

TRANSFORMING AT-WILL EMPLOYMENT DISPUTES INTO WRONGFUL DISCHARGE CLAIMS: FERTILE GROUND FOR ADR

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I. INTRODUCTION

In recent years, the employment-at-will rule² has been whittled away by legislative enactments and case law.³ Courts, once reticent about disturbing the

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2. "Employment-at-will" means that employment relationships of unspecified duration are presumed to be at the will of either the employee or employer. Either party may, without legal consequence, terminate the relationship without notice and for good cause, bad cause, or even cause that is morally wrong. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), *overruled on other grounds by Hutton v. Waters*, 179 S.W. 134 (Tenn. 1915); *see infra* notes 17-19 and accompanying text.

3. Only Montana and Puerto Rico have statutes preventing the discharge of employees without just cause. *See* MONT. CODE ANN. §§ 39-2-901 to -914 (1987); P.R. LAWS ANN. tit 29, § 185a-i (1985). The additional panoply of protections has been accomplished through case law, workers' compensation, or whistleblowers' legislation. Alabama: ALA. CODE § 25-5-11.1 (1992) (prohibiting the termination of an employee who sues to recover workers' compensation or files notification of a safety violation); Alaska: *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783 (Alaska 1989) (an employee manual can modify an employment-at-will relationship); Arizona: *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170 (Ariz. 1984) (an employee manual can form the basis of an exception to the at-will doctrine); Arkansas: *Sterling Drug v. Oxford*, 743 S.W.2d 380 (Ark. 1988) (at-will employee cannot be terminated for reporting violation of the law); California: *Petermann v. International Bhd. of Teamsters, Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959) (employee cannot be terminated for refusing to give false testimony before a legislative committee); Colorado: *Continental Air Lines v. Keenan*, 731 P.2d 708 (Colo. 1987) (at-will employee may enforce termination procedure of handbook under implied contract theory or promissory estoppel); Connecticut: *Schmidt v. Yardney Elec. Corp.*, 492 A.2d 512 (Conn. App. Ct. 1985) (retaliatory discharge for reporting employer's fraud is actionable); Delaware: *Heller v. Dover Warehouse Mkt.*, 515 A.2d 178 (Del. 1986) (employee required to take polygraph exam in contravention of state law has cause of action for wrongful discharge); Florida: *Smith v. Piezo Technology & Professional Adm'rs*, 427 So. 2d 182 (Fla. 1983) (Florida recognizes a cause of action for discharge of employee for filing workers'

compensation claim); Georgia: No modification; Hawaii: *Parnar v. Americana Hotels*, 652 P.2d 625 (Haw. 1982) (discharge for refusing to commit an illegal act is recognized as a public policy exception to the at-will doctrine); Idaho: *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977) (employee may claim damages for wrongful discharge if discharge violates public policy); Illinois: *Shores v. Senior Manor Nursing Ctr.*, 518 N.E.2d 471 (Ill. App. Ct. 1988) (Plaintiff's discharge for reporting poor performance on the job violates public policy); Indiana: *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (court refused to dismiss claim of employee discharged for declining to participate in restraint of trade scheme); Iowa: *McBride v. Sioux City*, 444 N.W.2d 85 (Iowa 1989) (employee handbook may create a unilateral contract); Kansas: *Kristler v. Life Care Ctrs. of Am.*, 620 F. Supp. 1268 (D. Kan. 1985) (employee terminated for testifying against former employer at unemployment compensation hearing can state cause of action for retaliatory discharge); Kentucky: *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730 (Ky. 1983) (employee discharged for pursuing workers' compensation benefits has cause of action for wrongful discharge); Louisiana: *Ducote v. J.A. Jones Constr. Co.*, 471 So. 2d 704 (La. 1985) (holding that LA. REV. STAT. ANN. § 23:1361 (1985) permits workers to exercise right to workers' compensation without fear of discharge); Maine: *Terrio v. Millenocket Community Hosp.*, 379 A.2d 135 (Me. 1977) (parties may enter into employment contracts terminable only for cause by clearly stating their intention to do so); Maryland: *Ewing v. Koppers Co.*, 537 A.2d 1173 (Md. 1988) (employee's discharge for filing workers' compensation claim contravenes public policy); Massachusetts: *DeRose v. Putnam Management Co.*, 496 N.E.2d 428 (Mass. 1986) (employee discharged for refusing to testify against co-worker can recover damages for wrongful discharge); Michigan: *Goins v. Ford Motor Co.*, 347 N.W.2d 184 (Mich. Ct. App. 1983) (employer cannot discharge employee for having filed workers' compensation claim against previous employer); Minnesota: *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986) (employee allegedly discharged for refusing to put leaded gasoline into an "unleaded fuel only" car has stated a public policy exception to the at-will doctrine); Mississippi: *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (limited exception to the at-will doctrine recognized for refusal to commit an illegal act); Missouri: *Boyle v. Vista Eyewear*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (employee discharged for refusal to violate a well-established public policy has cause of action); Montana: MONT. CODE ANN. §§ 39-2-901 to -914; Nebraska: *Johnston v. Panhandle Coop. Ass'n*, 408 N.W.2d 261 (Neb. 1987) (employee handbook constitutes a contract if it meets requirements for unilateral contract formation); Nevada: *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984) (discharge of at-will employee for filing for workers' compensation claim is actionable in tort); New Hampshire: *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974) (contract for definite period may be implied from employee's length of service and relocation of family at his employer's request); New Jersey: *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940 (D.N.J. 1991) (handbook language created a binding contract limiting employer's right to terminate absent good cause); New Mexico: *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd on other grounds*, 687 P.2d 1083 (N.M. 1983) (policy manual may constitute an implied contract even for probationary employees); New York: *Sivel v. Readers Digest, Inc.*, 677 F. Supp. 183 (S.D.N.Y. 1988) (oral assurances showed evidence of express limitations required to rebut the at-will presumption); North Carolina: *Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445 (N.C. 1989) (North Carolina recognizes the refusal to commit an illegal act exception to the at-will doctrine); North Dakota: *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (North Dakota recognizes public policy exception to the at-will doctrine for a discharge resulting from filing workers' compensation claim); Ohio: *Merkel v. Scovill, Inc.*, 570 F. Supp. 133 (S.D. Ohio 1983) (public policy exception to the at-will doctrine is recognized for discharge resulting from refusal to commit perjury at employer's request); Oklahoma: *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519 (Okla. 1985) (Oklahoma recognizes cause of action for retaliatory discharge resulting from filing workers' compensation claim); Oregon: *Delaney v. Taco Time Int'l*, 681 P.2d 114 (Or. 1984) (employee terminated for refusal to sign false statements regarding another's termination has action in tort for wrongful discharge); Pennsylvania: *Shaw v. Russell Trucking Line*, 542 F. Supp. 776 (W.D. Pa. 1982) (employee may have cause of action for wrongful discharge for dismissal resulting from reporting a violation of the law); Rhode Island: *Cummins v. E.G. & G. Sealol*, 690 F. Supp. 134 (D.R.I. 1988) (at-will employees have cause of action in tort for retaliatory discharge for reporting violations of statutorily recognized public policy); South Carolina: *Ludwick v. This Minute of*

employer-employee relationship, are now active partners in its regulation.⁴

With the development of case law has come a renewed emphasis on legislative proposals intended to protect employees from the adverse effects of unjust termination.⁵ In 1980, the Corporate Democracy Act was introduced in Congress.⁶ The bill, which would have amended the National Labor Relations Act,⁷ curtailed the right of employers to discharge employees freely.⁸ Viewed as an unacceptable encroachment on the employer's prerogative to terminate, the legislation could not muster sufficient support and died at the end of the legislative term.⁹

State legislative activity, no less acute, did not fare differently. Between 1973 and 1991, at least five states introduced, without success, legislation

Carolina, 337 S.E.2d 213 (S.C. 1985) (South Carolina recognizes public policy exceptions to the at-will doctrine); South Dakota: *Larson v. Kreiser's, Inc.*, 472 N.W.2d 761 (S.D. 1991) (employee who is promised a promotion to a specific position in exchange for continued work is no longer an at-will employee); Tennessee: *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984) (Tennessee Supreme Court recognizes cause of action for retaliatory discharge based on filing for workers' compensation benefits); Texas: *Murray Corp. v. Brooks*, 600 S.W.2d 897 (Tex. Ct. App. 1980) (Texas has a statutory exception to the at-will doctrine for retaliatory discharge of employee filing workers' compensation claim); Utah: *Hatton-Ward v. Salt Lake City Corp.*, 828 P.2d 1071 (Utah Ct. App. 1992) (employee alleging retaliatory discharge may seek relief pursuant to state's whistleblower statute); Vermont: *Sherman v. Rutland Hosp.*, 500 A.2d 230 (Vt. 1985) (pre-employment conduct of employee and employer constituted an express or implied agreement to incorporate the policy manual's termination provision into the employment agreement); Virginia: *Fielder v. Southco, Inc.*, 699 F. Supp. 577 (W.D. Va. 1988) (employee allegedly discharged for reporting his supervisor's sexual harassment of female employees has a cause of action for retaliatory discharge); Washington: *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (Washington recognizes exception to at-will doctrine when the discharge contravenes a mandate of public policy); West Virginia: *Gillespie v. Elkins S. Baptist Church*, 350 S.E.2d 715 (W. Va. 1986) (the at-will status may be modified by a personnel manual); Wisconsin: *Ferraro v. Kuelsch*, 368 N.W.2d 666 (Wis. 1985) (an employee handbook can modify at-will employment); Wyoming: *Griess v. Consolidated Freightways Corp.*, 776 P.2d 72 (Wyo. 1989) (an employee not covered by a collective bargaining agreement may maintain a cause of action for wrongful discharge for filing workers' compensation claim).

4. For years, courts viewed the employment relationship in the same way as a marriage — a private relationship subject to internal controls. Strict adherence to the traditional at-will rule often produced harsh results. To alleviate such consequences, courts have modified the rule to afford at-will employees some protection from unwarranted or injudicious discharge.

5. See Henry H. Perritt, Jr., *Constitutional, Political and Attitudinal Barriers to Reforming Wrongful Dismissal Law*, in PROCEEDINGS OF NEW YORK UNIVERSITY FORTY-SECOND ANNUAL NATIONAL CONFERENCE ON LABOR §§ 3.01-.06 (Bruno Stein ed., 1989). In advocating the passage of a federal and state statute, Professor Perritt posits that shifts in the balance of power require "more than a mere codification of common law theories." *Id.* § 3.01, at 3-3. Ideally, a constitutional statute will extinguish common law theories, make full use of incentive-based arbitration, provide administrative-type judicial review if arbitration is mandatory, and ensure that statutory replacements for common law rights are balanced and reasonable. *Id.* § 3.05, at 3-35 to 3-43.

6. H.R. REP. NO. 7010, 96th Cong., 2d Sess. (1980).

7. 29 U.S.C. §§ 151-169 (1988 & Supp. 1992).

8. See 1981 CIS S241-19.6, 386.

9. *The Narrowing Right to Fire: How Chemical Companies are Coping*, CHEMICAL WEEK, June 22, 1983, at 46, 48.

restricting an employer's right to terminate employees without cause.¹⁰ Montana is the only state that has been able to surmount all obstacles created by a formidable, albeit ironic, alliance of union and business interests.¹¹

In 1985, the Uniform Law Commissioners formed a subcommittee comprised of prominent labor and management advocates and academicians. After six years of intense activity, the subcommittee produced the Model Employment Termination Act.¹² Less intrusive than statutory law, it is a watered-down version of the bill introduced in Congress in 1980. It is, however, the first comprehensive rule-making initiative.

Today the rule of employment-at-will remains in flux. This situation will likely continue as the American unionized work force shrinks, and courts and legislatures look for ways to protect workers. Whether the politics of the time will succeed in compelling new legislative initiatives or impose on judges, as sculptors of public policy, the function of strengthening the common law rights of employees, it is clear that the at-will rule, once a virtual kingpin in employment law, has now been reduced to a patchwork of theories, exceptions, and evidentiary presumptions.

10. HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 9.11, at 216-18 (1992). States which introduced such legislation included California, Connecticut, Michigan, New York, and Pennsylvania. *Id.* The Michigan and Pennsylvania bills applied to all employees not covered by collective bargaining agreements and prohibited dismissal without just cause. *Id.* at 216. Both provided for a two-step grievance procedure incorporating mediation and arbitration. *Id.* at 217. A committee of the California State Bar endorsed legislation establishing a just-cause standard for dismissal, arbitration, and reinstatement with back pay as a primary remedy. *Id.* at 218.

11. *Id.* at 215. Employers and unions found themselves on the same side of the bargaining table for very different reasons. *Id.* Employers were reluctant to relinquish managerial authority over personnel. *Id.* Conversely, unions opposed the legislation because it would eliminate the principal incentive for workers to join unions — job protection. *Id.*

12. § 1-14, 7A U.L.A. 67 (Supp. 1992). The Uniform Employment Termination Act prohibits an employer from discharging an employee without good cause. *Id.* § 3(a). It extinguishes all common law rights and claims of a terminated employee against the employer based on the termination in exchange for statutory protection. *Id.* § 2(c). It does not displace statutory or collective bargaining agreement rights or express written or oral agreements. *Id.* § 2(e). The Act applies to persons who have been employed for one year and who have worked 520 hours during the 26 weeks before termination. *Id.* § 3(b). Parties may waive the good cause requirement only by express written agreement, provided a minimum schedule of severance pay is provided. *Id.* § 4(c). A quintessential component of the Act is the arbitration provision. *See id.* §§ 5-6. Remedies include back pay, lump sum severance, and attorney fees, although reinstatement is the preferred remedy. *Id.* § 7. Vacatur is based on the Uniform Arbitration Act. *Id.* § 6. Despite the consideration given by the drafting committee to address the substantive rights of employees, random remedies, and a time-consuming decision-making process, the Act has drawn considerable criticism. Among the opponents' concerns: (1) elimination of common law torts and contract claims; (2) elimination of punitive damages in egregious cases; (3) elimination of emotional distress damages; (4) drastic limits on prospective front pay damages; (5) ability of employer to "opt out" of the Act by obtaining agreements with employees that provide liquidated damages, establish an internal ADR procedure, and establish performance standards; (6) exclusion of part-time public and small firm employees; (7) unreasonably short statute of limitations; (8) limited discovery; (9) liberal appeal provision; and (10) good-cause standard subject to harsh interpretation. *See generally* Paul H. Tobias, *Defects in the Model Employment Termination Act*, LABOR LAW J. 500 (Aug. 1992).

