharge of employees on account of union activity and required reinstatement of such employees with back pay. *Id.* at 188-89.

50. *Jones & Laughlin*, 301 U.S. at 42-44 (1937).

tain their right to organize.⁵¹ Following the Court's example, the lower courts continued to uphold the doctrine of at-will employment throughout the 1960's.⁵² In the past fifteen years, however, the courts have qualified the rule by developing public policy exceptions to the at-will doctrine.⁵³

II. PROTECTIONS AGAINST UNJUST DISMISSAL AS AN EMERGING PRINCIPLE OF AMERICAN LAW

No American jurisdiction has enacted any general statutory protection from retaliatory discharges. Yet, legislative and judicial developments—at both federal and state levels—have managed to erode employers' freedom to discharge. Erosion of this freedom is prevalent in both the private and public sectors.⁵⁴

A. Statutory Protections

At the federal level, discrimination in employment on the basis of race, color, ancestry, gender, age and physical handicap is statutorily prohibited; and any retaliatory action for claiming protection under one of these categories is forbidden.⁵⁵ Statutes which

51. *Id.* at 45. The Court pointed out that the Board could not intervene generally with the employer's discretion to hire and fire: "[T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [antiunion] intimidation and coercion." *Id.* at 46.

52. *See, e.g.,* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir. 1964) (no enforceable claim even though employee's ability to obtain substitute employment was impaired by long service with defendant); Mallard v. Boring, 182 Cal. App. 2d 370, 6 Cal. Rptr. 171, 174 (Ct. App. 1960) (where employment was terminable at will, employer was acting within its legal rights in discharging employee who informed court she was willing to serve as trial juror); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 400, 153 N.W.2d 587, 590 (1967) (permanent employment contract is terminable at will unless there is additional consideration in form of an economic or financial benefit to employer, and mere detriment to employee is not enough); Carr v. Montgomery Ward & Co., 363 S.W.2d 571, 574 (Mo. 1963) (in absence of contract or contrary statutory provision, no employee has a right to continued employment despite length of employment); *see also* Hanson v. Central Show Printing Co., 256 Iowa 1221, 1226, 130 N.W.2d 654, 657 (1964); Plaskitt v. Black Diamond Trailer Co., 209 Va. 460, 465, 164 S.E.2d 645, 649 (1969); Webster v. Schauble, 65 Wash. 2d 849, 852, 400 P.2d 292, 294 (1965); Lukens v. Goit, 430 P.2d 607, 611 (Wyo. 1967).

53. *See infra* notes 78-142 and accompanying text.

54. *See* Committee Reports, *At-Will Employment and the Problem of Unjust Dismissal*, 26 REC. A.B. CTRY N.Y. 170, 180-81 (1981) [hereinafter cited as Committee Reports].

55. Title VII of the Civil Rights Act of 1964, §§ 793(a), 704(a), 42 U.S.C. §§ 2000e-2, 2000e-3(a) (1976) (prohibiting discriminatory discharge on the basis of race, color, religion, sex, or national origin, and reprisal for assertion of claims under statute); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631(a) (1976) (prohibiting employer reprisals and age-based discrimination of persons between ages of forty and seventy); Rehabil-

guarantee freedom of organization, establish fair labor standards, protect pension payments, and delineate occupational safety and health protections also prohibit the retaliatory discharge of any employee who should file a claim under one of these laws.⁵⁶ Any employee who serves jury duty⁵⁷ or whose wages are garnished for indebtedness⁵⁸ is also protected by federal statutes prohibiting dismissal.

Federal civil service employees⁵⁹ and veterans returning from military service⁶⁰ also enjoy federal protection against dismissals without "just cause." Recently, Congress enacted a statute which protects federal government workers from retaliatory action for the lawful disclosure of information "which the employees reasonably believe evidences" a violation of any law or "mismanagement."⁶¹

The courts have enforced these legislative initiatives to give employees some measure of job protection against unjust dismissal. The United States Supreme Court has ruled that Title VII of the Civil Rights Act of 1964 prohibits discriminatory preferences for any group, either majority or minority, in the employment relationship.⁶² The National Labor Relations Act protects "concerted activities" in fulfillment of the rights of "self-organization" and "mutual aid or protection."⁶³ This language has been interpreted to permit workers to participate in certain forms of political activity and to assert their rights as granted under other various labor laws as well.⁶⁴

itation Act of 1973, § 504, 29 U.S.C. §§ 791, 794 (1975) (barring exclusion of handicapped individuals from federally funded programs).

56. National Labor Relations Act, §§ 7, 8(a)(3), 8(a)(4), 29 U.S.C. §§ 157, 158(a)(3), 158(a)(4) (1976) (barring discrimination for union activity and reprisals for assertion of claims under statute); Fair Labor Standards Act, § 15(a)(3), 29 U.S.C. § 215(a)(3) (1976) (barring retaliatory discharge); Occupational Safety & Health Act of 1970, § 11(c), 29 U.S.C. § 660(c) (1976) (barring retaliatory discharge); Employment Retirement Income Security Act of 1974, §§ 502(a), 510, 29 U.S.C. §§ 1132(a), 1140 (1976) (barring retaliatory discharge); Railway Labor Act, § 2, 45 U.S.C. § 152 (1976) (protects union activity).

57. See 28 U.S.C. § 1875 (Supp. III 1980) (discharge for service as grand or petit juror in any federal court).

58. See Consumer Credit Protection Act, § 304(a), 15 U.S.C. § 1674(a) (1976) (prohibiting discharge of those whose wages are garnished for an indebtedness).

59. See Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. §§ 7503, 7513(a) (Supp. II 1978) (dismissal only "for such cause as will promote the efficiency of the service").

60. See 38 U.S.C. § 2021(b)(1) (1976) (returning veterans cannot be discharged for one year, except for "cause"). This statute applies to both government and private employers.

61. Civil Service Reform Act of 1978, § 101(a), 5 U.S.C. § 2301(b)(9) (Supp. II 1978).

62. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

63. National Labor Relations Act, § 7, 29 U.S.C. § 157 (1976).

64. See, e.g., *NLRB v. Downslope Indus.*, 676 F.2d 1114 (6th Cir. 1982) (NLRB held

Some states provide analogous protective legislation to employees.⁶⁵ For example, some jurisdictions protect employees against discharge for involvement in political activity, refusal to take a lie detector test, or filing a workmen's compensation claim.⁶⁶ Despite the fact that these various legislative acts provide significant protection to organized and unorganized employees, the limits placed on employer discharges are directed at only particular areas of activity and concern. They are not generally applicable to all unjust, abusive, or retaliatory employer behavior.

B. *Judicial Developments*

State courts have recognized exceptions to the at-will doctrine based on contract theories, the tort of "abusive discharge," and various public policy theories. These judicial developments show an emerging trend toward increasing the protections available to the unorganized employee in the private sector.

warranted in finding that employer violated Section 8(a)(1) of LMRA when it discharged employees who protested plant manager's sexual harassment of them and their co-workers); *NLRB v. Brewton Fashions*, 682 F.2d 918 (11th Cir. 1982) (employer violated LMRA when it discharged two employees based on their union and protected concerted activities, i.e., passing out union cards); *NLRB v. Pyromatics, Inc.*, 677 F.2d 24 (6th Cir. 1982) (employer violated LMRA when it discharged employee for employee's protected activity of circulating petition requesting leaves of absences during Christmas and New Year's Day); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (barring interference with employees who circulate petition on employer's property calling for political action relating to employee concerns); *NLRB v. Modern Carpet Indus.*, 611 F.2d 811 (10th Cir. 1979) (barring dismissal of employees who refuse to perform job believed in good faith to be dangerous); *Trinity Trucking & Materials Corp.*, 227 N.L.R.B. 792 (1977) (barring discharge for filing suit against employer for wages due employees).

65. See N.Y. CIV. SERV. LAW §§ 75-76 (McKinney 1973) (protected employees cannot be removed from their job, except for incompetency or misconduct shown at a hearing); N.Y. EXEC. LAW, § 296 (McKinney 1980) (barring discrimination in employment on the basis of "age, race, creed, color, national origin, sex or disability, or marital status"); VT. STAT. ANN. tit. 21, § 495 (1978 & Cum. Supp. 1983) (barring employer discrimination against any individual because of race, color, religion, ancestry, national origin, sex, place of birth, age, or against a qualified handicapped individual); VT. STAT. ANN. tit. 21, § 499 (1978) (no employer may discharge any employee by reason of service as a juror).

66. For statutory protection of political activity or affiliation, see e.g., CAL. LAB. CODE § 1102 (West 1971); COLO. REV. STAT. § 8-2-108 (1973); NEV. REV. STAT. § 613.040 (1979); *Human Rights Law*, D.C. CODE ANN. § 34-11.1 (1977). For statutory protection against submission to a lie detector test, see e.g., 18 PA. CONS. STAT. ANN. § 7321(a) (Purdon 1983). For statutory protection against retaliatory discharge for filing workers' compensation claims, see e.g., TEX. REV. CIV. STAT. ANN. art. 8307(c) (Vernon Supp. 1982-83); ILL. REV. STAT. ch. 48, § 138.4(h) (Smith-Hurd Supp. 1983-84).

