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At-Will Employment: An Overview

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AT-WILL EMPLOYMENT: AN OVERVIEW

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I. INTRODUCTION

A. In General

The most dramatic development of the last decade has been the rapid judicial expansion of modifications in at-will employment doctrine.

B. Signs of Quickening Interest in Unjust Dismissal Legislation

1. Bills forbidding wrongful discharge have been introduced in a dozen or more legislatures.

2. A special committee of the Labor and Employment Law Section of the State Bar of California has recommended statutory regulation of unjust dismissal.

3. The individual rights committee of the ABA Section on Labor and Employment Law has drafted a questionnaire regarding the critical issues to be considered in any proposed legislation.

4. The ALF-CIO's Executive Council has endorsed the concept of wrongful discharge legislation.

5. The Commissioners on Uniform State Laws have decided to draft a model statute.

6. A year ago Montana became the first state to enact a comprehensive law protecting employees against unjust discharge.

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II. CURRENT LAW ON EMPLOYMENT AT WILL

A. In General

Approximately 40 states have recognized, in holdings or strong dictum, some form of modification of the once universally accepted doctrine of employment at will. See generally C. Bakaly & J. Grossman, Modern Law of Employment Contracts (1983); H. Perritt, Employee Dismissal Law and Practice (1984); W. Holloway & M. Leech, Employment Toleration: Rights and Remedies (1985); S. Pepe & S. Dunham, Avoiding and Defending Wrongful Discharge Claims (1987).

B. Principal Legal Theories

1. Violation of public policy (usually tort), e.g., Peterman v. Teamsters Local 396, 344 P.2d 25 (Cal. App. 1959) (employee fired for refusing to commit perjury); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (employee fired for refusing to join price-fixing scheme); cf. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (even private employer may violate employee's right of free speech; but cf. Murphy v. American Home Prod. Corp., 448 N.E. 2d 86 (N.Y. 1983) (public policy exception not recognized).

2. Violation of contract (assurance of continuing employment at time of hiring or policy set forth in employee handbook), e.g., Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. App. 1981); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W. 2d 880 (Mich. 1980); Weiner v. McGraw-Hill, Inc., 443 N.E. 2d 441 (N.Y. 1982); but cf. Mau v. Omaha National Bank, 299 N.W. 2d 147 (Neb. 1980).

3. "Good faith and fair dealing," e.g., Fortune v. National Cash Register Co., 364 N.E. 2d 1251 (Mass. 1977); see also Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (Cal. App. 1980). Contra, Murphy v. American Home Prod. Corp., 448 N.E. 2d 86 (N.Y. 1983).

C. Subsidiary Legal Theories

1. Prima facie tort, e.g., Costello v. Shelter Mutual Ins. Co., 697 S.W. 2d 236 (Mo. App. 1985).

2. Fraud, e.g., Mueller v. Union Pacific R.R., 371 N.W. 2d 733 (Neb. 1985).

3. Negligent evaluation of employee's performance, e.g., Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982).

4. Defamation.

5. Intentional infliction of emotional distress.

III. COMMENTARY ON EXISTING LAW

A. Judicial Attitudes

1. Only the most timid or hidebound court is likely to hesitate to sustain a cause of action if a discharge violates a fundamental public policy enunciated by the legislature. But this is going to be the relatively rare case.

2. Despite some extremely broad language in the opinions of certain courts, notably California's in applying the doctrine of "good faith and fair dealing," I do not believe there is a square holding by any court (except possibly Montana's, where a statute now exists) that an employer may not fire any employee without a positive showing of just cause, unless there is a contract provision to that effect. Traditional good-faith doctrine deals with contract performance, not termination. Most courts will probably not apply it to dismissal cases.

3. Courts in the more progressive states have gone about as far with unjust discharge actions as they are going to go. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word not to fire except for good reason. But ordinarily they will not impose an affirmative obligation on employers to prove just cause to support a discharge.

B. Employer Counterattacks

1. Jury instructions, e.g., "just cause" for termination means "a fair and honest cause or reason, regulated by the good faith of the employer" (Pugh v. See's Candies, supra, on remand).

2. Explicit declaration on job application form that any contract would be for employment at will, e.g., Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986).

3. Purgation of personnel manuals having "just cause" assurances; this might create some problems regarding consideration or promissory estoppel but the technicalities can probably be worked out. Query the soundness of eliminating such protections as a matter of personnel policy.

4. Releases of all claims, signed by the employee at the time of termination and often accompanied by a special severance payment; these too are likely to be sustained, at least if there is no unconscionable overreaching.

IV. PROSPECTS FOR LEGISLATION

A. Current Activity

1. In general. Bills have been drafted in more than a dozen jurisdictions to give employees "just cause" protections against dismissals (California, Colorado, Connecticut, Illinois, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, Virgin Islands, Washington, Wisconsin, U.S. Congress).