This Article begins by reviewing the historical evolution of the at-will rule and examining the common law wrongful dismissal theories. Next, it describes the recent trend of arbitrating wrongful discharge disputes, a trend which the author suggests provides a practical, sound forum for the resolution of employment claims.¹³ Finally, since arbitration is in derogation of the common law, this Article discusses the constitutional and pragmatic barriers to full-scale reform and use of arbitration. The author concludes that fragmentation of interests, political motivations, and the reluctance of the United States Supreme Court to confront an indispensable provision of the Federal Arbitration Act are insufficient to overcome the strong if not virtually impregnable presumption favoring arbitration.

II. OVERVIEW OF EMPLOYMENT-AT-WILL

The concept of employment-at-will is not an American aberration. Traced to British law, an employment contract providing for no specific duration was presumed to be for a year. Blackstone observed that the law was intended to protect agricultural workers.¹⁴ As Great Britain became industrialized, exceptions were made to the yearly presumption.¹⁵ Custom of trade determined the duration of employment.¹⁶

American courts later adopted the traditional British perspective on at-will employment. In *Payne v. Western & Atlantic Railroad*,¹⁷ the earliest case to address the rule, the Tennessee Supreme Court held that an employer may discharge or retain an 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*."¹⁸ This

13. As the once impenetrable employment-at-will rule eroded, employers who sought to stave off organized labor implemented arbitration. By doing so, they rejected the at-will employment arrangement. Today, arbitration has become a favored process to resolve employment disputes primarily because arbitrators have the necessary skills, training, and experience to understand the unique problems of the work place.

14. See CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* § 1.4, at 9 (1991); STEPHEN PEPE & SCOTT DUNHAM, *AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS* § 1:02, at 3 (1991).

15. See *Hathaway v. Bennett*, 10 N.Y. 108 (1854). In this case, the New York Court of Appeals, relying on British precedent, held that a newspaper carrier was properly terminated even without notice. *Id.* at 113. The court's opinion introduced the rule of mutuality of obligation, i.e., that the plaintiff could terminate his employment with the defendant at any time, with or without notice. *Id.* at 112. American courts, however, rejected the yearly presumption. H.G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 283 (1886).

16. BAKALY & GROSSMAN, *supra* note 14, § 1.4, at 9.

17. 81 Tenn. 507.

18. *Id.* at 518. Commentators disagree on the origin of the doctrine. Some credit H.G. Wood's treatise. See *supra* note 15. Wood's rule stated that a hiring for an indefinite period was presumptively at-will and was terminable at any time by either party. See Wood, *supra* note 15, at 283-86. Others credit *Hathaway v. Bennett*, 10 N.Y. 108. In *Hathaway*, the court held that just as an employee could quit at any time, an employer could terminate him at any time except if trade custom required notice. *Id.* at 113. Absent this exception, the employer was free to terminate the

right may be exercised by the employee in the same way.¹⁹ The court's opinion illustrated the legal effect of employment-at-will and reinforced the rule of mutuality of obligation; unless both parties to a contract are bound, neither is bound.

The mutuality doctrine was strengthened in *Adair v. United States*.²⁰ The United States Supreme Court found unconstitutional a congressional act which made it a criminal offense for a carrier engaged in interstate commerce to discharge an employee because of union membership. The Court upheld the employer's unrestrained freedom to discharge at-will employees without cause, finding the act to be "repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce."²¹ After *Adair*, the at-will rule had a constitutional foundation, one which would remain undisturbed for several decades.

Erosion of the ironclad rule occurred in 1935 with the passage of the National Labor Relations Act (Wagner Act).²² The centerpiece of the Act, Section 7, encouraged collective bargaining and protected a worker's exercise of freedom of association and self-organization.²³ The Wagner Act was upheld when the Supreme Court repudiated the constitutional protection of the employer's absolute right to discharge by declaring the Wagner Act constitutional in *NLRB v. Jones & Laughlin Steel Corp.*²⁴ The mutuality of obligation theory, though

employee at will. *Id.* In another early case, *Perry v. Wheeler*, 75 Ky. (12 Bush) 541 (1877), an employee was dismissed although he had a contract of "permanent" employment. The Kentucky Supreme Court held that "permanent" is not meant literally and stressed the mutuality of obligation. *Id.* at 548-49. A final source, a code written by David Dudley Field in 1865 and adopted by California in 1873, defined at-will as follows: "Termination at will. An employment having no specified term may be terminated at the will of either party on notice to the other except where otherwise provided by this Title." CAL. CIV. CODE § 1999 (1873).

19. *Payne*, 81 Tenn. at 518.

20. 208 U.S. 161 (1908).

21. *Id.* at 180. The Court rationalized the decision by stating that "the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract." *Id.* at 175. To deny the employer the freedom to discharge his or her employees at-will constitutes deprivation of property without due process of law, and is a clear violation of the Fifth Amendment. *Id.* at 174, 176.

22. 29 U.S.C. §§ 151-169.

23. *See id.* § 151. This language states:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

24. 301 U.S. 1 (1937). In upholding the constitutionality of the Act, the Court distinguished between the "normal" exercise of the right of discharge and the use of the right of discharge to coerce and to intimidate employees from engaging in collective bargaining, holding that the legislative purpose was to preclude only the latter. *Id.* at 45-46.

ostensibly confined to employees subject to collective bargaining agreements, was no longer applicable without limitation.

The shift which occurred in *Jones & Laughlin Steel Corp.* did not penetrate the non-union arena until the Pennsylvania Supreme Court decided *Geary v. United States Steel Corp.*²⁵ Geary, a tubular product salesman, was dismissed after expressing concern over inadequately tested products.²⁶ Although the Pennsylvania Supreme Court was presented with an ideal opportunity to decide whether an employer's unfettered right to discharge employees should be judicially restricted, it declined to do so; instead, the court focused on the narrow issue of whether the employer's conduct constituted specific intent to harm or accomplish an ulterior purpose.²⁷ Geary, the court concluded, "had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house."²⁸

The public policy argument advanced by Geary was, with equal force, rejected.²⁹ Geary did not have expertise to assess safety, nor did his responsibilities include making judgments concerning products which enter the stream of commerce.³⁰ The court held that public policy must be clear, not amorphous, for a claim to prevail.³¹

A compelling dissent by Justice Roberts produced the seed for what would later become a public policy exception. Characterizing the majority opinion as one which "fails to perceive that the prevention of injury is a fundamental and highly desirable objective of our society,"³² Justice Roberts addressed the "realities of twentieth century industrial organization . . . recognizing [that] a cause of action for wrongful discharge . . . will help to check a serious menace

25. 319 A.2d 174 (Pa. 1974).

26. *Id.* at 175.

27. *Id.* at 177-78.

28. *Id.* at 178.

29. *Id.* at 179. The court stated:

The praiseworthiness of Geary's motives does not detract from the company's legitimate interest in preserving its normal operational procedures from disruption. In sum, while we agree that employees should be encouraged to express their educated views on the quality of their employer's products, we are not persuaded that creating a new non-statutory cause of action of the sort proposed by appellant is to the best way to achieve this result. On balance, whatever public policy imperatives can be discerned here seem to militate against such a course.

Id. at 180 (footnotes omitted).

30. *Id.* 178-79.

31. *Id.* at 180 n.16. In rejecting the broad public policy arguments interposed by Geary, the court was adamant that the notion of substantive due process does not reactivate the employer's constitutional right to discharge freely. *See id.* at 180. The court stated: "But this case does not require us to define in comprehensive fashion the perimeters of this privilege [elevating the employer's privilege of hiring and firing to an absolute constitutional right], and we decline to do so." *Id.* The court added: "Where the complaint . . . discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated," an employee has no cause of action. *Id.*

32. *Id.* at 181 (Roberts, J., dissenting).

in our society, the arbitrary dismissal power of employers."³³ Lamenting the employee's "highly vulnerable status," he observed:

Courts are duty-bound to fashion remedies for the changing circumstances of economic and social reality. And it is far too late in the day for this Court to indulge itself by fictionalizing that the doctrine of freedom of contract justified insulation of an employer's arbitrary and abusive exercise of his power of discharge.³⁴

Geary represented a turning point for at-will cases. No longer were courts willing to rubber-stamp the doctrine. The majority opinion, despite holding for the employer on the facts, made clear that an employer-employee relationship was a proper subject of inquiry for the courts. With *Geary*, a slight though unpronounced shift toward employee rights had occurred.

III. EXCEPTIONS TO THE AT-WILL RULE

It did not take long for courts to traverse the path created by *Geary*. Today the at-will rule, while alive in theory,³⁵ is riddled with exceptions which allow courts to inquire into and to regulate the once sacrosanct relationship between the employer and employee.

A. Implied Contract

The implied contract exception is one of several theories on which courts rely to protect employees from unjust dismissals. Derived principally from employee handbooks, personnel manuals, and oral representations made by employer to employee, the exception originated in a Michigan case, *Toussaint v. Blue Cross & Blue Shield*.³⁶ *Toussaint* consisted of two consolidated cases involving wrongful discharge.³⁷ Each plaintiff had inquired about job security when hired, and each was orally assured that as long as he was "doing the job" he would not be discharged.³⁸ *Toussaint* was given a policy manual which confirmed the company's policy to discharge employees "for just cause only."³⁹

33. *Id.* at 182.

34. *Id.* at 185.

35. See, e.g., *Shankle v. DRG Fin. Corp.*, 729 F. Supp. 122 (D.D.C. 1989). Employment was considered "at-will" when plaintiff conceded he had no written contract or oral assurances of employment for a specific duration. *Id.* at 125. See also *Addison v. Amalgamated Clothing & Textile Workers Union of America*, 372 S.E.2d 403 (Va. 1988), where the Supreme Court of Virginia held that since the contract did not specify a period of employment, it was presumed to be at-will. *Id.* at 405.

36. 292 N.W.2d 880 (Mich. 1980).

37. The companion case decided with *Toussaint* was *Ebling v. Masco Corp.*

38. *Toussaint*, 292 N.W.2d at 884.

39. *Id.*

In a decision which reversed years of laissez-faire attitudes toward the at-will relationship, the Michigan Supreme Court held that a promise not to fire an employee without cause is as enforceable as an employer's promise to pay a bonus, pension, or other form of compensation.⁴⁰ Such a promise may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations based on policy statements in a personnel manual.⁴¹ The court's preoccupation with striking a balance between employer and employee rights was evident:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.⁴²

The court suggested that this benefit to the employer constituted a sufficient consideration for the employer's promise not to discharge without just cause.⁴³

Toussaint unleashed a spate of cases, some consistent with and others slightly at variance with its theme. In *Renny v. Port Huron Hospital*,⁴⁴ the Michigan Supreme Court, following *Toussaint*, held that an employee handbook is, in essence, tantamount to a contract and representations can create a just-cause requirement for termination.⁴⁵ The existence of a written policy, however, does not preclude an employer from making unilateral changes to it. In 1989, the Michigan Supreme Court, in *Bankey v. Storer Broadcasting Co.*,⁴⁶ held that an employer may unilaterally change its written policy from one of discharge for cause to termination at-will, provided reasonable notice is given and the change is made in good faith.⁴⁷

40. *Id.* at 894.

41. *Id.* at 885. In this case, Blue Cross did not offer any evidence to counteract the employee's assertion that the contents of the policy manual expressed the official corporate policy on discipline and termination. *Id.* at 892. Blue Cross had established a policy to discharge for cause only, and this, combined with the written statements provided to the work force, was sufficient to overcome the presumptive construction that the contract of employment was at-will. *Id.*

42. *Id.*

43. *See id.* at 894-95.

44. 398 N.W.2d 327 (Mich. 1986).

45. *Id.* at 335. One crucial aspect of *Renny* was the court's support for the policies behind alternative dispute resolution, *see id.* at 336-38, a precursor of case law development five years hence. This aspect is more fully discussed in Part IV of this Article.

46. 443 N.W.2d 112 (Mich. 1989).

47. *Id.* at 113. The consideration for a new unilateral contract is the employee's continued employment. *Id.* at 115.