1. Contract Law Theories

The courts have used an implied contract theory to find employer promises of job security or assurances that dismissal may occur only for "cause." Under this approach, a court requires additional consideration in the employment relationship, which is usually satisfied by evidence of special detriment to the employee or special benefit to the employer.⁶⁷ Some recent court decisions have foresaken this required additional consideration in cases involving personnel manuals which maintain that employees will be dismissed only for "cause."

One court has found such a manual to have "become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements."⁶⁸ In *Toussaint v. Blue Cross & Blue Shield of Michigan*,⁶⁹ the Supreme Court of Michigan ruled that

67. See, e.g., *F.S. Royster Guano C. v. Hall*, 68 F.2d 533 (4th Cir. 1934) (contract to furnish the injured employee a term of life employment at top wages in consideration of release by employee of his claim for damages for loss of arm); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (rejection of another job offer on assurance of promotion); *Seifert v. Arnold Bros.*, 138 Cal. App. 324, 31 P.2d 1059 (1934) (contract to give employee steady employment at definite salary so long as services were satisfactory, in consideration of employee's purchase of car; found to be sufficient consideration); *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975) (employee's relocation of family and foregoing other business opportunity provides sufficient consideration); *Ward v. Consolidated Foods Corp.*, 480 S.W.2d 483 (Tex. Civ. App. 1972) (reliance on job stability induced by recruitment techniques prompted complainant to leave employment).

Yet in many instances, overcoming the presumption of at-will employment is very difficult:

To establish his employment as something other than at will, however, poses a formidable task to the discharged employee. He must be able to prove that his contract, either expressly or implicitly, has a definite duration. In situations where the employment relationship was contemplated by the employee to last for a lifetime, permanently, or for otherwise extended duration, he must show that he has supplied an additional consideration to bind the employer for such time, or that an express provision clearly shows that parties' intention to make the employment relationship endure for such time. Failing this, the contract is terminable at will by the employer, with or without cause, and no right of action for a wrongful discharge will lie despite the nature of the dismissal. Where there is no definite term of employment, and where the employee is not covered by any relevant statute, he is defenseless against arbitrary or abusive discharge.

Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 227-28 (1973).

68. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 583, 292 N.W.2d 880, 885 (1980).

69. 408 Mich. 579, 292 N.W.2d 880 (1980).

employee reliance on such published policy statements created an obligation to dismiss an employee only for cause.⁷⁰ A provision in the company personnel manual, which provided that an employee would not be discharged except for cause, created an enforceable contract even though the employee was employed for an indefinite term. The court held that such a provision may become part of the employment contract itself.⁷¹ *Toussaint*, however, does not reflect the prevalent standard in a number of jurisdictions. For example, in *Edwards v. Citibank, N.A.*,⁷² the New York Appellate Division ruled that these personnel manuals have no effect upon the appropriateness of the at-will doctrine for employment contracts of indefinite duration.⁷³

A second approach has been to find a duty of good faith and fair dealing on the part of employers. The judicial recognition of such a duty makes dismissal at will a breach of contract. Such a duty has been found in circumstances where long-term employees

70. *Id.* at 612, 292 N.W.2d at 892 (quoting *McCall Co. v. Wright*, 133 A.D. 62, 68, 117 N.Y.S. 775, 779 (1909)). *Id.* at 583, 292 N.W.2d at 885. See also *Cleary v. American Airlines, Inc.*, 11 Cal. App. 3d 443, 456, 168 Cal Rptr. 722, 729-30 (1980) (longevity of service and express employer policy "operate as a form of estoppel" to preclude dismissals without just cause); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal Rptr. 917, 927 (1981) (company president's oral assurances of job security, combined with longevity of employee's employment, promotions received, lack of direct criticism, and employer's company policies, evidenced implied promise to dismiss only for good cause). But see *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895-96, 568 P.2d 764, 769-70 (1977) (longevity of service, foregoing other job opportunities, moving when transfers were ordered, and acceptance of deferred compensation were insufficient consideration to allow employee to rely on just cause theory); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55, 551 P.2d 779, 781-82 (1976) (company policy manual, stating that "[n]o employee shall be dismissed without just cause," viewed as unilateral promise rather than enforceable promise).

71. *Toussaint*, 408 Mich. at 583, 292, N.W.2d at 885. In *Toussaint*, the employee's cause of action was based on his employer's oral promise that the employee would not be fired as long as he performed his job. The court found either the oral promise or the personnel manual guarantee to be sufficient to sustain the employee's wrongful discharge action. *Id.* at 598-99, 292 N.W.2d at 885. The court based its decision on the premise that there is no public policy against indefinite employment contracts providing job security; therefore, an employer can be prohibited from firing an at-will employee without just cause. *Id.* at 611, 292 N.W.2d at 891.

72. 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dept. 1980), appeal dismissed, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

73. *Id.* at 554, 425 N.Y.S.2d at 328 (employer's personnel manual does not create obligation on part of employer to continue the employment of the employee for life subject only to conditions asserted in manual, while leaving employee free to terminate at any time for any or no reason). See also *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982) (personnel manual does not bind employer); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980) (personnel manual does not bind employer); *Sargent v. Illinois Inst. of Technology*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979) (personnel manual not binding on employer).

are about to receive substantial benefits for past services rendered. The leading case using this approach is *Fortune v. National Cash Register Co.*⁷⁴ In *Fortune*, a salesman with forty years of service, and employed under a written contract, claimed that he had been dismissed by his employer to avoid payment of a commission due on a \$500,000 sale. The contract allowed discharges without cause, but the court found that "the written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract."⁷⁵

In sum, these broad contract theories have been used in a limited number of cases involving personnel manuals and other express guarantees of job security,⁷⁶ and when these dismissals result in the disallowance of entitled benefits to the worker.⁷⁷ Without these certain factors present, the courts have been unwilling to make the good-faith and fair-dealing requirement applicable to the dismissal of at-will employees.

2. The Public Policy Exceptions

Public policy exceptions,⁷⁸ created by the state courts, have had a crucial effect upon the employer's right to terminate employees at will. One approach the courts have taken to define public policy is to refer to a statute or constitutional provision.⁷⁹ These

74. 373 Mass. 96, 364 N.E.2d 1251 (1977).

75. *Id.* at 99, 364 N.E.2d at 1255-56. Courts that have adopted the good-faith and fair-dealing standard do so on the theory that there is an implied good-faith and fair-dealing requirement in every contract. *See, e.g.,* *Rees v. Bank Bldg. & Equip. Corp.*, 332 F.2d 548, 551-52 (7th Cir. 1964); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980).

76. *See, e.g.,* *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977) (oral representation by employer that employee "was secure in her job for 'the rest of [her] life' was sufficient" on which a jury could base a decision in plaintiff employee's favor). *Id.* at 138.

77. *See, e.g.,* *Hainline v. General Motors Corp.*, 444 F.2d 1250 (6th Cir. 1971) (court protected discharged employee's stock option plan); *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875 (S.D.N.Y. 1975) (court enforced separation pay provision); *Zimmer v. Wells Management Corp.*, 348 F. Supp. 540 (S.D.N.Y. 1972) (discharge of executive to deny him stock rights vesting after five years of employment); *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 78 N.W.2d 296 (1956) (court protected employee's termination pay benefit).

78. *See* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), where the Supreme Court of New Hampshire found actionable an employee's discharge for refusing to date her supervisor. The court ruled such a termination to be "motivated by bad faith or malice or based on retaliation," *id.* at 133, 316 A.2d at 551, and sufficient to evoke a cause of action even though the employer violated no statutory or other clearly established public policy.

79. *See* *Petermann v. International Bd. of Teamsters, Local 396*, 174 Cal. App. 2d 184,

courts have refused to acknowledge a retaliatory discharge cause of action unless the legislature has shown some inclination to amend the employment at-will rule by enacting a statute which protects the activity which prompted the employee's termination.⁸⁰ The judicial reasoning behind this approach is that a party is not guilty of committing a tort unless he violates a duty owed to another.⁸¹ The absence of a statute protecting certain employee activities or imposing duties upon employers suggests that employers have no obligations to their employees.⁸² In such instances, employers have free rein to discharge employees for any reason without threat of liability. In contrast, a statute designating protected employee rights would impose upon employers a duty to their employees. Employers could not then discharge employees in retaliation for the exercise of these statutorily protected rights.⁸³

Presently, public policy exceptions to the employers' right to terminate at-will employees fall into the following categories: 1) discharge for refusing to violate a criminal statute; 2) discharge for exercising a statutory right; 3) discharge for performing an important public obligation; and 4) discharge in violation of the general public policy of the state.

(a) *Discharge for Refusing to Violate a Criminal Statute*

A cause of action arising out of an employee's termination for refusal to violate a criminal statute was first recognized in *Petermann v. Teamsters Local 396*.⁸⁴ In *Petermann*, an employee was dismissed for refusing to obey his employer's instructions to commit perjury during an investigation of illegal acts allegedly

188-89, 344 P.2d 25, 27 (1959); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 252, 297 N.E.2d 425, 427 (1973).

80. See Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. Rev. 329, 349 (1982) [hereinafter cited as Murg & Scharman].

81. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 175-76, 319 A.2d 174, 176 (1974).

82. See Murg & Scharman, *supra* note 80, at 350.

83. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (recognized cause of action involving statutory protection against retaliatory discharge for refusal to submit to lie detector tests); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978) (right of action involving statutory protection against retaliatory discharge for filing workers' compensation claims); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (discharge for filing workers' compensation claim); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (discharge for filing workers' compensation claims).

84. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

committed by a union.⁸⁵ The court reasoned that the state's perjury laws evinced an important public policy upon which the reliability of the judicial process depended.⁸⁶ As a result, the court ruled that the employer's actions were tortious. The court recognized that because there was no employment duration provision in plaintiff's contract, this employee could be dismissed at will by the employer. However, the court looked to the state's perjury statute and sought to enforce the policy underlying the statute by refusing to allow the employer to fire the employee: "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury, an act specifically enjoined by statute."⁸⁷ Since the *Petermann* decision, other jurisdictions have recognized the right of at-will employees to sue for wrongful discharge when they are fired for refusing to violate a criminal statute.⁸⁸

(b) Discharge for Exercising a Statutory Right

The most frequent application of this statutory right exception occurs when employees are discharged in retaliation for filing a workmen's compensation claim.⁸⁹ In *Frampton v. Central Indiana Gas Co.*,⁹⁰ an employee filed a workmen's compensation claim after being injured on the job. The employee received a settlement and one month later she was fired. The trial court dismissed her

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

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

87. *Id.*

88. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980) (recognized employee's cause of action when discharge was for refusing to participate in an alleged price-fixing scheme); *Trombetta v. Detroit, T. & I. R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (recognized employee cause of action to discharge for refusing to falsify state pollution control reports).

Relying upon *Petermann* as the seminal California decision regarding wrongful discharges, Justice Tobriner's opinion for the *Tameny* court explained that:

even in the absence of an explicit statutory provision prohibiting the discharge of a worker on such grounds, fundamental principles of public policy and adherence to the objectives underlying the state 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.

Tameny, 27 Cal. 3d at 174, 610 P.2d at 1333-34 (footnote omitted).

89. See, e.g., *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). See also *supra* note 83 and accompanying text.

90. 260 Ind. 249, 297 N.E.2d 425 (1973).

suit, which alleged retaliatory discharge, for failure to state a claim upon which relief could be granted. The Indiana Supreme Court reversed. The court feared an erosion of the workmen's compensation act would result from a dismissal of this cause of action.⁹¹ The court reasoned that such a holding would discourage employees from filing claims for fear of retaliatory discharge with no support from the courts.⁹² The court stated:

The Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.⁹³

In a more recent decision, *Kelsay v. Motorola, Inc.*,⁹⁴ the court iterated the standard announced in *Frampton*. The *Kelsay* court refused to permit the employer's common law right under the terminable at-will doctrine to negate the legislative intent behind the workmen's compensation act. The court recognized that to deny this cause of action would force employees to choose between exercising their statutory rights or keeping their jobs. Since most would choose the latter, the court reasoned that there would be a two-fold result: 1) employees would lack a remedy for their compensation claims; and 2) employers would shed the responsibilities placed upon them by the legislature.⁹⁵

(c) *Discharge for Fulfilling an Important Public Obligation*

Instances where the at-will employee is terminated for complying with a statutory duty have also come under the courts' pub-

91. *Id.* at 252, 297 N.E. 2d at 428.

92. *Id.*

93. *Id.* at 251, 297 N.E.2d at 427 (emphasis in original). In *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976), the court found a right of action in the employee's discharge for filing a workers' compensation claim. The court reasoned that "discouraging the fulfillment of this legislative policy by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy of our state." *Sventko*, 69 Mich. App. at 645, 245 N.W.2d at 153.

94. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

95. *Id.* at 182, 384 N.E.2d at 357.

lic policy exceptions. One of the first cases to recognize this cause of action was *Nees v. Hocks*.⁹⁶ In *Nees*, an employee was called for jury duty, received a one-year postponement, and was later recalled. Her employers encouraged her to request a dismissal from jury duty. Upon learning that their employee had not sought to be excused, they fired her. The Oregon Supreme Court balanced the community interests against the employer's right to terminate at will, and ruled in favor of imposing restraints on the employer's ability to dismiss his employee.⁹⁷ The court reasoned that "[i]f an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted."⁹⁸ The *Nees* court relied upon the state constitution and state statutes, implementing the constitutionally guaranteed jury system, as the determinative authorities for its public policy exception.⁹⁹ The court held the defendant employers liable for firing their employee for serving on the jury.¹⁰⁰

Pennsylvania also recognizes a cause of action by an at-will employee dismissed for serving on a jury. In *Reuther v. Fowler & Williams, Inc.*,¹⁰¹ the Pennsylvania Supreme Court based its public policy rationale upon the Pennsylvania Constitution and pertinent state statutes.¹⁰² The court held that, "where a clear mandate of public policy is violated by the termination, the employer's right to discharge may be circumscribed."¹⁰³

96. 272 Or. 210, 536 P.2d 512 (1975).

97. *Id.* at 218-19, 536 P.2d at 516.

98. *Id.*

99. *Id.* OR. CONST. art. VII, § 3 provides that litigants must be afforded jury trials in civil cases. Art. I, § 11 ensures a defendant the right to a jury trial in all criminal cases. Art. VII, § 5 provides that "[T]he Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors."

The legislative enactments relied on by the court exempt certain persons from jury duty based on health, age and extreme financial hardship factors. The provisions also permit deferment of jury duty for "good cause shown." OR. REV. STAT. §§ 10.050, 10.055 (1981).

100. *Nees*, 272 Or. at 219, 536 P.2d at 517.

101. 244 Pa. Super. 28, 386 A.2d 119 (1978).

102. *Id.* at 32, 386 A.2d at 120. It should be noted here that the *Reuther* court recognized that there exists "no nonstatutory cause of action for an employer's termination of an at-will employment relationship." *Id.*

PA. CONST. art. 1, § 6 provides, "[t]rial by jury shall be as heretofore, and the right thereof shall remain inviolate." A Pennsylvania statute provides that failure to obey a summons for jury service would be considered the same as any disobedience to a court summons. PA. STAT. ANN. tit. 17, § 1336 (Purdon 1983).

103. 244 Pa. Super. at 31, 386 A.2d at 120. *Accord* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 125, 421 N.E.2d 876, 878 (1981) in which the Illinois Supreme Court was

A class of at-will employees who have recently attracted more judicial and legislative protections are the "whistleblowers." A "whistleblower" is an individual who has been terminated for reporting information, either to management or government authorities, that his fellow employees or employer have broken the law(s).¹⁰⁴ There is certainly a public interest in encouraging such "whistleblowing" in terms of societal benefits because most cases involve health, safety, or financial consequences.¹⁰⁵ Some courts are hesitant to invoke the public policy rationale in "whistleblower" termination cases, in the absence of legislation protecting such activity.¹⁰⁶

"Whistleblowers" fall into one of two categories: the "passive whistleblower" and the "active whistleblower." The former would be found in a situation in which the employee is requested by his or her superior to perform some act that violates statutory policy. The "passive whistleblower" would refuse to perform the act and would disclose the occurrence to his or her employer or the appropriate government authorities. The "active whistleblower," on the other hand, is an employee who observes allegedly unlawful conduct and reports the incident to his or her superiors or government

concerned with the difficulty in determining what is or is not public policy:

[T]he Achilles heel of the principle lies in the definition of public policy.

When a discharge contravenes public policy in any way the employer has committed a legal wrong. However, the employer retains the right to fire workers at will in cases "where no clear mandate of public policy is involved"

. . . . But what constitutes clearly mandated public policy?

Id. at 125, 421 N.E.2d at 878 (quoting *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1026, 366 N.E.2d 1145, 1148 (1977)).

104. Michigan recently enacted the *Whistle Blower's Protection Act*, MICH. STAT. ANN. § 17.428(1)-(9) (Callaghan 1981). This statute prohibits a Michigan employer from retaliating against an employee who reports or is about to report a suspected violation of federal, state, or local law to a public body.

105. See *Edwards v. Citibank, N.A.*, 100 Misc. 2d 418, N.Y.S.2d 269 (1979), *aff'd*, 74 A.D.2d 533, 425 N.Y.S.2d 327 (1980), *appeal dismissed*, 51 N.Y.2d 875 (1980) (executive employees reported to their supervisor of an officer's solicitation and acceptance of kick-backs); *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 427 A.2d 385 (1980) (quality control inspector in food packaging plant reported to supervisor various inaccuracies in the standards and specifications printed on employer's products); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W.Va. 1978) (employee-stockholder informed board of directors of bank's overcharge of installment loan customers which constituted violation of state and federal laws); *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977) (former Pentagon official A. Ernest Fitzgerald's "whistle blowing" on the C-5A transport plane cost overruns).