2. Typical bill (California, Illinois, Michigan) would provide for arbitration system, not court and juries, and would substitute reinstatement with or without back pay or severance pay as a remedy instead of compensatory and punitive damages. Montana's statute gives the option of arbitration but retains punitive damages. Most bills, and the new Montana law, do not apply to employees covered by collective bargaining agreements. There is plainly a federal preemption question here (e.g., Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985), but the Supreme Court has exhibited a liberal attitude toward state regulation of employment discrimination (e.g., Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963)) and "minimum labor standards" (e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). The federal courts of appeals are divided on the preemption issue.

3. A statutory arbitration system would not have the hand-tailored quality or the built-in support mechanisms of a collectively bargained system. But it would be much better than nothing for unorganized employees. Statutory "interest" arbitration procedures have worked, and so have unilaterally instituted employer grievance arbitration procedures.

4. Prospects are slight for immediate action in most states; California is strongest possibility.

B. Interested Parties and Positions

1. Employers have been troubled by multimillion dollar damage awards from juries ($20 million, $4.7 million, and $3.3 million have been granted to single individuals; plaintiffs in recent studies in California won over 75 percent of the time and averaged about $500,000 damages) but have generally resisted legislative trade-off or comprehensive "just cause" protections in return for elimination of jury awards of compensatory and punitive damages.

2. Unions have been ambivalent, some fearing loss of major selling point in organizing efforts, while others have responded to idealistic appeal and to opportunity to demonstrate representational capability. UAW, AFSCME, and California State Federation of Labor have long been supportive; national AFL-CIO Executive Council has recently announced its backing of legislation.

3. Academics have generally been favorable to "just cause" protections (Benjamin Aaron, Lawrence Blades, Alfred Blumrosen, Matthew Finkin, Cornelius Peck, Jack Stieber, Clyde Summers, among others), but Richard Epstein of Chicago and Richard Power of St. Louis have defended employment at will.

C. International Scene

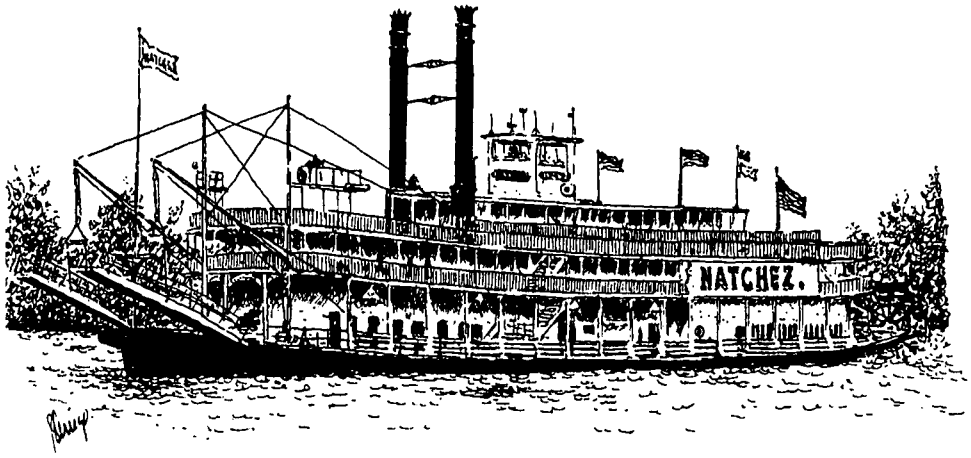
1. The United States remains the last major industrial democracy that has not heeded the call of the International Labor Organization for wrongful discharge legislation. See Association of the Bar of the City of New York, Committee on Labor and Employment Law, "At-Will Employment and the Problem of Unjust Dismissal," 36 The Record 170 (1981).

2. In Canada, employees subject to federal law are protected against unjust dismissal by a statutory arbitration system. Act to Amend Canada Lab. Code Section 61.5, 1977-78 Can. Stat. 615-18 (1978).

3. Warning against too ready a transplanting of foreign statutory schemes to American soil is Estreicher, "Unjust Dismissal Laws: Some Cautionary Notes," 33 Am. J. Comp. L. 310, 323 (1985).

V. CONCLUSION ON EMPLOYMENT AT WILL

Over time, moral imperatives and notions of simple justice tend to win out in American law over strictly economic interests. Despite certain costs that corrective legislation would impose on business, the financial and psychological devastation visited upon the estimated 150,000 nonunion, nonprobationary employees who are fired unfairly each year is not likely to be left unremedied indefinitely. A more contented, cooperative, and efficient work force may even prove the bonus in the bargain. See, e.g., E. Vogel, Japan as Number One: Lessons for America 131-57 (1979); R. Pascale & A. Athos, The Art of Japanese Management 131-237 (1981); cf. Special Task Force, Dep't of HEW, Work in America 93-110, 188, 201 (1973).



The Natchez is but one of several authentic sternwheel steamboats plying the Mississippi River at New Orleans, providing sightseeing and entertainment for visitors.
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