The reach of *Bankey* was extended to oral promises in *Bullock v. Automobile Club of Michigan*.⁴⁸ In this case, the Michigan Supreme Court found that an express oral promise existed at the time of employment, and changes in the employment manual created an offer to revise the discharge-for-cause provision of plaintiff's express contract.⁴⁹

B. Tort Actions Based on Implied Contract

Some courts, implying a duty of good faith and fair dealing in the context of employee evaluations, allow employees to sue their employers in tort for breach of this duty. In *Chamberlain v. Bissel, Inc.*,⁵⁰ the District Court for the Western District of Michigan held that negligent performance of a contractual obligation, resulting in harm to the other contracting party or to a third party, is actionable in tort.⁵¹ Since the employer had a contractual obligation, per its policy of termination for cause, to conduct employee reviews, and since it undertook to conduct the reviews, the employer had a duty to use ordinary or reasonable care in performing this obligation.⁵²

However, other courts, rejecting the *Chamberlain* court's logic, have held that tort actions arise only where there is a breach of duty distinct from a breach of contract. This approach, adopted by the Michigan Court of Appeals in *Mitchell v. General Motors Acceptance Corp.*,⁵³ denied recovery to an employee

48. 444 N.W.2d 114 (Mich. 1989); see also *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 734-35 (Ala. 1987) (enforcing handbook provisions while they are in effect are not burdensome to employers); *Pine River State Bank v. Metille*, 333 N.W.2d 622, 627 (Minn. 1983) (oral employment contract for indefinite duration modified by employee handbook); *Enyeart v. Shelter Mut. Ins. Co.*, 693 S.W.2d 120, 123 (Mo. Ct. App. 1985) (employer is contractually bound to observe established handbook policies until they are modified or withdrawn); *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, 1264 (N.J. 1985) (contractual obligations arising from handbooks are revocable for legitimate business reasons); *Langdon v. Saga Corp.*, 569 P.2d 524, 528 (Okla. Ct. App. 1976) (personnel manual's provision can supplant prior contractual terms and become a new contract during the period the policy is in effect and the employee performs).

49. *Bullock*, 444 N.W.2d at 119. Recently, this same court decided *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268 (Mich. 1991). Reiterating the general rule that all employment is presumed to be at-will absent a contrary provision, the court held that where the employee alleges a cause-only contract based on oral statements, those statements must be "clear and unequivocal." *Id.* at 275; see also *Terrio*, 379 A.2d at 138 (oral statement that employee was secure in her job for the rest of her life, made in connection with her long service, creates evidentiary support for her contract claim); *American Bank Stationery v. Farmer*, 799 P.2d 1100, 1102 (Nev. 1990) (employee's acceptance of employer's explicit oral promise to keep employee on the job as long as he performed adequately creates an express oral contract permitting firing for cause only).

50. 547 F. Supp. 1067 (W.D. Mich. 1982).

51. *Id.* at 1081.

52. *Id.*

53. 439 N.W.2d 261 (Mich. Ct. App. 1989).

whose tort claim emanated solely from the "contractual" relationship between employer and employee.⁵⁴

Courts receptive to a claim of tortious conduct are loath to impose restrictions. In *Rulon-Miller v. International Business Machines Corp.*,⁵⁵ the California Court of Appeals ruled that extreme and outrageous behavior of an employer is actionable in tort and supports an award of punitive damages for emotional distress.⁵⁶

C. Implied Covenant of Good Faith and Fair Dealing

It is axiomatic that parties to a contract or commercial transaction are bound by the standard of good faith.⁵⁷ This good faith principle constitutes the third

54. *Id.* at 266. Plaintiff in *Mitchell* relied on *Schipani v. Ford Motor Co.*, 302 N.W.2d 307 (Mich. Ct. App. 1981), in which an appellate panel held that an employee who states a proper claim in contract for breach may also state a claim in tort for negligent evaluation of employment duties. *Id.* at 315. Most panels of the Michigan courts, including those constituted post-*Schipani*, have refused to sanction tort claims where breach of duty is indistinguishable from breach of contract. *See, e.g.*, *Squire v. General Motors Corp.*, 436 N.W.2d 739 (Mich. Ct. App. 1989); *Grant v. Michigan Osteopathic Medical Ctr. Inc.*, 432 N.W.2d 313 (Mich. Ct. App. 1988); *Lopus v. L & L Shop Rite, Inc.*, 430 N.W.2d 757 (Mich. Ct. App. 1988); *Loftis v. G.T. Prods.*, 423 N.W.2d 358 (Mich. Ct. App. 1988). *See also Ferrett v. General Motors Corp.*, 475 N.W.2d 243 (Mich. 1991), where an employee, discharged for excessive absenteeism, brought an action alleging breach of contract and negligent evaluation. *Id.* at 245. In declining to recognize an action in tort for negligent evaluation, the court held that an action may be maintained, if at all, only for breach of a contractual obligation to evaluate. *Id.* at 246.

55. 208 Cal. Rptr. 524 (Ct. App. 1984).

56. *Id.* at 534. The conduct complained of must be so extreme "as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 533. The conduct in *Rulon* involved the plaintiff's manager's initial acquiescence in plaintiff's dating arrangement with a supervisor of IBM, his subsequent flagrant disregard of IBM's policy prohibiting him from inquiring into plaintiff's "off job behavior," his illusory choice to plaintiff [if she gave up her lover, she could retain her job], and his final act of "making the decision for her." *Id.* at 527-28; *see Alcorn v. Anbro Eng'g Inc.*, 468 P.2d 216, 219 n.5 (Cal. 1970) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (3d. ed. 1964)); *see also Rogers v. Loews L'enfant Plaza Hotel*, 526 F. Supp. 523, 529-31 (D.D.C. 1981) (sexual harassment); *Agarwal v. Johnson*, 603 P.2d 58, 62-65 (Cal. 1979) (employee subjected to social epithets and profane insults); *Kelly v. General Tel. Co.*, 186 Cal. Rptr. 184 (Ct. App. 1982) (false accusation of serious crime and alteration of personal records); *McGee v. McNally*, 174 Cal. Rptr. 253 (Ct. App. 1981) (campaign of harassment designed to deprive plaintiff of his job and to replace him with a fellow worker); *Lagies v. Copley*, 168 Cal. Rptr. 368 (Ct. App. 1980) (attempt to undermine professional credibility as well as professional harassment); *Renteria v. County of Orange*, 147 Cal. Rptr. 447 (Ct. App. 1978) (rude and degrading treatment including surveillance and interrogation); *Toney v. State of California*, 126 Cal. Rptr. 869 (Ct. App. 1976) (insidious racial harassment); *Hall v. May Dep't Stores Co.*, 637 P.2d 126 (Or. 1978) (threat of arrest with no evidence to support charge).

57. *See U.C.C. § 1-203* (1990); *see also, e.g.*, MASS. GEN. L. ch. 93B, § 4(3)(c)-(d) (1984); *Kerrigan v. Boston*, 278 N.E.2d 387, 393 (Mass. 1972) (collective bargaining contract); *Murach v. Massachusetts Bonding & Ins. Co.*, 158 N.E.2d 338, 342 (Mass. 1959) (in an insurance contract, insurer must exercise discretionary power to settle claims in good faith); *Krauss v. Keuchler*, 15 N.E.2d 207, 208 (Mass. 1938); *Clark v. State St. Trust Co.*, 169 N.E. 897, 903 (Mass. 1930) (secondary agreement to a stock option agreement); *Elliott v. Kazajian*, 152 N.E. 351, 352 (Mass.

type of at-will exception. Only a handful of states, however, have recognized the implied covenant of good faith and fair dealing in employment contracts.⁵⁸

The seminal case is *Cleary v. American Airlines*.⁵⁹ Plaintiff was discharged for violating employer-imposed regulations,⁶⁰ and plaintiff sued, invoking an implied-in-law covenant of good faith and fair dealing.⁶¹ Tracing the development of good faith and fair dealing from insurance contracts to all contracts, the duty which arises from this principle, said the court, is unconditional, independent in nature, and not controlled by events in the same manner as conditions subsequent or precedent.⁶² The longevity of an employee's service, together with the expressed policy of the employer, operates as a form of estoppel and precludes discharge without good cause.⁶³

At the time, *Cleary* represented a quantum leap in the protection of employee rights, a bold attempt by a liberal court to regulate, in the absence of specific statutory guidelines, the relationship between employer and employee. Some viewed the result in *Cleary* as contrived, calibrated to diminish rampant unionism by safeguarding employment and thwarting the primary benefit of collectively bargained job protection.

Regardless of the court's motivation, *Cleary* paved the way for other jurisdictions to fall in line. Montana took the lead in *Gates v. Life of Montana Insurance Co.*⁶⁴ In adopting the doctrine of good faith and fair dealing in

1926) (broker's commission).

58. Alabama: *Campbell*, 512 So. 2d at 738 (a duty of good faith and fair dealing is implied in all contracts under state law, including employment contracts); Alaska: *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983) (covenant of good faith and fair dealing prevents the discharge of an employee for the purpose of denying him from sharing corporation's future profits); Arizona: *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985) (covenant of good faith and fair dealing protects an employee from discharge because of an employer's desire to withhold benefits earned); California: *Cleary v. American Airlines*, 168 Cal. Rptr. 722, 729 (Ct. App. 1980); see *infra* notes 59-63 and accompanying text; Connecticut: *Magnan v. Anaconda Indus.*, 479 A.2d 781, 789 (Conn. 1984) (implied covenant of good faith and fair dealing is recognized in the at-will context when necessary to fulfill the parties' reasonable expectations); Idaho: *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 749 (Idaho 1989) (implied covenant of good faith and fair dealing is recognized to protect the parties' benefit in the employment contract); Massachusetts: *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977) (at-will employment carries implied covenant of good faith and fair dealing in a contract barring discharge to avoid paying accrued benefits); Montana: *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063, 1066-67 (Mont. 1982); see *infra* notes 64-66 and accompanying text; Nevada: *K-Mart Corp. v. Pansock*, 732 P.2d 1364, 1370 (Nev. 1987) (the bad faith discharge is recognized as a violation of the implied covenant of good faith and fair dealing); New Hampshire: *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1143 (N.H. 1981) (implied covenant of good faith and fair dealing is recognized in all contractual relationships); see also Kimberly Kraly Geariety, *At-will Employment: Time for Good Faith and Fair Dealing Between Employers and Employees*, 28 WILLIAMETTE L. REV. 681 (1992).

59. 168 Cal. Rptr. 722.

60. *Id.* at 724.

61. *Id.*

62. *Id.* at 728.

63. *Id.* at 729.

64. 638 P.2d 1063.

employment contracts, the Montana Supreme Court followed the balancing test established by prior courts and recognized that "'an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world'"⁶⁵ Yet, the court continued, "the employee is entitled to some protection."⁶⁶

While this covenant has gained healthy recognition in several jurisdictions, its use is not without limit. California, retreating drastically from *Cleary*, imposed a stringent limit on damages for breach of the covenant in *Foley v. Interactive Data Corp.*⁶⁷ The *Foley* court, in confining recovery to contract damages only, rejected the notion of a special employment relationship analogous to insured and insurer.⁶⁸ With respect to tort remedies generally, the court, in dictum, commented: "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes."⁶⁹ Creation or extension of rights beyond those provided by contract law, observed the court, lies within the province of the legislature.⁷⁰

Most states have relaxed their application of the covenant, preferring to predicate recovery on the slightly less nebulous implied-in-fact contract and public policy tort exceptions. However, Montana remains aggressive. In 1987, Montana enacted the Wrongful Discharge From Employment Act⁷¹ and became

65. *Id.* at 1066-67 (quoting *Fortune*, 364 N.E.2d at 1256).

66. *Id.* at 1067. The case was remanded to determine whether the employer, in failing to follow established procedures regarding terminations, breached the covenant. *Id.* In a second review, the Montana Supreme Court addressed two fundamental issues. See *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213 (Mont. 1983). First, whether punitive damages can be recovered for breach of the duty to deal fairly and in good faith? Second, whether the breach was for the jury to decide? *Id.* at 216. Relying on *Lipinski v. Title Insurance Co.*, 655 P.2d 970 (Mont. 1982), the court held that, even in the absence of statutory violations, punitive damages may be assessed when the duty with respect to an employee is breached. *Gates*, 668 P.2d at 714. While this duty may arise out of the employment relationship, the duty exists apart from, and in addition to, terms agreed to by the parties. *Id.* Since the duty is imposed by operation of law, tort remedies are available. *Id.* at 715. Observing that "courts exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decisions," the court located evidence in the record to support the jury's finding of fraud, oppression, and malice and reinstated the jury's award of punitive damages. *Id.* at 215-16. "The sting of punitive damages will only be sanctioned where" there is conduct which rises to the requisite level of culpability. *Id.* at 216.

67. 765 P.2d 373 (Cal. 1988).

68. *Id.* at 396.

69. *Id.* at 394.

70. *Id.* at 397 & n.31. See also *Majerus v. Skaggs Alpha Beta*, 799 P.2d 1053 (Mont. 1990), where the Montana Supreme Court held that even when the covenant of good faith and fair dealing applies to an employment relationship, the employer may still terminate an employee if there is a "fair and honest reason" for the termination. *Id.* at 1055. In this case, the theft of company funds constituted "more than a simple transgression" which justified the employee's discharge. *Id.* at 1056.