106. See *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (1979), *aff'd*, 74 A.D.2d 533, 425 N.Y.S.2d 327 (1980), *appeal dismissed*, 51 N.Y.2d 875 (1980); *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

authorities.¹⁰⁷

The leading decision concerning employee termination for "whistleblowing" is *Geary v. United States Steel Corp.*¹⁰⁸ *Geary* reveals some of the problems confronted by the courts in adjudicating disputes in which the employee is not pressured by the employer to commit or conceal wrongdoing. *Geary* was a salesman for a steel manufacturer who brought an action against his former employer alleging unjust dismissal in retaliation for his disclosing to superiors the unsafe nature of the manufacturer's products. U.S. Steel later withdrew the products from the market. The Pennsylvania Supreme Court ruled that *Geary's* allegations failed to state a claim upon which relief could be granted.¹⁰⁹ The *Geary* court apparently was looking for an employee dismissal which "involve[d] an element of specific interest to cause harm or accomplish an ulterior purpose."¹¹⁰ The court could find no such instance:

There is nothing here from which we could infer that the company fired *Geary* for the specific purpose of causing him harm, or coercing him to break any law or otherwise to compromise himself. According to his own averments, *Geary* had already won his battle within the company. The most natural inference . . . is that *Geary* had made a nuisance of himself, and the company discharged him to preserve administrative order in its house.¹¹¹

The court rejected plaintiff's theory that he was acting in the best interests of the general public as well as his employer by opposing the marketing of the manufacturer's products which he believed to be defective.¹¹² The court concluded that since the complaint itself provided a legitimate reason for terminating an at-will employment relationship and no clear mandate had been violated, the at-will employee had no cause of action against his employer for wrongful discharge.¹¹³

107. See Committee Reports, *supra* note 54, at 185.

108. 456 Pa. 171, 319 A.2d 174 (1974).

109. *Id.* at 184, 319 A.2d at 180.

110. *Id.* at 177, 319 A.2d at 177.

111. *Id.* at 179-80, 319 A.2d at 178 (footnote omitted).

112. *Id.*

113. *Id.* at 184, 319 A.2d at 180. Other courts have shared the *Geary* court's philosophy. See *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977) (employee discharged because she refused to falsify medical records, but the court found the public policy concept too vague for the creation of a new cause of action and held the issue was best left to the legislature); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) (employee

In dissent, Justice Roberts argued that Geary's dismissal violated Pennsylvania's public policy and that his claim for relief should be granted. Roberts pointed out that the majority "fail[ed] to perceive that the prevention of injury is a fundamental and highly desirable objective of our society,"¹¹⁴ and that Geary's dismissal weakened that goal. The *Geary* court allowed plaintiff's dismissal because his "whistleblowing" incident made him a nuisance in the company. Plaintiff fulfilled his public obligation by reporting the danger of defendant's defective products. Yet, the *Geary* court offered no support for the "whistleblower."

"Whistleblowers" have been successful in some instances. In *Sheets v. Teddy's Frosted Foods, Inc.*,¹¹⁵ the Connecticut Supreme Court held that a quality control director hired at will, who alleged that he had been dismissed in retaliation for insisting that his employer comply with the requirements of the state's food and drug laws, sufficiently stated a cause of action for wrongful discharge.¹¹⁶ The court added, "[c]ertainly when there is a relevant state statute we should not ignore the statement of public policy that it represents . . . an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."¹¹⁷ In *Harless v. First National Bank in Fairmont*,¹¹⁸ the West Virginia Supreme Court ruled that an employee stated a cause of action when he alleged that he had been fired in retaliation for his efforts to ensure his employer's compliance with state

discharged after uncovering and reporting numerous improper corporate activities such as payment of bribes, alteration of sales and income information, and misuse of corporate funds, but courts held cause of action recognized only where discharge violated some clear mandate of public policy); *Percival v. General Motors Corp.*, 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (6th Cir. 1976) (employee filed legitimate complaints to the government about his employer's deceptive trade practices in securities offerings and was fired for refusal to give perjured testimony at the subsequent hearing; court denied employee's cause of action for retaliatory discharge); *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979) (two employees complained to supervisor of an officer's solicitation and receipt of kickbacks from suppliers; court held there was no cause of action for retaliatory discharge on theory that discharge was contrary to public policy).

In *Martin v. Platt*, the court declined to fashion any sort of remedy and suggested turning to the legislature for answers: "Normally, of course, the determination of what constitutes public policy, or which of competing public policies should be given precedence, is a function of the legislature." *Id.* at 690, 386 N.E.2d at 1028.

114. *Id.* at 183, 319 A.2d at 181 (Roberts, J., dissenting).

115. 179 Conn. 471, 427 A.2d 385 (1980).

116. *Id.* at 476, 427 A.2d at 389.

117. *Id.* See also *Kilbride v. Dushkin Pub. Group*, 186 Conn. 718, 443 A.2d 922 (1982).

118. 246 S.E.2d 270 (W. Va. 1978).

and federal consumer credit protection laws.¹¹⁹ As in *Sheets*, the court found that the legislature had established a public policy of consumer protection.¹²⁰ In situations in which the courts lack a pertinent constitutional or statutory provision, they may exercise considerable discretion in expanding the public policy of their respective states.

(d) *Discharge in Violation of General Public Policy*

The exception which permits a cause of action for at-will employees dismissed in violation of the state's general public policy has experienced the greatest judicial expansion of all four exceptions. In this category, the courts have not relied on constitutional or statutory policy to protect the discharged employee. Rather, they have created a new exception to the terminable at-will doctrine based upon their own formulation of public policy. This judicial tenet is essentially a tort of abusive discharge whereby a dismissal for reasons unrelated to the employer's legitimate business considerations is held to be "abusive" and actionable.

*Monge v. Beebe Rubber Co.*¹²¹ accurately demonstrates the public policy exception. In *Monge*, the plaintiff alleged that she had been promoted to a better position in the company after her foreman had told her she could have the job if she were "nice" to him. She was subsequently fired because she refused to date him,¹²² but was eventually reinstated after she complained to her union. Plaintiff later received her final dismissal for failing to appear for work for three days without notifying the company.¹²³ Plaintiff claimed she had given notification and that this alleged unexcused absence was a mere pretense for her discharge. The New Hampshire Supreme Court recognized the employee's cause of action and based its holding upon general public policy. The court stated that "[w]e hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."¹²⁴

119. *Id.* at 276.

120. *Id.*

121. 114 N.H. 130, 316 A.2d 549 (1974).

122. *Id.* at 131, 316 A.2d at 550.

123. *Id.* at 131-32, 316 A.2d at 551.

124. *Id.* at 133, 316 A.2d at 551.

The *Monge* court deviated from prior judicial practices by not citing any constitutional or statutory authority as support for what it deemed to be in the public's best interests. The creation of a new public policy exception by the *Monge* court prompted other courts to follow its lead and expand the relief available to discharged at-will employees.¹²⁵

On the other hand, some jurisdictions have rejected such a general public policy exception to the terminable at-will doctrine. For example, New York has addressed the issue of whether to recognize a cause of action for abusive discharge. New York's lower courts tentatively recognized a cause of action for abusive discharge.¹²⁶ However, the New York Court of Appeals later emphatically refused to recognize a cause of action for abusive or wrongful discharge.¹²⁷

In *Chin v. American Telephone & Telegraph Co.*,¹²⁸ the plaintiff alleged that AT&T had dismissed him because he held certain political beliefs and associations. Plaintiff contended that the dismissal violated his employment contract with AT&T, and was a malicious and abusive discharge. The supreme court found that under the right circumstances a cause of action might be recognized for an employee discharged in violation of clear public pol-

125. See *Fortune v. National Cash Register*, 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977) (cites *Monge* as lending support to the proposition that good faith is implied in contracts terminable at-will); *Savodnick v. Korvettes, Inc.*, 488 F. Supp. 822, 826-27 (E.D.N.Y. 1980) (employer commits tort when employer terminates employee solely to deprive employee of pension benefits). Cf. *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) in which the New Hampshire Supreme Court construed *Monge* and *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980), to create a two-part test. First, the plaintiff employee must show that defendant employer was motivated by bad faith, malice, or retaliation in discharging the employee. Second, the employee must demonstrate that he was discharged because he performed an act that public policy would encourage or refused to do what public policy would discourage. *Cloutier*, 121 N.H. at 920, 436 A.2d at 1144. As a result, the New Hampshire courts now require the showing of a violation of clear public policy interest.

126. See, e.g., *Chin v. American Tel. & Tel.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160, *appeal dismissed*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979); *Fletcher v. Greiner*, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (1980) (plaintiff's alleged discharge was due to her refusal to have sex with her employer; court dismissed abusive discharge claim for failure to show violation of New York's public policy against sex discrimination).

127. *Murphy v. American Home Prod. Corp.*, 112 Misc. 2d 507, 447 N.Y.S.2d 218 (1982), *modified*, 88 A.D.2d 870, 451 N.Y.S.2d 770 (1982), *modified*, 58 N.Y.2d 293, 448 N.E.2d 86, 481 N.Y.S.2d 232 (1983).

128. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978).

icy.¹²⁹ The court pointed out that the doctrine of abusive discharge placed upon the plaintiff the burden of persuading the court that: 1) there is a public policy of the state, that 2) was violated by the defendant.¹³⁰ The court dismissed Chin's claim of abusive discharge for failure to clearly establish such a violation of the state's public policy.¹³¹ This ruling was affirmed by the Appellate Division of the New York Supreme Court.¹³²

The New York Court of Appeals firmly denied the recognition of a cause of action in tort for abusive or wrongful discharge with its ruling in *Murphy v. American Home Products Corp.*¹³³ Murphy, an officer and assistant treasurer of the defendant corporation, alleged that he was discharged because (a) he was 59 years old, and (b) he insisted on revealing, to executives of the defendant corporation, illegal accounting practices designed to present a fraudulent picture of the defendant's growth in income.¹³⁴ The New York Supreme Court dismissed the cause of action for alleged age discrimination,¹³⁵ but ruled that the plaintiff presented facts sufficient to state a cause of action for abusive discharge.¹³⁶

On appeal, the New York Supreme Court, Appellate Division,¹³⁷ ruled that New York law does not presently recognize a cause of action for abusive discharge. The court noted that the plaintiff merely complained to his employers that the corporation's records were not kept in accordance with generally accepted accounting principles. The court found the plaintiff's accusation to be merely a matter of judgment on his part.¹³⁸

129. *Id.* at 1075, 410 N.Y.S.2d at 740-41.

130. *Id.* at 1075, 410 N.Y.S.2d at 741.

131. *Id.*

132. *Chin*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1979). See also *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980), *appeal dismissed*, 51 N.Y.2d 875, 433 N.Y.S.2d 1020 (1980) (discharge allegedly due to plaintiff's uncovering evidence of illegal foreign currency manipulation; court held plaintiff failed to show clear violation of public policy).

133. 112 Misc. 2d 507, 447 N.Y.S.2d 218 (1982).

134. *Id.* at 511, 447 N.Y.S.2d at 220-21.

135. *Id.*

136. *Id.* at 509, 447 N.Y.S.2d at 220. The court stated:

The day may be inevitable when the doctrine of abusive discharge will be a fixed principle in the substantive law of New York. But that day has not yet come, although some courts in New York have paid homage to the doctrine.

This case may or may not prove to be the turning point. . . .

Id. at 509, 447 N.Y.S.2d at 219-20.

137. *Murphy*, 88 A.D.2d at 870, 451 N.Y.S.2d at 771.

138. *Id.* at 871, 451 N.Y.S.2d at 771.

On further appeal, the New York Court of Appeals emphatically denied recognition of a cause of action in tort for abusive or wrongful discharge.¹³⁹ The court refused to alter the state's well-established rule that "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason."¹⁴⁰ Declining to join the emerging trend among jurisdictions that recognize such a tort, it deferred such a significant change in the law as "best left to the Legislature."¹⁴¹ To date, the New York courts have not recognized a cause of action in tort for abusive discharge,¹⁴² leaving appropriate resolution of the issue to the legislature.

C. *Where Does Vermont Fit In?*

The Vermont Supreme Court has adhered to a strict interpretation of the employment at-will doctrine.¹⁴³ The court's reliance on the employment at-will rule dates back to 1923, when it formally adopted the doctrine in *Mullaney v. C.H. Goss Co.*,¹⁴⁴ *Mullaney* involved a breach of contract action focusing on a dispute as

139. *Murphy*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

140. *Id.* at 300, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.

141. *Id.* at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 235. The court of appeals stated "the Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected," and to investigate and anticipate the impact of imposing liability upon the employer. *Id.* at 302, 448 N.E.2d at 90-91, 461 N.Y.S.2d at 235-36. The court of appeals explained its reasoning as follows:

If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps some time ago, between employer and employee in reliance on existing legal principles are to be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only, or at least so the Legislature might conclude.

Id. at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

142. See *O'Donnell v. Westchester Community Serv. Council, Inc.*, 466 N.Y.S.2d 41 (App. Div. 1983).

143. See *Brower v. Holmes Transp. Inc.*, 140 Vt. 114, 435 A.2d 952 (1981); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Mullaney v. C.H. Goss Co.*, 97 Vt. 82, 122 A. 430 (1923).

144. 97 Vt. 82, 122 A. 430 (1923).

to the duration of the employee's services.¹⁴⁵ The court based its decision on the trial court's findings that the plaintiff's employment was indefinite in duration, and applied the employment at-will rule. The court explained:

[T]he contract of employment, as shown by defendant's evidence, being indefinite in duration, the doctrine in this country, laid down by a great majority of the courts having the question before them, is that it was a hiring at will, under which either party had the right at any time to terminate the employment.¹⁴⁶

The Vermont Supreme Court finally hinted for a legislative resolution of this issue in *Jones v. Keogh*.¹⁴⁷ There, the plaintiff was discharged following a dispute concerning the company's vacation time and sick leave policies.¹⁴⁸ She alleged that the defendant had wrongfully discharged her without cause and that the dismissal was motivated by bad faith, malice, and retaliation for the assertion of her rights.

The court applied the employment at-will rule announced in *Mullaney* and dismissed the plaintiff's complaint. Although it noted the public policy exceptions emerging in other jurisdictions, the court expressed a concern that the expansion of enforceable contract rights to at-will employees would destroy the mutuality of obligation between employer and employee.¹⁴⁹ Justice Hill summarized the supreme court's position as it now stands in the absence of legislative resolution:

While full employment and employer-employee harmony are noble goals to which society aspires, they alone do not present the clear and compelling policies upon which courts have been willing to rely in upholding an action for discharge of an employee at will. Nor is the fact that bad faith, malice and retaliation are motives upon which we look askance suffi-

145. *Id.* at 86-87, 122 A. at 431-32. Based on defendant's evidence introduced at the trial court, the supreme court agreed that plaintiff's contract was indefinite in duration.

146. *Id.* at 87, 122 A. at 432. The court cited statements in the treatise, C. LABATT, *MASTER AND SERVANT*, §§ 159-160 (1913), that the preponderance of American authority supporting this doctrine was so great that it was barely open to criticism. The court also cited the favorable recognition of this doctrine in *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

147. 137 Vt. 562, 409 A.2d 581 (1979).

148. *Id.* at 563, 409 A.2d at 582.

149. *Id.* at 564, 409 A.2d at 582.

cient to impel us to find a clear and compelling public policy where, as here, there is none. This is not to say, of course, that the legislature could not provide the remedy plaintiff seeks.¹⁵⁰

Finally, in *Brower v. Holmes Transportation, Inc.*,¹⁵¹ the Vermont Supreme Court ruled that the plaintiff, a truck driver fired within his 30-day trial period, could not recover under the wrongful discharge doctrine because "an employment contract at will may be terminated by either party, at any time, with or without cause."¹⁵² The plaintiff had been previously employed as a union truck driver for more than fifteen years at a terminal in Bellows Falls, Vermont. Wanting to work closer to home, he gave notice to his former employer and began work at Holmes Transportation, Inc. as a "casual employee."¹⁵³ Under the union contract there, "a casual employee fill[ed] in for vacations, 'book-offs' and/or sickness;" acquired "no seniority for a thirty-day period;" and "during that period may be discharged without further recourse."¹⁵⁴ After working four days, he was informed by the Holmes terminal manager that his services were no longer needed. The company cited plaintiff's previous back injury as grounds for discharge and relied on a company policy against hiring drivers with such a medical history.¹⁵⁵

The Vermont Supreme Court refrained from relaxing the employment at-will rule in Vermont.¹⁵⁶ It refused to follow the lead of the New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*,¹⁵⁷ which modified this rule in situations in which an employee's dismissal was motivated by bad faith, malice or retaliation.¹⁵⁸ *Brower* considered the adoption of such a public policy to be "primarily a legislative concern," and flatly rejected this approach in the face of an express contract provision that "no cause for discharge" was required.¹⁵⁹ In light of *Jones* and *Brower*, it is

150. *Id.*

151. 140 Vt. 114, 435 A.2d 952 (1981).

152. *Id.* at 117, 435 A.2d at 953 (1981). See also *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979).

153. *Brower*, 140 Vt. at 116, 435 A.2d at 953.

154. *Id.*

155. *Id.*

156. *Id.* at 116, 435 A.2d at 953-54.

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

158. *Monge*, 114 N.H. at 133, 316 A.2d at 551.

159. *Brower*, 140 Vt. at 117, 435 A.2d at 954.

up to the Vermont Legislature to effectuate this desirable societal goal by statutory protection of employee's rights against unjust dismissal.

III. CAUSALITY AND BURDEN OF PROOF AMONG THE PARTIES

A. *What is the Applicable Test?*

Causality has become an increasingly important issue in recent court decisions, and is most pertinent with regard to alleged violations of section 8(a)(3) of the Labor Management Relations Act (LMRA).¹⁶⁰ Causality determines the relationship between employees' protected activities and employer actions which detrimentally affect their employment. For example, in resolving cases involving alleged violations of Section 8(a)(3), it must be determined whether an employee's employment status was adversely affected by his engaging in union activities and, if so, whether a dismissal by the employer was motivated by that employee's union activities. Various tests have been utilized by the National Labor Relations Board and the courts to assist in making such determinations. However, there has been uncertainty and conflict, among the courts of appeals and between certain courts and the Board, concerning the applicable test for causality. Before one can analyze the tests used by the Board and courts, it is helpful to understand the distinction between the reasons given by the employer for the decision to discharge an employee.