71. MONT. CODE ANN. §§ 39-2-901 to -914.

one of the first states to legislate the victories achieved through judicial activism.⁷²

Today, most states do not recognize the implied covenant of good faith and fair dealing exception to the at-will rule. The rationale for refusing to align with the pro-covenant states was well-articulated by the Washington Supreme Court in *Thompson v. St. Regis Paper Co.*,⁷³ significantly, to imply a duty to terminate in good faith into every employment contract would "subject each discharge to judicial incursions into the amorphous concept of bad faith."⁷⁴ Such intrusions are better left to the legislature.⁷⁵

D. Public Policy

Of all legal theories, the public policy argument is the most frequently asserted and represents a fertile source for expanding employee rights. The majority of cases fall into three distinct categories:

- (1) discharge for whistle-blowing;
- (2) discharge in retaliation for exercising a vested or statutory right, e.g., suing the employer for a workers' compensation claim; and
- (3) discharge in retaliation for refusing to commit an illegal act.⁷⁶

1. Discharge for Whistle-Blowing

Some states have passed statutes which protect employees from being discharged for exposing the legal violation of others.⁷⁷ Under these statutes,

72. The Montana statute authorizes damages for discharges which: (a) violate public policy or arise from reporting a violation of public policy; (b) lack cause; or (c) violate the employer's express personnel policy provisions. *Id.* § 39-2-904. Federal whistleblower claims and claims which would otherwise arise under collective bargaining agreements are excluded. *Id.* § 39-2-912. Actions must be filed within one year of the discharge. *Id.* § 39-2-911. The statute provides for wages and lost benefits for a period not to exceed four years. *Id.* § 39-2-905. Punitive damages can be awarded if actual fraud or malice is shown. *Id.* If the employer maintains written internal procedures, those procedures must be exhausted before filing an action. *Id.* § 39-2-911. Arbitration is governed by the Uniform Arbitration Act. *Id.* § 39-2-914. A party whose valid offer to arbitrate is not accepted and who prevails in court is entitled to reasonable attorney fees incurred after the offer to arbitrate. *Id.* If an employee makes a valid offer to arbitrate and prevails, the employer pays costs and fees of arbitration. *Id.* If a valid offer to arbitrate is accepted, arbitration is the exclusive remedy for the wrongful discharge. *Id.*

73. 685 P.2d 1081.

74. *Id.* at 1086 (quoting *Pamar*, 652 P.2d at 629).

75. *Id.* at 1086-87.

76. BAKALY & GROSSMAN, *supra* note 14, § 11.1, at 200.

77. See, e.g., ARIZ. REV. STAT. ANN. § 38-532(A)-(E) (1985); CAL. LAB. CODE § 1102.5 (West 1989); COLO. REV. STAT. §§ 24-50.5-101 to -107 (1973); CONN. GEN. STAT. § 31-51m (1958); DEL. CODE ANN. tit. 29, § 5115 (1974); IOWA CODE § 19A.19 (1989); KAN. STAT. ANN. § 75-2973 (1989); LA. REV. STAT. ANN. § 23:964 (West 1985); MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1983); N.J. REV. STAT. § 34.19-1-8 (1988); N.Y. LAB. LAW. § 740 (2)(a) (McKinney 1984);

generally, to prevail, an employee must show that she engaged in protected activity defined by the applicable whistleblowers' act, she was subsequently discharged, and there was a causal connection between the protected activity and the subsequent discharge. The burden then shifts to the employer to assert legitimate reasons for the discharge, i.e., the employer must rebut the prima facie case established by the protected employee.

Michigan, one of the first states to pass a whistleblowers' statute, addressed the public policy exception in *Tyrna v. Adamo, Inc.*⁷⁸ Plaintiff, claiming retaliatory discharge for reporting a faulty furnace to the Health Department, filed a claim against Adamo, Inc. under the Michigan Occupational Safety and Health Act ("MIOSHA").⁷⁹ Plaintiff also filed a separate suit against Adamo, Inc. in circuit court, alleging that she was fired in violation of the Whistleblowers' Protection Act.⁸⁰ When the trial judge granted summary disposition in favor of defendants, finding plaintiff's exclusive remedy to be confined to an administrative action for wrongful discharge under MIOSHA, plaintiff appealed.⁸¹

The Michigan Court of Appeals distinguished between administrative and legal remedies, and held that plaintiff could properly maintain an action under the Whistleblowers' Protection Act even if the employer's wrongful conduct also violates the Michigan Occupational Safety and Health Act.⁸² This is wholly consistent with the underlying purpose of the Whistleblowers' Protection Act which "seeks to protect the integrity of the law by removing barriers to employee efforts to report violations of the law."⁸³

Recognition of the whistleblowers' exception is not limited to reporting violations of law to regulatory organizations or law enforcement officials. In *Sheets v. Teddy's Frosted Foods*,⁸⁴ the quality control director reported deviations in the company's food labeling to his supervisor.⁸⁵ Soon after his report, he was discharged.⁸⁶ The Supreme Court of Connecticut adopted the employee's theory of wrongful discharge.⁸⁷ If the employee had not reported the violation, he could have been subject to criminal sanctions.⁸⁸ According to

OKLA. STAT. tit. 74, § 841.7-.8 (1981 & Supp. 1984); PA. STAT. ANN. tit. 43, §§ 1421-1428 (1963); R.I. GEN. LAWS § 28-5-7(5) (1986). These statutes often provide a full range of legal and injunctive remedies including reinstatement, payment of back wages, full reinstatement of benefits and seniority rights, actual damages, costs, and attorney fees.

78. 407 N.W.2d 47 (Mich. Ct. App. 1987).

79. *Id.* at 48; see MICH. COMP. LAWS ANN. §§ 408.1001-.1094 (West 1985 & Supp. 1992).

80. *Tyrna*, 407 N.W.2d at 48; see MICH. COMP. LAWS ANN. §§ 15.362-.369.

81. *Tyrna*, 407 N.W.2d at 49.

82. *Id.* at 51.

83. *Id.* (quoting *Hopkins v. City of Midland*, 404 N.W.2d 744, 749 (Mich. Ct. App. 1987)).

84. 427 A.2d 385 (Conn. 1980).

85. *Id.* at 386.

86. *Id.*

87. *Id.* at 389.

88. *Id.* at 388.

the court, an employee should not be put in a position to choose between possible criminal sanctions and loss of his employment.⁸⁹

Federal courts have recognized this exception when applicable state law makes retaliatory discharge a crime. In *Belline v. K-Mart Corp.*,⁹⁰ an employee brought suit claiming he was fired in retaliation for reporting to management his supervisor's possible criminal activity involving store merchandise.⁹¹ The employee pursued the matter internally and did not report the matter to police.⁹² The trial court granted the employer's summary judgment motion.⁹³

The Seventh Circuit Court of Appeals held that although no law compels an individual to report criminal activity, public policy favors the exposure of crime.⁹⁴ Illinois law shields employees from retaliatory discharge for volunteering information on suspected criminal activity to encourage crime reporting.⁹⁵ The risk of discharge may deter employees from making such reports.⁹⁶

2. Exercising a Vested or Statutory Right

It is well-settled that the at-will rule cannot be asserted to defeat explicit rights which have been established by the legislature, e.g., Title VII rights.⁹⁷ In *Ambroz v. Cornhusker Square*,⁹⁸ an employee was discharged when he refused to take a polygraph exam under the Nebraska Truth and Deception Examiners Act.⁹⁹ The Act prevents employers from requiring a polygraph as a condition of employment unless the employment involves public law enforcement.¹⁰⁰ Plaintiff's position as a security guard did not meet the threshold requirement.¹⁰¹ The Supreme Court of Nebraska concluded that the

89. *Id.* at 389.

90. 940 F.2d 184 (7th Cir. 1991).

91. *Id.* at 185.

92. *Id.* at 186.

93. *Id.* at 185.

94. *Id.* at 187.

95. *See id.* at 188-89.

96. *Id.* at 188.

97. *See, e.g.*, MASS. GEN. L. ch. 268, § 14A (1990); MICH. COMP. LAWS ANN. § 37.1202 (West 1985) (statute prohibits discharge of handicapped employee who is otherwise qualified for the job); OHIO REV. CODE ANN. § 2313.18(A)(B) (Anderson 1991) (prohibits retaliatory discharge for serving on jury duty); *see also* PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 2:53, at 207-08 (1990).

98. 416 N.W.2d 510, 512 (Neb. 1987).

99. *Id.*; *see* NEB. REV. STAT. § 81-1901 (1981).

100. *Ambroz*, 416 N.W.2d at 512.

101. *Id.*

statute is a clear mandate of public policy on wrongful discharge.¹⁰² A discharge which flies in the face of clear public policy cannot be sustained.¹⁰³

3. Refusing to Commit an Illegal Act

Under this exception, the court's mandate is to assess whether a discharge is based on fulfilling a legal duty and whether there is sufficient nexus to an expressed public policy of the state. This is not an enviable task, given the body of law which purports to define the scope of public policy, but often falls short of doing so.

In *Trombetta v. Detroit, Toledo & Ironton Railroad Co.*,¹⁰⁴ a discharged employee contended that he was requested to alter pollution control reports.¹⁰⁵ The reports were required by state law to ensure conformity with state pollution control standards.¹⁰⁶ The employee argued that his discharge, allegedly for failure to alter the reports, violated public policy.¹⁰⁷ The Michigan Court of Appeals held that at-will exceptions are recognized to prevent the contravention of public policy.¹⁰⁸ The public policy of Michigan, the court stated, does not condone attempts to violate its laws.¹⁰⁹

For a terminated employee to prevail under this exception, it is enough for the employee reasonably to believe that action ordered by the employer was

102. *Id.* at 515.

103. *Id.* at 514. This exception also has been applied to an employee who is terminated because of a legal claim asserted against an employer. In *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057 (5th Cir. 1981), an employee seaman suffered an injury on a ship, and his attorney notified the employer that he was filing a personal injury claim under the Jones Act. *Id.* at 1059. The ship captain advised the seaman to drop the suit or face dismissal. *Id.* The employee refused and was fired. *Id.* The employer argued that there was no cause of action for retaliatory discharge under maritime law. *Id.* The court disagreed, holding that discharge in retaliation for exercising a legal right under the Jones Act constitutes a maritime tort. *Id.* at 1063. An employer should not be permitted to use his right to discharge to retaliate against an employee for seeking to recover what is due him or to intimidate an employee from seeking legal remedies. *Id.* at 1062. "The right to discharge at-will should not be allowed to bar the courthouse door." *Id.*

In *Dudewicz v. Norris Schmid, Inc.*, 480 N.W.2d 612 (Mich. Ct. App. 1991), plaintiff brought suit alleging that his dismissal, stemming from criminal charges filed against his supervisor for assault at work, violated public policy. Defendant sought partial summary judgment. *Id.* at 613. The trial court granted defendant's motion for partial summary judgment and then dismissed plaintiff's motion for reconsideration. *Id.* The court granted defendant a directed verdict, concluding that the public policy argument and the Whistleblowers' Protection Act were inapplicable. *Id.* The Michigan Court of Appeals reversed and held that to allow the discharge of an at-will employee for filing a criminal complaint against a co-worker would force the employee to choose between justice and livelihood. *Id.* at 614. "It is the public policy of this state to protect its citizens from such an onerous choice." *Id.*

104. 265 N.W.2d 385 (Mich. Ct. App. 1978).

105. *Id.* at 386.

106. *Id.*

107. *Id.*

108. *Id.* at 388.

109. *Id.*

illegal, contrary to clearly expressed statutory policy. In *Martin Marietta Corp. v. Lorenz*,¹¹⁰ a former at-will employee brought a wrongful discharge action alleging that he had been discharged because he refused to deceive and to misrepresent the quality of materials used by Martin Marietta in designing equipment for the National Aeronautics and Space Administration (NASA).¹¹¹

The trial court directed a verdict in favor of the employer and ruled that in Colorado a public policy exception was not cognizable.¹¹² The court of appeals, utilizing the standard established in *Cronk v. Intermountain Rural Electric Ass'n*,¹¹³ reversed.¹¹⁴ Martin Marietta appealed to the Colorado Supreme Court, urging the court that, should it endorse the exception, it should restrict its application to situations where there existed "a specific statutory prohibition evincing a clear public-policy."¹¹⁵

Relying on *Petermann v. International Brotherhood of Teamsters, Local 396*¹¹⁶ where this doctrine was first articulated, the court acknowledged that public policy is not a term of "precise definition."¹¹⁷ The term conveys "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."¹¹⁸

Although courts generally have become receptive to some exceptions to the at-will doctrine, uniformity in application continues to be lacking. From this

110. 823 P.2d 100 (Colo. 1992).

111. *Id.* at 102.

112. *Id.* at 104.

113. 765 P.2d 619 (Colo. Ct. App. 1988).

114. *See Lorenz v. Martin Marietta Corp.*, 802 P.2d 1146, 1149 (Colo. Ct. App. 1990).

115. *Martin Marietta*, 823 P.2d at 104.

116. 344 P.2d 25.

117. *Martin Marietta*, 823 P.2d at 105.

118. *Id.* (quoting *Petermann*, 344 P.2d at 27). This public policy exception applies even when statutory remedies are available. In two recent cases, statutory remedies were found to be non-exclusive. In *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992), a black employee sued his former employer under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 1971 to 2000h-6 (1988), claiming retaliation for filing a discrimination charge. *Tate*, 833 P.2d at 1211. He also initiated a pendent state law tort claim for wrongful discharge. *Id.* at 1221. Following an earlier line of cases, the Oklahoma Supreme Court held that the termination of an at-will employee which contravenes a clear mandate of public policy "is a tortious breach of contractual obligations, compensable in damages." *Id.* at 1225. The court stated that a racially-motivated discharge or one in retaliation for filing a race discrimination complaint offends public policy and falls within the reach of *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989), the court's 1989 decision which adopted the public policy tort exception to any discharge violative of constitutional, statutory, or decisional law mandates. *See Tate*, 833 P.2d at 1225. Notwithstanding the availability of Title VII, Oklahoma's anti-discrimination statute, said the court, is to be liberally construed, and remedies provided by state statute are not exclusive. *Id.* at 1230. The application of *Burk*'s common law tort to a racially motivated retaliatory discharge was sustained. *Id.* In *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992), the Utah Supreme Court held that an employee terminated for refusal to falsify tax documents in violation of Utah and Missouri law deserves the protection of the public policy exception of Utah's employment-at-will doctrine. *Id.* at 1283. The court held "that the public policy exception applies in this state when the statutory language expressing the public conscience is clear and when the affected interests of society are substantial." *Id.* at 1282.

quixotic tapestry of case law and pro-employee statutes has emerged an embrace of arbitration to counter the inevitable — a rise in employment disputes. However logical this phenomenon, the embrace was not to be without legitimate challenge.

IV. ARBITRATION AND WRONGFUL DISCHARGE CLAIMS

A. Transformation

Arbitration, a binding adjudicatory process, has roots in antiquity.¹¹⁹ It was exported to the American colonies, but initial acceptability remained elusive, emanating from the English perspective that arbitration agreements were "ugly step-children."¹²⁰ English courts refused to enforce private agreements, and American jurists adopted this posture without examination or analysis.¹²¹

Rapid economic growth, which mobilized the American business lobby, ultimately reduced the hostility and protectionism displayed by courts in the early years. In 1920, the State of New York enacted the first modern arbitration statute.¹²² This was followed by the passage of the Federal Arbitration Act.¹²³

In recent years, the United States Supreme Court has interpreted the Federal Arbitration Act as a mandate to enforce agreements to arbitrate contractual *and* statutory claims.¹²⁴ Together, these cases have reduced the last vestiges of

119. BARRY B. BRAMBLE ET AL., *ARBITRATION OF CONSTRUCTION DISPUTES* § 1.1, at 3 (1990); MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 2:02, at 9 (Gabriel M. Wilner ed., rev. ed. 1987); Thomas Oehmke, *Commercial Arbitration* § 12:3, at 17 (1987).

120. DOMKE, *supra* note 119, § 2:04, at 17.

121. *Id.*

122. See 1920 N.Y. Laws ch. 275, §§ 1-10 (codified as amended at N.Y. CIV. PRAC. L. & R. 7501-7514 (McKinney 1980)). Features of modern or statutory systems of arbitration: (a) treat as irrevocable any agreement to submit future disputes to arbitration; (b) permit a party to compel a recalcitrant party into arbitration; (c) provide that any court action instituted in violation of an agreement may be stayed until arbitration in the agreed manner has taken place; (d) restrict the court's freedom to revise arbitral findings of fact and applications of law; and (e) specify grounds on which awards may be attacked for procedural defects. DOMKE, *supra* note 119, § 4:01, at 27. All states except West Virginia and Alabama have modern arbitration statutes. See ROBERT COULSON, *BUSINESS ARBITRATION — WHAT YOU NEED TO KNOW* 175 (1987).

123. Ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-15 (1988) [hereinafter FAA]). The drafters sought to make arbitration more acceptable in the United States by placing arbitration agreements on the same footing as other commercial contracts. See *id.* § 2.

124. The Supreme Court began reversing years of judicial hostility to the arbitration of statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The *Mitsubishi* Court held that broad arbitration agreements encompass all disputes including those raised on statutory grounds. *Id.* at 625. The international aspect of the contract rendered claims under the Sherman Act arbitrable. See *id.* at 635-36. *Mitsubishi* was followed by *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), where the Court held that arbitration agreements of future disputes arising under the Securities and Exchange Act of 1934 were enforceable. *Id.* at 238. Included in the Court's broad ruling were RICO claims. See *id.* at 242. Finally in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Supreme Court held that pre-

judicial hostility toward arbitration and created a more hospitable environment for arbitration to acquire a firm hold.

To what extent does the Court's relinquishment of jurisdiction over statutory claims apply to wrongful discharge and, more specifically, employment discrimination? Prior to the *Mitsubishi* trilogy,¹²⁵ the law was clear. In 1974, the United States Supreme Court decided the seminal case of *Alexander v. Gardner-Denver Co.*¹²⁶ In *Alexander*, the Court held that arbitration of a Title VII claim is not to be given preclusive effect.¹²⁷ The Court found "no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."¹²⁸ Title VII's purpose and procedure strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance in arbitration under a non-discrimination clause of a collective bargaining agreement.¹²⁹ While an employee presumably may waive his rights under Title VII through a voluntary settlement, resort to arbitration to enforce contractual rights does not constitute waiver.¹³⁰ Title VII creates statutory rights which can be protected best by access to a judicial forum.¹³¹

dispute agreements to arbitrate claims under the Securities Act of 1933 were enforceable. *Id.* at 483. In so holding, the Court expressly overruled *Wilko v. Swan*, 346 U.S. 427 (1953), stating that it was inconsistent with the construction of other federal statutes governing arbitration agreements in a business setting. *Rodriguez de Quijas*, 490 U.S. at 484-85. With this last ruling, judicial skepticism toward arbitration all but disappeared. See *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Public Policy Exception to Arbitrability*, 22 ST. MARY'S L.J. 261, 271-74 (1991).

125. See *supra* note 124.

126. 415 U.S. 36 (1974).

127. *Id.* at 51.

128. *Id.* at 47.

129. *Id.* at 49.

130. *Id.* at 52.

131. See *id.* at 56-57. This view is not antithetical to American labor law. Neither does it reduce the efficacy of arbitration. In its now famous footnote 21, the *Alexander* Court recognized that arbitration, by its very structure, is due considerable deference in appropriate cases. See *id.* at 60 n.21. This footnote reads as follows:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Id.

In assessing arbitration as an adjudicatory process, the Supreme Court found it to be a comparatively inappropriate forum for the final resolution of Title VII claims.¹³² Confronting the critical distinctions between fora without rejecting the arbitral process altogether, the Court observed:

- (a) the arbitrator's role is to effectuate party intent, not the requirements of legislation;¹³³
- (b) the arbitrator's competence "pertains primarily to the law of the shop, not the law of the land;"¹³⁴ and
- (c) fact finding, discovery and evidence in arbitration are not equivalent to the judicial processes.¹³⁵

The federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices, the Court continued, "can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."¹³⁶ Thus, Title VII claims are entitled to a trial *de novo*.¹³⁷

The Supreme Court's next encounter with statutory versus contractual rights occurred seven years later in *Barrentine v. Arkansas Best Freight Systems*.¹³⁸ At issue were violations of the Fair Labor Standards Act¹³⁹ and whether submitting the contractual claim to arbitral review foreclosed judicial action.¹⁴⁰ The Court, with the same exacting standard of scrutiny employed in *Alexander*, confirmed that a single set of facts can give rise to two separate causes of action.¹⁴¹ Once again, the Court offered its rationale:

- (a) a union may not support a statutory claim in arbitration;¹⁴²
- (b) employee statutory rights may not be adequately protected in dispute resolution;¹⁴³
- (c) an arbitrator may not have the contractual authority to apply statutory law;¹⁴⁴

132. See *id.* at 56-57.

133. *Id.*

134. *Id.* at 57.

135. *Id.* at 57-58.

136. *Id.* at 59-60.

137. *Id.* at 60.

138. 450 U.S. 728 (1981).

139. 29 U.S.C. §§ 201-219 (1988).

140. *Barrentine*, 450 U.S. at 729.

141. *Id.* at 737.

142. *Id.* at 742.

143. *Id.* at 743.

144. *Id.* at 744.

- (d) arbitration may deprive employees of statutory rights because arbitrators look to party intent, not enforcement of statutes;¹⁴⁵ and
- (e) arbitrators may be powerless to fashion broad remedies.¹⁴⁶

With this arsenal in hand, it came as no surprise when, three years later, the United States Supreme Court decided *McDonald v. City of West Branch*.¹⁴⁷ Relying heavily on earlier decisions, the Court held that arbitration of federal statutory and constitutional rights of the ilk that 42 U.S.C. § 1983 was designed to safeguard is not an adequate substitute for a judicial proceeding.¹⁴⁸ The Court stressed the distinction: "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law."¹⁴⁹

The Court's opinion was couched in terms nonetheless supportive of arbitration: "In addition to diminishing protection of federal rights, a rule of preclusion might have a detrimental effect on the arbitral process."¹⁵⁰ Employees who are aware of this dichotomy may elect to circumvent arbitration altogether.¹⁵¹

Alexander and its progeny represented the law in the area of statutory rights until the *Mitsubishi* trilogy.¹⁵² This trilogy paved the way for the Court to depart from its earlier holdings, and in a series of recent cases the Court decided that agreements to arbitrate employment disputes should be enforced.¹⁵³ Despite the views of some commentators, these decisions do not create an intersecting line of precedent. The Court's earlier decisions, including the pivotal *Alexander*, involved union contracts. In the context of collective bargaining where the union representative negotiates contract terms directly with the employer, and employees are bound, the Court's earlier decisions may well be justified.¹⁵⁴ But, these decisions stand in stark contrast to those involving individual statutory rights and private two-party agreements to arbitrate, and may warrant the conclusion that different judicial analyses and results are compelled.

145. *Id.*

146. *Id.* at 744-45.

147. 466 U.S. 284 (1984).

148. *Id.* at 290; see 42 U.S.C. § 1983 (1988). The Court determined that arbitration is not a "judicial proceeding" and, therefore, the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), does not apply. *McDonald*, 466 U.S. at 292.

149. *McDonald*, 466 U.S. at 290 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

150. *Id.* at 292.

151. *Id.*

152. See *supra* note 124.

153. See *infra* notes 155-220 and accompanying text.

154. Henry Perritt asserts that commentators, and courts by implication, should not be too quick to judge the potential success of arbitration of wrongful discharge claims based on the collective bargaining experience. Perritt, *supra* note 5, § 3.05[2][b]. In the collective bargaining arena, the union and employer monitor the process and can easily alter contract language if an arbitrator does not render a favorable decision. *Id.* See Part V of this Article for further amplification.

*B. The Supreme Court's Pronouncement:
Gilmer v. Interstate/Johnson Lane Corp.*

The Court's departure from its long-standing position upholding the separability of federal civil rights action occurred in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁵⁵ The United States Supreme Court, in a 7-2 decision, held that claims arising under the Age Discrimination in Employment Act of 1967 (ADEA)¹⁵⁶ are subject to binding arbitration.¹⁵⁷

As a condition of his employment, Gilmer was required to register as a securities representative with the New York Stock Exchange (NYSE).¹⁵⁸ His registration application contained an agreement "to arbitrate any claim, dispute or controversy."¹⁵⁹ When Gilmer was terminated, he filed a charge with the Equal Employment Opportunity Commission and simultaneously brought suit in district court alleging a discriminatory discharge under ADEA.¹⁶⁰ The employer moved to compel arbitration.¹⁶¹ In denying the motion, the court, relying on *Alexander*, held that employee suits under the ADEA, like actions under Title VII of the Civil Rights Act of 1964, are not precluded.¹⁶² The court of appeals reversed.¹⁶³

The United States Supreme Court ruled that neither the text of the ADEA nor its legislative history and underlying purposes precludes enforcement of an arbitration agreement.¹⁶⁴ The Court also clarified its prior rulings in *Alexander*, *Barrentine*, and *McDonald*, confining their application to cases in the collective

155. 111 S. Ct. 1647 (1991). Prior to *Gilmer*, the Third Circuit Court of Appeals held that a claim arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988), may be submitted to a judicial forum even though a private agreement to arbitrate exists. See *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 227-28 (3d Cir. 1989); see also *Gilmer*, 111 S. Ct. at 1655. The lower court opined that Congress intended ADEA claims to be non-arbitrable since the goals of the ADEA are incompatible with a waiver of a right to judicial forum. *Nicholson*, 877 F.2d at 227-28. A First Circuit Court of Appeals decision set the stage for *Nicholson*. In *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), the appellate court held that a securities sales associate who signed a Uniform Application for Securities Industry Registration or Transfer which committed her to arbitrate any dispute between her and her firm could not be required to participate in or to exhaust arbitration before proceeding to a judicial hearing on her federal civil rights claims of sex discrimination and a hostile working environment. *Id.* at 185. In this context, the appellate court found arbitration to be inconsistent with Title VII's congressional intent. *Id.* at 186; see also Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213.

156. 29 U.S.C. §§ 621-634.

157. *Gilmer*, 111 S. Ct. at 1647.

158. *Id.* at 1650.

159. *Id.*

160. *Id.* at 1651.

161. *Id.*

162. *Id.*

163. *Id.* at 1652.

164. *Id.* at 1652-53.

bargaining context.¹⁶⁵ With respect to *Alexander* specifically, the Court noted that nothing in *Alexander* involved an agreement to arbitrate statutory claims and that arbitrators were authorized by the parties to resolve only contractual, not statutory, claims.¹⁶⁶

An important part of the Court's opinion focused on the adequacy of arbitration proceedings, with the Court concluding that: (1) competent, impartial arbitrators are available in arbitration (both the NYSE and FAA protect against biased panels);¹⁶⁷ and (2) lack of formal discovery with respect to discrimination claims is not problematic since no more discovery is required in RICO or anti-trust claims.¹⁶⁸

Gilmer raised two interesting points of jurisprudence. First, the Court entirely bypassed the FAA exclusion of employment contracts,¹⁶⁹ ruling that this was an agreement between *Gilmer* and the NYSE, not *Gilmer* and his employer.¹⁷⁰ Given this conclusion, it was unnecessary for the Court to decide whether the "workers in commerce" exemption would insulate *Gilmer*.¹⁷¹ Second, the Court stated that EEOC surveillance, an important monitoring function of enforcement agencies, is still possible since an aggrieved individual can file a claim with EEOC, requesting employer practices to be closely scrutinized.¹⁷²

However commendable the majority opinion, the dissent captured its weaknesses. Justice Stevens, speaking for the minority, stated that "[t]he Court today . . . skirts the antecedent question of whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue."¹⁷³ Justice Stevens reasoned that the intent of Congress, in enacting the Federal Arbitration Act, was essentially to preclude its application to employment disputes.¹⁷⁴ *Gilmer* was clearly such a case.