No employer will openly admit that he has disciplined an employee because he dislikes unions and will not tolerate employees engaging in union or other protected activities. In disputes classified as "pretext" cases, the employer asserts what he regards to be a legitimate business reason for his disciplinary action.¹⁶¹ However, examination of the evidence in these cases reveals that the asserted justifications for the discipline were mere fabrications because they either did not exist or were not actually relied upon by the employer.¹⁶² Thus, the employers' business reasons were labelled as

160. Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization" 29 U.S.C. § 158(a)(3) (1976).

161. *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084 (1980).

162. *Id.*, See, e.g., *NLRB v. Brown Food Store*, 380 U.S. 278 (1956); *NLRB v. Symons Mfg. Co.*, 328 F.2d 835 (7th Cir. 1964).

pretexts for disciplinary action, and subsequently found to lack merit by the courts.¹⁶³

The dual motive cases present a different situation. In a dual motive case, the employer's disciplinary decision involves two factors. The first is a legitimate business reason. The second is not a legitimate business reason, such as an employer's reaction to his employee's involvement in union or other protected activities.¹⁶⁴ Admittedly, there is a fine line of distinction between pretext and dual motive cases.¹⁶⁵ In both types of cases, however, the inquiry by the Board and courts has floundered as to the appropriate test to apply—either the "in part" test or the "dominant motive" test.

The "in part" test examines the reasons for the employee's discharge to determine if it was motivated "in part" by that employee's involvement in protected activities. When this "in part" motivation is found, reinstatement of the employee will be ordered notwithstanding the fact that the employer also relied on a legitimate business reason in his decision.¹⁶⁶ For example, in a case involving an alleged violation of section 8(a)(3) of LMRA, the dismissal is found to be in violation of the Act if it was motivated "in part" by the employee's union activities. Critics of the "in part" test noted a conflict between the employment at-will doctrine and the "in part" test,¹⁶⁷ and urged the creation of a new test.¹⁶⁸

163. *Wright Line*, 251 N.L.R.B. at 1084. See also *NLRB v. Solo Cup Co.*, 237 F.2d 521 (8th Cir. 1956).

164. *Id.*

165. The Board and the courts continued to recognize this distinction until *Mount Healthy City Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); see *infra* notes 173-76 and accompanying text; see also *Wright Line*, 251 N.L.R.B. at 1083 n.4.

166. *Wright Line*, 251 N.L.R.B. at 1084. The Board has persistently clung to application of the "in part" test over the years. See also *The Youngstown Osteopathic Hosp. Assoc.*, 224 N.L.R.B. 574, 578 (1976). The "in part" test has taken various forms with its language having been continuously modified; yet the underlying concept remains untouched. Board decisions have used terms such as: "the motivating or moving cause," *The Banker's Warehouse Co.*, 146 N.L.R.B. 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 N.L.R.B. 270, 271 (1965); "the substantial, contributing factor," *Erie Sand Steamship Co.*, 189 N.L.R.B. 63, 65 (1971); "in substantial part," *Central Casket Co.*, 225 N.L.R.B. 362 (1976).

167. This conflict arises because "[m]anagement can discharge for good cause, or bad cause, or no cause at all . . . with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids." *Wright Line*, 251 N.L.R.B. at 1084 (quoting *N.L.R.B. v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956)). This conflict is particularly thorny in a dual motive case where the employer has a legitimate reason for his action. As a result, the employer's recognized right to enforce rules of his own choosing conflicts with the employee's right to be free from retaliation for participating in protected activities. *Id.*

In an effort to remedy this conflict and the problems that subsequently have arisen, the Court of Appeals for the First Circuit recommended application of a "dominant motive" test.¹⁶⁹ The "dominant motive" test provides that when both a "good" and a "bad" reason for discharge exists, a substantial burden of proof is placed upon the employee.¹⁷⁰ The employee must show that a "bad" or unlawful reason was the dominant motive behind the dismissal.¹⁷¹ In other words, the employee is required to establish a prima facie showing of unlawful motive by the employer, such as dismissal of the employee for union activity. In addition, the employee must rebut the employer's asserted defense by showing that the dismissal would not have taken place absent the employee's protected activities.¹⁷²

Finally, the Supreme Court addressed the issue with its adoption of a new causality test in *Mount Healthy City School District Board of Education v. Doyle*.¹⁷³ There, the Court ruled that the employee was required to make a prima facie case that a "substantial or motivating" factor in the discharge was based on the employee's protected activity. Upon that showing, the burden of production of evidence shifted to the employer to demonstrate that the discharge would have occurred regardless of the protected activity.¹⁷⁴ This burden shift is crucial since the decision as to who

168. Critics of the "in part" test argue that its analysis goes only half way toward resolving this conflict. Once an employer's hostility to protected rights has been found, the search ends and the employer's asserted justification is ignored. *NLRB v. Billen Shoe Co.*, 397 F.2d 801 (1st Cir. 1968). In *Billen Shoe*, the court protested application of the "in part" test because it ignored legitimate business motives of the employer and placed the union activist in an impregnable position, once anti-union animus has been established. The court was distressed that the "in part" test essentially immunized union activists against legitimate discipline for genuine offenses. *Id.* at 803. See also *NLRB v. Almeida Bus Lines*, 333 F.2d 725, 727 (1st Cir. 1964).

169. *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963). See also *Colletti's Furniture, Inc. v. NLRB*, 550 F.2d 129 (1st Cir. 1977) (when both "good" and "bad" reasons for discharge exist, burden is upon the General Counsel to establish that, in absence of the protected activities, the discharge would not have taken place).

170. *Wright Line*, 251 N.L.R.B. at 1085.

171. *Id.*

172. *Id.* at 1087.

173. 429 U.S. 274 (1977).

174. *Id.* at 287. See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), an employment discrimination case under Title VII of the Civil Rights Act of 1964 in which the Court clarified the allocation of the burden of production between the parties. The Court's allocation is as follows: 1) Plaintiff has burden of proving by a preponderance of the evidence a prima facie case of discrimination; 2) if plaintiff succeeds, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; and 3) should defendant carry this burden, plaintiff must have opportunity to

bears this burden of production can be determinative of the outcome.

The Court's substantive standard is analogous to a "but for" test because to determine the existence of a causal connection between protected activity and the employee's dismissal, the inquiry is whether the discharge would have occurred "but for" the protected activity.¹⁷⁵ The rationale for the "but for" test in *Mount Healthy* stems from the Court's dissatisfaction with the Board-ordered reinstatement of employees based on a finding that the protected activity was one of two reasons in the employee's dismissal. The Court noted that the Board's approach placed the employee involved in protected conduct in a much better position than he would have held if not involved. Thus, the employer's freedom to apply legitimate performance standards would be impaired by the employee's favored position.¹⁷⁶

In *Wright Line, A Division of Wright Line, Inc.*,¹⁷⁷ the Board considered the litigation to be a "dual motive" case because the decision to discipline involved two factors: (1) a legitimate business reason,¹⁷⁸ and (2) the employer's retaliatory reaction to employee's engaging in union activities.¹⁷⁹ Since the courts had been uncertain whether to apply the "in part" test or "dominant motive" test when confronted with "dual motive" cases,¹⁸⁰ the Board rejected both tests¹⁸¹ and adopted the new *Mount Healthy* test, requiring

prove by preponderance of the evidence that reasons offered by defendant were not the true reasons, but were a pretext for discrimination. *Id.* at 253-56.

175. *NLRB v. Wright Line, A Division of Wright Line, Inc.*, 662 F.2d 899, 903 (1st. Cir. 1981).

176. *Mount Healthy*, 429 U.S. at 284-85. On remand, in *Doyle v. Mount Healthy City School Dist. Bd. of Educ.*, 670 F.2d 59 (6th Cir. 1982), the court of appeals affirmed the district court's finding that the board of education had shown by a preponderance of the evidence that it would have reached the same decision in failing to renew the contract of an untenured teacher in the absence of protected speech by the teacher.

177. 251 N.L.R.B. 1083 (1980).

178. Respondent *Wright Line* alleged that the employee was discharged for violation of a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." *Id.* at 1089.

179. *Id.* at 1090-91.

180. *Id.* at 1086.

181. *Id.* at 1087. The Board noted that the "in part" test stopped short of the proper inquiry in dual motive cases. The test stopped with the establishment of a prima facie case or upon a showing of an improper motive. *Mount Healthy* clearly represents a rejection of such an inquiry. *Id.* The "dominant motive" test rejects the "in part" analysis by requiring proof of how the employer would have acted in the absence of the protected activity. But, unlike the *Mount Healthy* standard which shifts the burden to the employer upon a prima facie showing of unlawful motive, the "dominant motive" test requires the General Counsel

that

the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.¹⁸²

The Board noted that the shifting burden analysis in *Mount Healthy* recognized the fact that the employer is the party with the best access to proof of its motivation.¹⁸³ As a result, the Board's new analysis placed the burden of persuasion upon the employer.