Speaking next to the congressional purpose animating the ADEA, Justice Stevens observed that broad injunctive relief, "the cornerstone to eliminating discrimination in society," is absent in arbitration.¹⁷⁵ It is this type of relief which affords grievants full statutory recovery. Arbitration undermines the

165. *Id.* at 1656-57.

166. *Id.* at 1656.

167. *Id.* at 1654.

168. *Id.*

169. Section 1 of the FAA excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This provision seemingly excludes all arbitration contracts negotiated by organized labor, but the scope of the exclusion has been left open by the United States Supreme Court.

170. *Gilmer*, 111 S. Ct. at 1651 n.2.

171. *Id.* at 1652 n.2.

172. *Id.* at 1653.

173. *Id.* at 1657 (Stevens, J., dissenting).

174. *Id.*

175. *Id.* at 1660.

objectives of the age discrimination statute¹⁷⁶ and "eviscerates the important role played by an independent judiciary in eradicating employment discrimination."¹⁷⁷

C. *Gilmer's Progeny*

1. *Alford v. Dean Witter Reynolds*

*Alford v. Dean Witter Reynolds*¹⁷⁸ was initially presented to the Fifth Circuit Court of Appeals one year prior to *Gilmer*. The plaintiff in *Alford*, a stockbroker, sued Dean Witter Reynolds, Inc. for sex discrimination and sexual harassment.¹⁷⁹ Prior to commencing employment, Alford signed a U-4 form requiring her to submit all employment disputes to arbitration.¹⁸⁰ When the district court refused to compel arbitration, Dean Witter appealed.¹⁸¹

On appeal, Dean Witter argued that the *Mitsubishi* trilogy¹⁸² governed the disposition of Alford's Title VII claims.¹⁸³ Attempting to reconcile the strong national policy favoring arbitration with the "equally important federal legislation designed to combat discrimination," the court held that *Alexander's* rationale was sufficiently broad to encompass all Title VII claims, irrespective of their source.¹⁸⁴ But the court left room to move, in the event a different signal was given by the United States Supreme Court: "If the issue were open to us to evaluate afresh, we might well interpret Title VII consistent with these recent decisions."¹⁸⁵ *Gilmer* was the signal.

176. *Id.*

177. *Id.* at 1661. Despite the analytical flaws of *Gilmer*, state courts are following its lead. Recently, a California state appeals court ruled that claims of race discrimination in employment must be submitted to arbitration if a private agreement to arbitrate exists. See *Spellman v. Securities, Annuities & Ins. Servs.*, 10 Cal. Rptr. 2d 427, 430 (Ct. App. 1992). The court reasoned, "In enacting Section 2 of the Federal Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 431 (quoting *Keating*, 465 U.S. at 10). "*Gilmer* and *Alford* stand for the proposition that important social policies and public rights embodied in statutes prohibiting discrimination in employment can be appropriately resolved by arbitration. The Supreme Court has determined that the arbitration forum provides sufficient procedural safeguards and mechanisms for discovery 'to make the process suitable for discrimination claims' under such statutes." *Id.* at 434 (quoting *Sacks v. Richardson Greenshield Secs.*, 781 F. Supp. 1475, 1483 (E.D. Cal. 1991); see also *Boogher v. Stifel, Nicholas & Co.*, 825 S.W.2d 27, 29 (Mo. Ct. App. 1992) (mandating arbitration of an age discrimination claim).

178. 905 F.2d 104 (5th Cir. 1990), *vacated*, 111 S. Ct. 2050 (1991).

179. *Id.* at 105.

180. See *Alford v. Dean Witter Reynolds, Inc.*, 712 F. Supp. 547, 548 (S.D. Tex. 1989).

181. *Alford*, 905 F.2d at 105.

182. See *supra* note 124.

183. See *Alford*, 905 F.2d at 105.

184. *Id.* at 106.

185. *Id.*; see *Rodriguez de Quijas*, 490 U.S. 477; *McMahon*, 482 U.S. 220; and *Mitsubishi*, 473 U.S. 614.

In the post-*Gilmer* review, the Fifth Circuit Court of Appeals concluded that since Title VII and the ADEA are similar remedial civil rights statutes enforced by the EEOC, plaintiff's Title VII claims were subject to compulsory arbitration.¹⁸⁶ Public policy arguments, rejected by the United States Supreme Court in *Gilmer*, were as swiftly and definitively rejected by the Fifth Circuit in *Alford*.¹⁸⁷

2. *Willis v. Dean Witter Reynolds*

Alford was fortified by *Willis v. Dean Witter Reynolds*.¹⁸⁸ In *Willis*, plaintiff filed suit, alleging sexual harassment and sexual discrimination under Kentucky law, breach of contract, and outrage.¹⁸⁹ Dean Witter removed the matter to federal court on the basis of diversity jurisdiction and moved to compel arbitration.¹⁹⁰ Subsequently, Willis amended the complaint to include a Title VII claim.¹⁹¹ The district court denied the motion to compel as to the civil rights claims only, and Dean Witter appealed.¹⁹²

On appeal, Willis and the EEOC, which filed an amicus brief, presented four pivotal arguments. First, they argued that the Supreme Court's decision in *Alexander* prevented application of the arbitration provision of the Securities Registration Form to Title VII claims.¹⁹³ The *Willis* Court promptly disposed of this argument by observing that the employees in *Alexander* did not agree to arbitrate statutory claims.¹⁹⁴ Second, they asserted that Title VII's regulatory scheme, which includes EEOC oversight and enforcement, precludes a finding that the FAA applies to Title VII claims.¹⁹⁵ This argument was similarly rejected.¹⁹⁶ Arbitration will not undermine the role of the EEOC in enforcing the ADEA.¹⁹⁷ A claimant may file a claim with the EEOC even though private judicial action is foreclosed.¹⁹⁸ Third, Willis and the EEOC contended that arbitration was inappropriate for Title VII claims because of insufficient procedural safeguards and different methods of discovery.¹⁹⁹ *Gilmer*, in interpreting the same NYSE arbitration rule at issue in this case, had declined to

186. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991), *rev'g Alford*, 905 F.2d 104.

187. *Id.* at 230.

188. 948 F.2d 305 (6th Cir. 1991).

189. *Id.* at 306; *see also* KY. REV. STAT. ANN. § 344.040 (Baldwin 1984).

190. *Willis*, 948 F.2d at 306.

191. *Id.*

192. *Id.*

193. *Id.* at 307.

194. *Id.* at 308 (citing *Gilmer*, 111 S. Ct. at 1657).

195. *Id.*

196. *Id.*

197. *Id.* at 309 (citing *Gilmer*, 111 S. Ct. at 1653).

198. *Id.*

199. *Id.* at 310.

accept these arguments, and the *Gilmer* approach was embraced by the *Willis* court.²⁰⁰

Finally, the *Willis* court rejected the claim that the FAA did not apply to this case because of the "contracts of employment" exclusion clause.²⁰¹ Adopting the *Gilmer* rationale, the court concluded that the securities registration form containing the arbitration provision was not a "contract of employment"²⁰² and that arbitration of ADEA claims could be compelled.²⁰³

3. *Higgins v. Superior Court*

Gilmer was distinguished in *Higgins v. Superior Court*²⁰⁴ where the California Court of Appeals reversed the trial court's order compelling arbitration.²⁰⁵ Petitioners sought damages for sexual discrimination for alleged violations of the California Fair Employment and Housing Act.²⁰⁶ The employer argued that, since all parties were members of the National Association of Securities Dealers and petitioners had signed a form U-4 containing an arbitration clause, the disputes should be arbitrated.²⁰⁷ In response to petitioners' argument that discrimination claims are exempt from the public policy favoring arbitration, the trial court compelled arbitration.²⁰⁸

The California Court of Appeals held that the messages of *Gilmer* and *Alford* are clear.²⁰⁹ Despite the important public policies involved, disputes alleging violations of a statutory prohibition against discrimination in employment may be subject to arbitration as long as the agreement is covered by the FAA.²¹⁰ If the

200. *Id.* Quoting from *Gilmer* directly, the court of appeals stated, "'Congress . . . did not explicitly preclude arbitration or other non-judicial resolution of claims, even in its recent amendments to the ADEA.'" *Id.* at 309 (quoting *Gilmer*, 111 S. Ct. at 1654). "'[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.'" *Id.* (quoting *Gilmer*, 111 S. Ct. at 1654 (quoting *Mitsubishi Motors*, 473 U.S. at 628)) (alterations by *Gilmer* court).

201. *Id.* at 310.

202. *Id.* at 312. This decision was preceded by an exhaustive review of the FAA's legislative history. *See id.* at 310-12. The Act was drafted initially to counter judicial animosity toward arbitration and to overturn the common-law rule which precluded enforcement of agreements to arbitrate in commercial contracts. *See id.* at 311. Congress deliberately "limited the scope of the Act by creating a category of contracts not subject to the Act's strictures." *Id.* (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The court recognized that collective bargaining agreements and individual employment contracts are contracts of employment which fall outside the scope of the FAA. *Id.* (citing *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 404-05 (6th Cir. 1988)).

203. *Id.* at 312.

204. 1 Cal. Rptr. 2d 57 (Ct. App. 1991).

205. *Id.* at 63.

206. *Id.* at 58; *see* CAL. GOV'T CODE §§ 12900-12996 (West 1992).

207. *Higgins*, 1 Cal. Rptr. 2d at 58.

208. *Id.*

209. *Id.* at 62.

210. *Id.*

agreement is covered by the FAA, any conflicting state law is preempted.²¹¹ However, the court ruled that the agreement in this case was significantly different from the one in *Gilmer*.²¹² Here, the rule concerned "Industry and Clearing Controversies."²¹³ The Alabama Supreme Court had previously interpreted this rule in *A.G. Edwards & Sons v. Clark*,²¹⁴ limiting its application to disputes related to the securities industry.²¹⁵ The fact that defendant was employed by a securities firm, according to the Alabama Supreme Court, did not mean that every tort created an arbitrable "Industry" or "Clearing" controversy.²¹⁶

Petitioners in *Higgins* agreed to arbitrate industry and clearing disputes arising out of or in connection with business transactions.²¹⁷ "They did not agree to arbitrate . . . employment disputes."²¹⁸ The court reasoned that no reasonable person would suspect that an agreement to arbitrate business disputes would be interpreted to include discrimination disputes.²¹⁹ As a matter of law, the arbitration clause did not encompass such claims.²²⁰

211. *Id.*

212. *Id.* at 63.

213. *Id.*

214. 558 So. 2d 358 (Ala. 1990).

215. *Id.* at 363.

216. *Id.* at 362.

217. *Higgins*, 1 Cal. Rptr. 2d at 63.

218. *Id.*

219. *Id.*

220. *Id.* *Gilmer* and its progeny were recently extended to the non-discrimination area. In *Saari v. Smith, Barney, Harris Upham & Co.*, 968 F.2d 877, 878-79 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992), an account executive employed by a brokerage firm, terminated for refusing to take a polygraph examination, filed an action in federal district court alleging a violation of the Employee Polygraph Protection Act (EPPA). See 29 U.S.C. §§ 2001-2009 (1988). The brokerage firm filed a motion to compel arbitration, relying on a signed U-4 form and conditions of employment. *Saari*, 968 F.2d at 879. In denying the employer's motion, the district court cited a Third Circuit decision, *Nicholson v. CPC International, Inc.*, 877 F.2d 221, which assured court access to persons claiming violations of the Age Discrimination in Employment Act. See 29 U.S.C. §§ 621-634; *Saari*, 968 F.2d at 879. On appeal, *Saari* attempted to distinguish *Gilmer* by arguing the flexibility of the ADEA in resolving claims through "conciliation, conference and persuasion." *Saari*, 968 F.2d at 880. The court of appeals rejected this argument and stated that "the fact that a particular statute embodies a judicial enforcement process does not exclude arbitration." *Id.* at 881.

The court also rejected *Saari*'s argument that the anti-waiver provision of the EPPA is different, with the language, rights and procedures requiring judicial resolution of disputes. See *id.* at 881-82. "This rationale does not stand in light of *Gilmer* The term 'procedures' is too broad to relate solely to forum selection." *Id.* at 881. Furthermore, substantive rights enforced by arbitration are identical to those enforced in a judicial forum. *Id.* at 882.

Saari raised two additional, unique claims of non-arbitrability which, in turn, the appellate court dismissed. First, *Saari* claimed that his dispute was outside the scope of NYSE Rule 347 since his conduct did not implicate customers, handling of accounts, or performance as a broker. *Id.* The court responded by noting that the plain language of Rule 347 was broad, and encompassed essentially "any controversy between a registered representative and a member or member organization arising out of the employment or termination of employment." *Id.* at 883. Second, state polygraph and slander laws were found non-controlling. *Id.* The polygraph law at issue did not determine whether the claim

V. THE DEBATE BETWEEN THE RIGHT TO A JURY TRIAL VERSUS ARBITRATION

Traditional labor arbitration, a product of World War II, proliferated in the aftermath of the war, a period when the union movement grew in geometric progression to the establishment of federal labor laws favoring collective representation.²²¹ Initially adopted as a *quid pro quo* for the strike weapon of employers, arbitration became firmly embedded in the collective bargaining process. Sparked by the passage of the Federal Arbitration Act of 1925, judicial support for arbitration was confirmed by the United States Supreme Court in the *Steelworkers* Trilogy.²²²

The *Steelworkers* Trilogy model of labor arbitration gradually penetrated the public sector. Today, virtually all collective bargaining agreements in the private and public sectors contain arbitration as part of the formal grievance machinery.²²³ Arbitration is considered the last and final step; resort to courts is rare.

Although support for traditional labor arbitration on all levels remains solid, the retrenchment of the labor movement will produce fewer cases eligible for arbitration.²²⁴ Concomitantly, non-union work place disputes will rise. Can the success of arbitration in the conventional collective milieu be extended to the non-union sector without adversely affecting the arbitrability presumptions carved out by the United States Supreme Court? This section examines whether the current tide of aggressively incorporating arbitration clauses into employer

should be arbitrated or adjudicated in federal court. *Id.* The court held that where a state law's preference for a judicial forum interferes with the choice expressed by Congress in the FAA, it is preempted. *Id.* The slander claim directly related to Saari's job as a broker and was thus subject to the arbitration provisions of his contract. *Id.* "The Supreme Court . . . has repeatedly told us that the Federal Arbitration Act manifests a liberal policy favoring arbitration agreements." *Id.*

221. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 3 (4th ed. 1985); *FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 1-9 (Ray J. Schoonhoven ed., 3d ed. 1991).

222. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In a single paragraph, the Supreme Court captured the very essence of the arbitral process:

[A]rbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Warrior & Gulf, 363 U.S. at 578.

223. Theodore St. Antoine, *The Legal Framework of Labor Arbitration in the Private Sector*, in *LABOR ARBITRATION: A PRACTICAL GUIDE TO ADVOCATES* 18, 18 (Max Zimny et al. eds., 1990).

224. Fewer than eight percent of the cases on the Supreme Court's docket in 1992 involved labor relations, compared with the 20-25 percent of the 1960s. *THE WORLD ALMANAC* 180 (Mark S. Huffman ed., 1992). Today, collective bargaining covers less than 25 percent of private employment. *Id.* In 1990, union membership was 16.1 percent. *Id.* It has decreased in each succeeding year. *Id.*

handbooks and personnel manuals directly confronts the Seventh Amendment's jury trial requirement, clashes with other constitutional pronouncements or creates an impermissible tension between protective labor legislation and employee rights.

A. The Nature of "Individual" and Collective Bargaining

The dynamics of non-union arbitration are markedly different than those which were recognized by the United States Supreme Court in the *Steelworkers Trilogy*.²²⁵ In an erudite assessment of this distinction, Professor Estreicher observes:

To extend the special status that arbitration enjoys under the *Trilogy* — the twin features of a virtually all-inclusive presumption of arbitrability and a sharply limited role for the courts — to settings where collective bargaining does not take place would be to divorce the court's doctrine from its underlying justification, its mooring in a particular institution of industrial government premised on collective representation of workers and joint labor-management determination of basic terms and conditions of employment.²²⁶

Professor Estreicher's points are well-taken.²²⁷ The success arbitration enjoys in the union sector is attributable to several factors: the parties' willingness to accept an arbitral award in lieu of a strike²²⁸ and the industrial harmony which emanates from the parties' ability to enforce their rights through the grievance mill. "The norms governing the arbitrator's award are shaped by the bargaining history of the parties and the web of informal practices that serve to give flesh to the bare bones of the contract — what Justice Douglas referred to as 'the common law of the shop.'"²²⁹ If parties disfavor an award, they can bargain away its terms or ramifications during the next round of negotiations.²³⁰

225. See *supra* note 222 and accompanying text.

226. Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 758 (1990).

227. Professor Estreicher describes the models of work place arbitration in different institutional settings. *Id.* at 757. First, typified by the *Steelworkers Trilogy*, the Supreme Court's federal law of collective bargaining creates a framework for parties to use arbitration exclusively and "sharply restricts access to the courts except where in aid of the process." *Id.* Second, arbitration is merely a substitute for adjudication in a public forum, a process administered by courts or private administrative agencies. *Id.* at 760.

228. Congress has indicated that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 411-12 (1976) (quoting Labor Management Act, 29 U.S.C. § 173(d) (1970)).

229. Estreicher, *supra* note 226, at 759; see also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 681 (1986).

230. Estreicher, *supra* note 226, at 759.

Ultimately, "the cultivation of collective bargaining [and all permutations] is not merely an abstract matter of freedom for the worker . . . but rather a concrete foundation for the general welfare."²³¹

Are the dynamics in the union sector sufficiently dissimilar to those in the non-union sector to warrant a different treatment of general employment disputes? Perhaps. After *Toussaint*, many employers unilaterally adopted grievance procedures which limited an employee's right to grieve wrongful discharge or disciplinary issues through arbitration. Under this procedure, the intended beneficiary, the employee, is no less bound by the grievance procedure than a bargaining unit member subject to the terms of a collective bargaining agreement. But the crucial difference between the two may well lie in the union member's ability, through the negotiating team, to create a contract through conference, discussion, and, at times, hard core bargaining. This "give and take" of the collective bargaining process is a facet noticeably absent in the non-union sector.

However, as Professor Estreicher advances, this distinction does not mean that arbitration cannot assume and retain a viable role in the resolution of non-union employment disputes.²³² Acceptability by courts, employers and private employees will depend on how arbitration is structured. In this vein, the procedural fairness of arbitration assumes a particular saliency. As the Michigan Supreme Court found in *Renny v. Port Huron Hospital*,²³³ an employer may avoid jury review of an employee's termination under a just cause termination contract by establishing an alternative dispute resolution system.²³⁴ But if such a system is prescribed, the procedures must comply with elementary fairness requirements.²³⁵ These requirements include:

- (1) Adequate notice to persons who are bound by the adjudication;
- (2) The right to present evidence and arguments and the fair opportunity to rebut evidence and arguments by the opposing party;
- (3) A formulation of issues of law and facts in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
- (4) A rule specifying the point in the proceeding when a final decision is rendered; and
- (5) Other procedural elements as may be necessary to ensure the means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter

231. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 9 n.9 (1988) (quoting JOSEPH HUTMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 195, 203-04 (1968)).

232. Estreicher, *supra* note 226, at 760.

233. 398 N.W.2d 327 (Mich. 1986).

234. *Id.* at 336.

235. *Id.* at 338.

must be resolved and the opportunity of the parties to obtain evidence and to formulate legal conclusions.²³⁶

The court concluded that a unilaterally imposed grievance procedure which lacks these elements does not meet the elementary fairness requirement.²³⁷

The few isolated cases which address the issue of fairness in arbitration demonstrate the importance of preserving trial safeguards. The loss of certain procedures, e.g., the right to retain counsel, to cross-examine witnesses, and to discover essential documents, will upset the delicate balance of rights which the drafters of civil and statutory rights legislation sought to create and will likely trigger a veto over the entire ADR procedure.

B. The FAA Exclusion — A Salient Omission

A complete analysis of the appropriateness of arbitration in the non-union employment context invariably involves the FAA exclusion. This act, which applies to arbitrations concerning transactions in enterprises engaged in or affecting interstate commerce and any maritime transaction, excludes from its scope "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²³⁸

In enacting such far-reaching legislation, Congress was inspired by the need to ensure the enforcement of commercial arbitration agreements which at common law could be revoked.²³⁹ So preoccupied have courts been with this aspect of the FAA that they have given short shrift to the exclusionary clause set forth in Section 1 of the Act. Since the 1950s, judicial opinions have "applied the exception to workers directly involved in the interstate movement of physical objects."²⁴⁰ However, in *Gilmer*, the United States Supreme Court skirted the

236. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 83(2), 84(3)(b) (1982)); see also *Khalifa v. Henry Ford Hosp.*, 401 N.W.2d 884, 890-91 (Mich. Ct. App. 1986). In *Khalifa*, another panel of the Michigan Court of Appeals, employing *Toussaint*, concluded that a fair grievance procedure incorporated into an employee manual may culminate in summary judgment in favor of the employer. *Khalifa*, 401 N.W.2d at 890-91. The court decided that procedures which do not comport with elementary fairness will nullify arbitration and require the case to be submitted to a jury to determine if the employee was terminated for just cause. *Id.*; *Vander Toon v. City of Grand Rapids*, 348 N.W.2d 697, 702 (Mich. Ct. App. 1984) (the decision of a five-member commission upholding the plaintiff's termination was not impartial because this commission also participated in the decision to terminate plaintiff's employment).

237. *Renny*, 398 N.W.2d at 338.

238. 9 U.S.C. § 1.

239. *Id.* § 2.

240. Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 263; see also *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (basketball player does not fall within the exceptions created by Section 1 of the Act); *Tenney Eng'g v. United Elec. Radio & Mach. Workers Local 437*, 207 F.2d 450, 453 (3d Cir. 1953) (plaintiffs engaged in the production of goods for subsequent sale in interstate commerce are not a class of

exclusion in a less prudential way, declaring that the arbitration clause was not contained in a contract of employment: The FAA requires that the arbitration clause being enforced be in writing. . . . [T]he arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate.²⁴¹

The *Gilmer* Court's refusal to confront the exclusionary clause issue has produced a firestorm of criticism:

The Court's invocation of "plain language" despite the absurdity of result provides a neat way for the *Gilmer* majority to avoid considering the other factors thought to be integral to intelligent statutory interpretation: legislative history; specific legislative intent; overall legislative purpose; evolutionary influences on law and society; the distribution of power within the political system; and (in close cases) the "better" rule.²⁴²

Notwithstanding the Court's failure to address the meaning of Section 1, recent opinions of federal district courts have emphatically repudiated a broad interpretation of the exclusion clause.²⁴³ The rationale which undergirds this posture was best articulated in *Dancu v. Coopers & Lybrand*,²⁴⁴ where the court stated that if Section 1 were "intended to exempt all contracts of employment, the drafters easily and almost certainly would explicitly have so stated without qualification."²⁴⁵ Until the Supreme Court adopts a clear perspective on the intent and meaning of the clause, eclectic results will be the norm.

C. Constitutional Impediments — Fact or Fiction?

1. Trial by Jury

The right to a jury trial in civil cases is preserved by the Seventh Amendment of the United States Constitution and extended to all but two states

workers engaged in interstate commerce within the meaning of Section 1 of the Act).

241. *Gilmer*, 111 S. Ct. at 1651 n.2. The Court stated that lower courts have uniformly concluded that the exclusionary clause in Section 1 of the Federal Arbitration Act is inapplicable to arbitration clauses if inserted in registration applications. *Id.*

242. Stempel, *supra* note 240, at 276-77; see also Vicki M. Young, *The Gilmer Decision*, 16 LAW. ARB. LETTER 1 (Fall 1992); Jennifer A. Clifton, Note, *The Right to Sue vs. The Agreement to Arbitrate: The Dilemma in Title VII Cases*, 1991 J. DISP. RESOL. 407.

243. See, e.g., *Bender v. Smith Barney*, Harris Upham & Co., 789 F. Supp. 155 (D.N.J. 1992).

244. 778 F. Supp. 832 (E.D. Pa. 1991).

245. *Id.* at 834.

through parallel provisions of state constitutions.²⁴⁶ The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"²⁴⁷

Commentators agree that the litmus test of whether a cause-of-action in federal court implicates a jury trial is historical,²⁴⁸ qualifying litigants to argue to a jury only if permitted to do so under the common law of England during the Constitution's ratification.²⁴⁹ Legal claims which are subject to mandatory or contractual arbitration appear, at least facially, to violate the Seventh Amendment's jury trial requirement.²⁵⁰ Those who subscribe to this view assert that arbitration is not the functional equivalent of a jury trial or, in any event, arbitration is not a civil proceeding as contemplated by court rules and statutes.²⁵¹ Opponents of ADR further assert that even the summary jury trial, which comes close in concept to a jury trial, is noticeably distinct and does not satisfy constitutional standards.²⁵²

246. See Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); see also PERRITT, *supra* note 5, § 3.03[4]. Colorado and Louisiana are the only states which do not guarantee the right of a jury trial in civil cases. State constitutions may contain slightly different language. For example, the pertinent language in the Oklahoma constitution is: "The right of trial by jury shall be and remain inviolate" OKLA. CONST. art. II, § 19. This creates interpretational differences between the Seventh Amendment and state constitutional guarantees which the reader should be cognizant of in assessing the impact, if any, on the right to trial by jury and whether arbitration offends the reach of its protection.

247. U.S. CONST. amend. VII.

248. Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 502 (1989).

249. See *id.* at 502-03.

250. Most cases which have addressed the mandatory (compulsory) use of ADR have focused on the permissibility of diversion programs — at what point in the trial should this preliminary but not exclusive step be imposed? In *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), the Supreme Court held that Congress had "considerable discretion" to require a case to be tried before a justice of the peace as long as the right to pursue a jury trial later was not "unreasonably obstructed." *Id.* at 44-45. In *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985), the Sixth Circuit Court of Appeals held that a local mediation rule did not offend the protections of the Seventh Amendment where resort to a trial *de novo* exists. *Id.* at 268. Arbitration in both contexts was used as a prelude to trial. In *Gilmer*, and clearly in the collective bargaining context, arbitration is not a supplement to trial. Indeed, it is the trial — a contractual arrangement, not mandated but merely enforced by legislation. Thus far, the Supreme Court has not shown any eagerness to preserve a litigant's access to courts except where the underlying action involves a fundamental right. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (fundamental right to marry).

251. See *Varga v. Heritage Hosp.*, 362 N.W.2d 282, 282 (Mich. Ct. App. 1984) (refusing to recognize arbitration as an action which tolled the statute of limitations because it was a non-judicial proceeding).