On appeal, the Court of Appeals for the First Circuit granted the petition for enforcement of the NLRB order,¹⁸⁴ but corrected the Board's burden of persuasion standard.¹⁸⁵ The court ruled that the NLRB General Counsel must prove the employer's guilt by a preponderance of the evidence to support a finding that an unfair labor practice has occurred. The only burden that could be placed on the employer was the "burden of production" which required the employer to come forward with credible evidence to rebut or

to rebut the employer's asserted defense by demonstrating that the discharge would not have occurred absent the employee's protected activities. *Id.*

182. *Wright Line*, 251 N.L.R.B. at 1089. See also *Transportation Management Corp.*, 256 N.L.R.B. 101 (1981) (General Counsel established *prima facie* case that employer violated section 8(a)(3) of the National Labor Relations Act by discharging employee for union activities; employer failed to show that dismissal would have occurred without regard to the protected activities); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134 (1st Cir. 1981) (Board made *prima facie* showing that employee was an active union participant in union organizational effort and the employer was well aware of this; employer met burden by showing employee's dishonesty and poor work record—the former falling under strict company policy of discharge); *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 69 (1st Cir. 1981) (once Board has made *prima facie* showing of "significant proper motivation," the employer need only come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing violation); *Peavy Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981) (court followed the *Mt. Healthy/Wright Line* test). For the sake of clarity as well as consistency with court interpretations regarding allocation of burdens, it is hereinafter assumed that plaintiff discharged employees are represented by General Counsel before the Board or court.

183. *Wright Line*, 251 N.L.R.B. at 1087-88.

184. *NLRB v. Wright Line*, A Div. of *Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981).

185. *Id.* at 902. The court reviewed the Board's adoption of the *Mount Healthy* test for legal error. The court iterated its concern that the Board focus on the question of actual cause, and give serious consideration to the employee's legitimate business reasons for discharging the employee. *Id.* The court insisted upon application of the "dominant motive" test when examining a discharge that allegedly involved a protected activity.

meet General Counsel's *prima facie* case.¹⁸⁶ Therefore, once the General Counsel had shown a basis for finding an improper motive, the employer was required to "come forward with enough evidence to convince the trier of fact that, under the circumstances, there [was] no longer a preponderance of evidence establishing a violation."¹⁸⁷

The *Wright Line* court was satisfied with the Board's recognition that the General Counsel must always establish the existence of an unfair labor practice by a preponderance of the evidence. However, the court was concerned with the Board's confusion in mislabeling the employer's burden as an "affirmative defense."¹⁸⁸ The court emphasized that the employer merely bears the burden of producing rebuttal evidence, which in no way constitutes a true affirmative defense.¹⁸⁹ The burden of persuasion on all issues of disputed fact remains upon the General Counsel.¹⁹⁰

In *NLRB v. Transportation Management Corp.*,¹⁹¹ the circuit court again held that the Board had erred in its allocation of the burden of persuasion. The court asserted that it was beyond the Board's statutory authority to impose upon the employer any burden greater than that of "neutralizing the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case."¹⁹² Rather, the General Counsel carried the burden of prov-

186. *Id.* at 904. See also *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57 (1st Cir. 1981).

187. *Wright Line*, 662 F.2d at 904 (quoting *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 69 (1st Cir. 1981)). The court clarified the distinction between the burden of production and burden of persuasion:

[T]he general counsel's initial, *prima facie* showing creates a kind of presumption that an unfair labor practice has been committed. At this point, the employer risks losing his case unless he rebuts the presumption with evidence of his own The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred Thus, the employer in a section 8(a)(3) discharge case has no more than a limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.

Id. at 905.

188. *Wright Line*, 662 F.2d at 905 n.9, where the court referred to the Board's requirement that the employer raise what it labelled an "affirmative defense." See *Wright Line*, 251 N.L.R.B. 1083, 1088 n.11 (1980).

189. *Wright Line*, 662 F.2d at 905 n.9.

190. *Id.*

191. 674 F.2d 130 (1st Cir. 1982).

192. *Id.* at 131. See also *NLRB v. American Spring Bed Mfg. Co.*, 670 F.2d 1236 (1st Cir. 1982) (employer bears burden of producing credible evidence to rebut *prima facie* case by providing it had "good reason" to discharge). The second circuit has been slow to follow

ing not only that an improper motivation contributed to the discharge, but also that the discharge would not have taken place absent the employee's protected conduct.¹⁹³

The United States Supreme Court reversed the circuit court of appeals decision in *NLRB v. Transportation Management Corp.*¹⁹⁴ The Court held that the employer's burden of proof amounts to an affirmative defense.¹⁹⁵ The Court ruled that the court of appeals erred in holding that section 10(c) of the NLRA¹⁹⁶ forbids placing the burden on the employer to prove that absent the improper motivation, the discharge would have occurred anyway based on a legitimate reason.¹⁹⁷ The General Counsel still had the burden of proving that the employee's protected conduct was a substantial or motivating factor in the dismissal.¹⁹⁸

The Court agreed with the Board's interpretation of the statute, which "permitt[ed] the employer to avoid being adjudicated a violator by showing that his actions would have been the same regardless of his forbidden motivation."¹⁹⁹ The Court further found that the Board's statutory construction extended to the employer what it considered to be an affirmative defense.²⁰⁰ It refused to invalidate the Board's recognition of this affirmative defense in which the employer must carry the burden of proof by a preponderance of the evidence.²⁰¹

B. *Ramifications on Employees and Employers*

The public's interest in efficient operation of this country's

its sister circuit in altering the burdens placed upon the parties. See, e.g., *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) ("but for" test appears to be the rule in second circuit; court adopted *Mount Healthy* test whereby employee would not have been dismissed but for his protected activity).

193. *Transportation Management Corp.*, 674 F.2d 130, 132 (1st Cir. 1982) (Breyer, J., concurring).

194. 103 S. Ct. 2469 (1983).

195. 103 S. Ct. 2475. The General Counsel bears the burden of proving that the employee's protected conduct was a substantial or motivating factor in the discharge. In rebuttal, the employer must prove by a preponderance of the evidence that the discharge stemmed from the employee's unprotected conduct and that the employee would have lost his job in any event. *Id.*

196. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976).

197. *Transportation Management Corp.*, 103 S. Ct. at 2474.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 2473. See *supra* note 188 and accompanying text.

businesses acts as a fulcrum in the balancing of two potentially conflicting interests. Continued use of the at-will doctrine in employment relationships necessitates judicial intervention to protect the employees' interests. On the other hand, the countervailing interests of employers must be considered.

In *Monge v. Beebe Rubber Co.*,²⁰² the New Hampshire Supreme Court fashioned a liberal application of the public policy exception. Yet, it mentioned that a balancing of competing interests was required:

In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.²⁰³

The only actual limitation upon the discharged employee's action comes from the standard for a prima facie case which a given jurisdiction has adopted. A broad standard, such as that used in *Monge*,²⁰⁴ will facilitate the court's admission of facts sufficient to constitute a prima facie case and eventually put the employee's claim before the jury. Should the employee raise questions of fact enabling him to avoid summary judgment or a directed verdict, his chance of success in the minds of the jury is excellent—as juries tend to sympathize with the discharged employee.²⁰⁵ With this in mind, a court should carefully weigh the competing interests of the employer and the employee, when it defines the boundaries of a prima facie case of wrongful discharge.

This is exactly where the legislature must step in. Legislative action is needed to provide statutory guidelines for a court to support its decision, rather than compelling it to fashion adequate relief for the discharged employee on grounds of nebulous public policy exceptions. Thus, the legislature may resolve any ambiguities by particularizing the statutory guidelines by which to weigh the competing interests of employer and employee. Then the judiciary is free to implement these statutory guidelines to resolve abusive discharge practices. By defining the impermissible grounds for the discharge of at-will employees, the legislature can provide notice to

202. 114 N.H. 130, 316 A.2d 549 (1974).

203. *Id.* at 133, 316 A.2d at 551.

204. *Id.*

205. See *Blades*, *supra* note 18, at 1428.

both employees and employers of their respective rights and duties.

IV. A STATUTORY PROPOSAL

The preceding sections have described the level and means of protection against unjust dismissals afforded at-will employees in this country. A statutory provision of general legal protection against unjust dismissal is required in order to meet the complex needs of employers and employees in modern society. A strong indication is the fact that the United States is virtually unique among western industrialized nations in allowing an employer to discharge an employee, regardless of term of service, for *any reason* or *no reason* at all.²⁰⁶ Furthermore, there is no uniformity among the state courts regarding retaliatory discharges and the at-will employee, and Vermont courts are certainly no exception. Therefore, a statute would establish helpful guidelines for the courts to utilize when deciding job termination cases.²⁰⁷

Vermont citizens have valuable rights and interests in their jobs which the legislature must protect against arbitrary actions by employers. Approximately sixty percent of Vermont's work force lacks adequate protection and thereby is subject to arbitrary termination.²⁰⁸ Justice Roberts emphasized the pressing need in his statement in the *Geary* case; "[T]he time has surely come to afford unorganized employees an opportunity to prove in court a claim for arbitrary and retaliatory discharge."²⁰⁹

The Vermont courts have shown an unwillingness to break away from the traditional employment at-will rule.²¹⁰ Thus legal protection against unjust dismissal must come from the legislature. An appropriate statute for Vermont would specify that employees are not to be dismissed without "just cause," and require that de-

206. See *Blades*, *supra* note 12, at 508-19. Included in Summers' comparison are: France (dismissed employee must prove that employer has committed an "abuse of right"); Germany (dismissal with notice "shall be without effect if such dismissal is socially unwarranted"); Great Britain (Industrial Relations Act provides comprehensive protection against unjust dismissal, wherein no employee may be unfairly dismissed by his employer); and Sweden (dismissal with notice can only be for "an objective cause" that must be proved by the employer).