252. The summary jury trial permits parties to present summary versions of their cases to a judge or magistrate before a jury of six persons. The jury returns a non-binding verdict and is permitted to offer feedback on the strengths and weaknesses of the case. The summary jury trial does not affect the parties' right to a trial on the merits. See generally Charles W. Hatfield, *The Summary Jury Trial: Who Will Speak for the Jurors*, 1991 J. DISP. RESOL. 151, 152-55 (providing a background of the summary jury trial).

But this perspective is not well-founded. First, in arbitration, live witnesses appear before an arbitrator much like witnesses appear before a judge or jury. Truncated or artificial time lines are not imposed. Cross-examination, rebuttal, and closing arguments are permitted. While arbitration offers no formal rules or guidelines for conducting discovery, parties are not prevented from obtaining necessary information. Administrative conferences and preliminary hearings can be used to facilitate adequate discovery. Also, arbitrators have the authority to require production of documents and other evidence.²⁵³ A full airing of the dispute is not only possible but far more likely to occur. Most importantly, arbitration of wrongful discharge claims is usually not mandatory — in other words dictated by statute. It is merely permitted and regulated by statute, and enforced through the appropriate judicial channel.

Thus, the question of whether the right to a trial by jury is absolute or even fundamental remains clearly open to analysis.²⁵⁴ Assuming the right is either absolute or fundamental, the principal inquiry is whether this right can be waived? In *Moore v. Fragatos*,²⁵⁵ the Michigan Court of Appeals held that arbitration agreements, at least in the medical context,²⁵⁶ constitute a waiver of a patient's constitutional right to a jury trial, and such a waiver must be made knowingly, intelligently, and voluntarily.²⁵⁷ For a waiver to be knowing, the "record must affirmatively show that the plaintiff was aware that he was signing an arbitration agreement."²⁵⁸ The court posited that a presumption against waiver of a constitutional right, which is based on a rational inference from the facts, is weightier than the presumption that a person has read what he has signed.²⁵⁹ Accordingly, the first presumption must prevail.²⁶⁰ As to whether the waiver is intelligent, the court observed that "[i]n order to make an intelligent choice, a

253. 9 U.S.C. § 7; UNIF. ARBITRATION ACT § 7, 7 U.L.A. 4 (1985).

254. No court has yet to rule on this specific issue.

255. 321 N.W.2d 781 (Mich. Ct. App. 1982).

256. Under the Michigan Medical Arbitration Act, MICH COMP. LAWS ANN. §§ 600.5040-.5065 (West 1987), insured hospitals, HMO's, clinics, and sanatoria offer patients the option to sign an agreement to arbitrate malpractice disputes. *Id.* § 600.5041(1). The patient is also given an information booklet that details the arbitration agreement and explains that by choosing arbitration, the patient forgoes jury trial rights. *See id.* § 600.5041(6). Signing the agreement is not a prerequisite to health care. *See id.* § 600.5041(2). A patient may revoke a signed agreement within 60 days of discharge. *See id.* § 600.5041(3). Should a dispute arise, the parties mutually select a three member panel to hear the evidence. *See id.* § 600.5044. The panel is comprised of an attorney, a member of the public, and a physician or hospital administrator. *Id.* § 600.5044(2). The attorney chairs the panel. *Id.* The panel's decision is final and binding. *See id.* § 600.5054. The Act has withstood attacks on the composition of the arbitration panel and on the waiver of jury trial rights. *See e.g., Morris v. Metriyakool*, 344 N.W.2d 736 (Mich. 1984).

257. *Moore*, 321 N.W.2d at 785. The court readily acknowledged that this standard, used in the context of a criminal proceeding, may not apply to a civil proceeding. *Id.* But in the civil area, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

258. *Moore*, 321 N.W.2d at 786.

259. *Id.*

260. *Id.*

person must be informed of the consequences of the decision: *i.e.* the *material* difference between . . . arbitration and trial in civil court."²⁶¹

The import of this decision was severely undercut by the Michigan Supreme Court several years later in *McKinstry v. Valley Obstetrics-Gynecology Clinic, P.C.*:²⁶²

We disagree with the holding of *Moore v. Fragatos*, to the extent it places the burden on the defendant to prove by clear and convincing evidence that the plaintiff, intelligently, and voluntarily waived his right to court access.

We do not infuse constitutional concerns equivalent to those in a criminal proceeding into a civil litigant's contractual choice-of-forum decision.²⁶³

The *McKinstry* court continued that "[a] party's voluntary decision to arbitrate neither involves the complete relinquishment of a constitutional right nor raises the specter of procedural due process violations."²⁶⁴

This analysis may be confined to state courts. On the federal level, an extensive array of factors is used to determine whether a contractual waiver of the right to a jury trial is "knowing and voluntary."²⁶⁵ Among the factors the federal courts consider are:

- (1) whether the parties possessed equal bargaining power;²⁶⁶
- (2) whether the waiver provision was a bargained-for provision of the agreement;²⁶⁷

261. *Id.* Material differences include reference to giving up the right to trial by jury or judge, description of the arbitration panel, and the voluntary nature of final and binding arbitration. *Id.* at 786-87. Despite the *Moore* court's unequivocal pronouncement that access to the court system is a fundamental right under the First and Fourteenth Amendments, *see id.* at 784-85 & n.3, the court was equally adamant that a person is entitled to select the forum and tribunal in which a dispute should be resolved. *See id.* at 791-92.

262. 405 N.W.2d 88 (Mich. 1987).

263. *Id.* at 95.

264. *Id.* The Court has made clear that the United States Constitution does not confer a federal constitutional right to trial by jury in state court civil cases. *See Curtis v. Loether*, 415 U.S. 189 (1974); *see also* U.S. CONST. amend. VII. Also, the Michigan Constitution provides, in pertinent part, "the right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." MICH. CONST. art. I, § 14. "The right to a jury trial in a civil action is therefore permissive, not absolute." *McKinstry*, 405 N.W.2d at 95.

265. *See generally* A. Darby Dickerson, *Contractual Jury Waiver Provisions, A Striking Idea*, 39 FEDERAL B. NEWS & J. 206 (1992).

266. *See Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (no disparity in bargaining power existed between two sophisticated parties).

267. *See Dreiling v. Peugeot Motors of Am.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (defendants failed to present evidence that the contract's waiver provision was a bargained-for term or was even brought to plaintiff's attention).

- (3) whether the agreement was subject to negotiation;²⁶⁸ and
- (4) whether the waiver provision was conspicuous.²⁶⁹

These factors demonstrate that parties must use care when drafting and placing waiver provisions in contracts. Federal courts are unlikely to find a waiver was made knowingly and voluntarily if the clause is inconspicuous or displays an inequity in bargaining power between the parties.

2. Due Process and 'State Action'

The Fourteenth Amendment prohibits state deprivation of life, liberty, or property without due process of law.²⁷⁰ The United States Supreme Court has employed a three-part analysis to determine whether a due process violation exists:

- (1) a deprivation by the state or a private person who may be fairly treated as the state;
- (2) of a constitutionally cognizable life, liberty, or property interest;
- (3) without due process of law.²⁷¹

The state action element of this analysis admits of no easy response; state action cannot be assumed.²⁷² Moreover, a state's mere acquiescence in a private action will not convert it into state action.²⁷³ Instead, the Supreme Court has identified three situations which confirm the existence of state action:

- (1) The "state action"/"private action" nexus is formed when the challenged conduct "has sufficiently received the imprimatur of the State so as to

268. See *Fairfield Leasing v. Techni-Graphics*, 607 A.2d 703, 706 (N.J. Super. Ct. Law Div. 1992) (where a non-negotiated jury waiver clause appears inconspicuously in a standard contract entered into without assistance of counsel, a waiver should not be enforced).

269. See *National Equip. Rental v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (a waiver clause set deeply and inconspicuously in a contract fails to overcome the presumption that right to jury trial was waived).

270. U.S. CONST. amend. XIV.

271. See, e.g., *Martinez v. California*, 444 U.S. 277, 284-85 (1980).

272. *District of Columbia v. Canter*, 409 U.S. 418, 423 (1973). "[T]he commands of the Fourteenth Amendment are addressed only to the State or those acting under color of its authority." *Id.* Until there is a finding of state action, the due process requirements of the Fourteenth Amendment remain segregated from analysis. *Id.*

273. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-57 (1974). In *Jackson*, the Supreme Court stated: "Approval by a state utility commission of . . . a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* (emphasis added).

- make it 'state' action for the purpose of the Fourteenth Amendment."²⁷⁴
- (2) The challenged "private" conduct involves the exercise of powers that are "traditionally exclusively reserved to the State."²⁷⁵
 - (3) The challenged conduct necessitates a "symbiotic relationship" between the state and the private party.²⁷⁶

In following the precedent established by the United States Supreme Court on the scope of federal constitutional rights, it is clear that arbitration of wrongful dismissal claims does not implicate state action. "[E]xercise of a choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so, state action for purpose of the Fourteenth Amendment."²⁷⁷ Arbitration typically would fail this test since the state's role is permissive, not prominent or persuasive.²⁷⁸ Certainly, it is not a traditionally exclusive governmental function. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"²⁷⁹ Private civil dispute resolution is not a traditionally exclusively governmental function for which the States' acquiescence may be classified as performance by private parties, thus constituting state action. The deprivation occurs because of a private decision which does not constitute the performance of a governmental function.²⁸⁰

274. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982).

275. *Jackson*, 419 U.S. at 352.

276. *Id.* at 357; *see also* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). In *Burton*, the Supreme Court held that a state parking authority which relied on a restaurant which served whites only made itself a party to the refusal of service through its inaction. *Burton*, 365 U.S. at 725. Because of the state's interdependence with the restaurant, "it must be recognized as a joint participant in the challenged activity." *Id.*

277. *Jackson*, 419 U.S. at 357.

278. States providing for arbitration do not usually compel parties to arbitrate their employment disputes. Rather, states, in line with strong federal authority, have announced the circumstances under which courts will not interfere with private contractual agreements to arbitrate. Once an employee signs a form and agrees to submit any employment dispute to arbitration, the state's enforcement function does not transmute it to "state action." It retains its private character.

279. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (quoting *Jackson*, 419 U.S. at 352). Even if the state were to subsidize arbitration, it is doubtful that a "symbiotic relationship" could be established. *See* *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982) (nursing home decisions to alter the level of care received by Medicaid patients does not involve state action despite the fact that the state has an interest in and oversees the nursing home determinations).

280. Since arbitration is conducted without judicial supervision or with limited oversight, a question often raised is whether alternate dispute resolution, such as arbitration, violates the Article III separation of powers clause of the United States Constitution. *See* U.S. CONST. art. III, § 1. State constitutions contain similar limitations to ensure that judicial authority is not delegated to non-judges. Article III "safeguards the role of the Judicial Branch . . . by barring congressional attempts 'to transfer jurisdiction [to non-article III tribunals] for the purpose of emasculating' constitutional courts . . . thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)); *see*

VI. CONCLUSION

Evolved from relatively innocuous beginnings, common law modification of the employment-at-will rule is now well-entrenched. Following the paradigmatic model established in the union sector, judicial opinions have attempted to redress imbalances in bargaining power between employee and employer. While superimposing a structure which limits employer autonomy to discharge freely and without legal consequence, courts, fearful of usurping their constitutional mandate, have been reluctant to carve out a just cause requirement.

In the face of divergent judicial perspectives, it is inevitable that legislation to solidify pro-employee gains will again be considered. Perritt credits a 1976 law review article which proposes a wrongful discharge statute "because of pessimism about the capacity of the common law to effect needed changes in the employment-at-will doctrine" as part of the stimulus for the common law revolution of the 1980s.²⁸¹ While legislative efforts remain spotty, the Montana statute, in tandem with the Uniform Employment Termination Act adopted by the Commissioners on Uniform State Laws, demonstrates that the political climate indeed is changing and that passage of either a federal statute, or state statutes as expansive as Montana's, though not imminent, will likely occur in the next decade.²⁸²

Finally, whether the goal of protecting employee rights is realized through the traditional legislative process or not, it is clear that the United States Supreme Court has set the tone for adjudicating wrongful discharge claims with discrimination underpinnings. While some commentators remain adamant that the use of arbitration "centrally confronts the jury trial right"²⁸³ or implicates other constitutional safeguards, others are not so convinced. Despite its analytical shortcomings, in the aftermath of *Gilmer*, appellate courts have favored the use of arbitration as the exclusive remedy in suits involving statutory claims. Until the Supreme Court decides to rule conclusively on the FAA exception, this trend is likely to continue.

also Golann, *supra* note 248, at 521-24. Even assuming that this type of jurisdictional turf war exists, Golann, for example, takes the analysis one step further and argues that because arbitrators are not required to follow any particular legal standards of decision, and their decisions are outside the general purview of judicial scrutiny, statutes enacted to protect individual rights may lose their potency. See Golann, *supra* note 248, at 522-23. The analysis offered in the last part of this Article suggests that arbitrators are not impervious to substantive standards embodied in legislation, that they do not fall prey to "arm-twisting settlement devices," and that they do not issue decisions which "conform to popular trends." *Id.* at 523. Furthermore, Golann's arguments are confined to mandatory, not contractual, arbitration. See *id.* at 495.

281. PERRITT, *supra* note 10, § 3.03, at 3-18 (citing Clyde W. Summers, *Individual Protection Against Unfair Dismissal Time for a Statute*, 62 VA. L. REV. 481 (1976)).

282. See *supra* notes 64-66, 71-72 and accompanying text.

283. Perritt, *supra* note 10, § 3.05, at 3-37.