207. See *supra* text accompanying notes 78-125.

208. See *supra* notes 20-29 and accompanying text.

209. *Geary v. United States Steel Corp.*, 456 Pa. 171, 188, 319 A.2d 174, 182 (1974) (Roberts, J., dissenting).

210. See *supra* notes 136-53 and accompanying text.

termination of all actions brought under the statute be resolved via an arbitration process.²¹¹ In addition, the legislature must declare its position regarding limits on the judicially created public policy exceptions to the employment at-will doctrine. A good start would be to limit the public policy exceptions to instances in which an employee is dismissed for refusing to violate a constitutional or statutory provision, for exercising a constitutional or statutory right, or for fulfilling a constitutionally or legislatively created duty. The primary objective must be to facilitate the creation of procedures which would assure that future discharges are based upon objective factors and made in good faith.²¹²

This statute need not include each and every prohibited reason for discharge. Such a specific proposal would render the statute too rigid. The resulting inflexibility would make the courts incapable of using their common law ability to delineate new prohibited dismissals. It would also leave the statute silent on various public policy exceptions that may arise in future employment relations. The following is a framework for a statute which would establish and govern limitations on the rights of employers to terminate at-will employees.

A. "Just Cause"

This provision would state that employees may be dismissed from their jobs only for "just cause."²¹³ This is essentially an extension to all employees of the level of protection presently available to workers covered by "just cause" provisions in their collective bargaining agreements or civil service laws. Such a provision would not be as difficult to implement as some might believe:

211. Arbitration is a superior procedure for such "just cause" determinations because it makes available the vast amount of arbitration precedent concerning substance and procedure developed over the years of operation. The relative informality and speed of arbitration are certainly beneficial attributes. See St. Antoine, *You're Fired*, 10 HUMAN RIGHTS 32, 37 (Winter 1982).

212. See St. Antoine, *You're Fired*, 10 HUMAN RIGHTS 32, 53 (Winter 1982) where the author emphasizes the necessity for statutory protection: "statutory relief for this long-neglected abuse of the unorganized worker can now be likened to a moral imperative for conscientious legislators and for all those who labor in the field of industrial relations." *Id.* at 53.

213. One should note that "cause" has been held to exist if two criteria of reasonableness are met: (1) that it is reasonable to discharge employees because of certain conduct; and (2) that the employer had fair notice, express or fairly implied, that such conduct would be grounds for discharge. *Carter v. United States*, 407 F.2d 1238, 1244 (D.C. Cir. 1968).

The term "just cause" provides a workable standard because it has already been given content by thousands of arbitration decisions that have worked out substantive and procedural principles and submitted them to the test of continued criticism and experience. Unlike other countries that have used equally flexible phrases as statutory standards, we have a large body of precedent and general understanding as to what "just cause" means.²¹⁴

A brief list of specific grounds for discharge found in negotiated contracts throughout this country serve as "just cause" examples: violation of contract; violation of company rules; intoxication on the job; incompetence or failure to meet standards; insubordination; violation of safety rules; or misconduct.²¹⁵ However, the statute ought not attempt to define "just cause" because existing arbitration precedent has given it a workable content and preserved its flexibility for adaptation to special situations and changed circumstances.²¹⁶

The statute would direct that any claims arising under it be submitted to arbitration. Arbitration would relieve any tremendous burden upon the courts in handling the subsequent large number of cases. One commentator suggests that existing state mediation and arbitration agencies provide excellent forums for these unjust dismissal cases; thus, at-will employees would receive substantially the same protection as that now enjoyed by employees covered by collective agreements.²¹⁷

Many states have state mediation services which already provide arbitration panels from which parties with a labor disagreement may select an arbitrator.²¹⁸ This provision would apply to all employees in Vermont (except probationary employees new on the job) with accompanying costs to be carried primarily by the state. The assessment of a modest fee upon each party, perhaps one week's take-home pay, would discourage frivolous claims or defenses.

214. See Summers, *supra* note 12, at 521.

215. *Basic Patterns: Discharge and Discipline, 2 Collective Bargaining Negotiations and Contracts* (BNA) No. 876, at 40:1 to 40:14 (1978).

216. See Summers, *supra* note 12, at 521.

217. *Id.* at 522-23.

218. *Id.* at 522. Some of the states maintaining panels of arbitrators for resolution of labor disputes include Connecticut, New York, North Carolina, South Carolina, and Pennsylvania. *Id.*

B. *Discrimination*

Title 21, section 495 of the Vermont Statutes Annotated²¹⁹ incorporates the provisions of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.²²⁰ Consequently, the proposed statute need not address this particular area with its legislative protections.

C. *Reporting Violations by Employers That Threaten Public Health or Safety*

A "whistleblowing" provision would bar unjust dismissals of employees for disclosures to their supervisors or to a public body of any activities, policies or practices of employers that the employee reasonably believes to pose a substantial threat to public health or safety.²²¹ The provision would also encourage the employee to disclose to his/her supervisor or appropriate public body any substantial mismanagement, excessive waste of funds, or abuse of public authority by ensuring protection against retaliatory personnel action for having done so. This provision would also protect those employees who report a violation or suspected violation of a law, regulation, or rule promulgated pursuant to the law of Vermont or the United States. An employee requested to participate in an investigation, hearing, or inquiry held by a public body or a court would also be afforded whistleblower protection against employer retaliation. Encouraging such important public obligations on the part of employees would certainly be in the best interests of Vermont citizens.

D. *Refusal to Violate a Criminal Statute*

It would be unlawful for an employee to be discharged for refusing to obey his/her employer's instructions to commit an act in

219. VT. STAT. ANN. tit. 21, § 495 (1981).

220. See *supra* note 55. In Vermont, the *Fair Employment Practice Act* states: (a)(1) It shall be unlawful employment practice, . . . [f]or any employer, employment agency or labor organization to discriminate against any individual because of his race, color, religion, ancestry, national origin, sex, place of birth or age, or against a qualified handicapped individual.

VT. STAT. ANN. tit. 21, § 495 (1981).

221. See *supra* notes 104-20 and accompanying text.

violation of a criminal statute.²²² Since the statute which makes that conduct a crime is a clear indication of an accepted public policy, this provision would dissuade an employer from using his/her leverage in the employment relationship to defeat that public policy.

E. *Exercising Statutory Rights or Duties*

This provision would bar unjust dismissals by employers of those employees who have simply carried out one of their statutory rights or duties.²²³ This provision would serve to protect employees who seek to exercise their statutory rights and duties by freeing them from the employer's threats convincing them to do otherwise. Such statutory rights and duties include: jury duty service, filing a workmen's compensation claim, or the right to vote.

F. *Union Activities*

The Vermont Legislature has enacted a statute which covers this particular area. It is the Vermont State Labor Relations Law,²²⁴ and essentially incorporates the provisions of the National Labor Relations Act.

G. *"Catch-all" Provision*

This section would be the most flexible provision of the statute because it would leave the scope of prohibited terminations rather open-ended. It would be closely modeled after the French *abus de droit*, or "abuse of right" concept,²²⁵ which prohibits discharges that are totally arbitrary or completely unrelated to the needs of the employment relationship. A glaring example at the present time is sexual harassment toward employees on the job. Other instances would include refusals to respond to an employer's inquiries or questionnaires which are not job-related, or refusal to take a lie detector test. The employee who resists his/her employer's attempts to intimidate or coerce in such a way must be afforded some legal support.

222. See *supra* notes 84-88 and accompanying text.

223. See *supra* note 89-95 and accompanying text.

224. VT. STAT. ANN. tit. 21, §§ 1501-1623 (1981 & Cum. Supp. 1983).

225. See *Summers, supra* note 12, at 510.

CONCLUSION

In the past decade, various state and federal courts have taken the initiative in recognizing causes of action for those employees who are terminable at the will of their employer. Backed by the employment at-will doctrine, the employer holds considerable leverage in the employment relationship. The courts have been careful when making inroads to this doctrine, with many hinting that such a matter would be better suited for the legislatures. In light of today's economy and the scarcity of jobs, non-unionized employees in the private sector require protection from unjust dismissals and retaliatory discharges. The Vermont Legislature must balance the competing interests of employer and employee before proposing any statutory solutions.

Many employment relationships lack the mutuality of obligation that was prevalent in the past. The Vermont Legislature would benefit many Vermont citizens employed in the private sector without coverage of a collective bargaining agreement, by injecting some fairness and objectivity back into those decisions concerning termination. By continuing to adhere to the common law rule, the Vermont courts, thus far, have shown little concern for the plight of the at-will employee. Therefore, it is time for the Vermont Legislature to come forward with the statutory protections needed by the vulnerable at-will employee and reject the long-accepted employer's absolute right of discharge.

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