THE SEARCH FOR A WRONGFUL DISMISSAL STATUTE: A LOOK AT PUERTO RICO'S ACT NO. 80 AS A POTENTIAL STARTING POINT

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I. INTRODUCTION

For many years now, scholars in the United States have debated the need for the adoption, either at the federal or state level, of some sort of wrongful termination statute that will finally replace the discredited employment at-will doctrine.[1] During that time, it has

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1. *See, e.g.*, Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 1 (2010) (citing consensus for abandoning the employment at-will doctrine); Mary A. Bedikian, *Transforming At-Will Employment Disputes into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RESOL. 113; Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 94 (2009); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008); Harry Hutchinson, *The Collision of Employment-at-Will, Section 1981 & Gonzalez: Discharge, Consent and Contract Sufficiency*, 3 U. PA. J. LAB. & EMP. L. 207, 207 (2001) ("Since the beginning of the twentieth century, 'the majority of employment relationships in the United States have been governed by the common

been noted that the United States is still the only industrialized nation that lacks a national wrongful dismissal statute.[2] The reason for the lack of such statute is not, of course, the federal structure of the United States, for the individual states have not adopted them either.[3] Most states still abide by common law rules that view the employment relationship as one the parties may enter into and exit from at will. Although seemingly equal in its approach, the at-will doctrine has mostly benefited employers at the expense of workers.

The inherent problem with this doctrine, which still exhibits the same *Lochner*-type rationale that employers and employees are equal parties in a contract whose liberty to contract must not be meddled with,[4] is that it treats the right to fire as if it were on the same level as the right to resign.

Notwithstanding the rejection by broad sectors of legal academia of the at-will model, this consensus has not resulted in any sort of

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law employment-at-will presumption.'"); Anne Marie Lofaso, *Talking is Worthwhile: the Rule of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL'Y J. 55, 55 (2010) ("In the United States, the dominant default job security rule is governed by state law: employers generally may fire their employees for any reason, good or bad, or for no reason at all."); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1504-06 (1996); Michael D. Wulfsohn, *Martin Marietta v. Lorenz: Palpable Public Policy and the Superfluous Sixth Element*, 70 DENV. U. L. REV. 589, 617-22 (1993).

For a contrary view, see Richard Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947 (1984).

2. Kurt H. Decker, *Pennsylvania's Whistleblower Laws Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 DUQ. L. REV. 723, 760 (2000) ("No comprehensive federal wrongful termination legislation exists."); Lofaso, *supra* note 1, at 63 (citing Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000)) ("[T]he 'United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice.'").

For a comparative analysis, see Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635 (1992).

3. Other countries, like Canada, have little protection for employees by way of federal legislation, but there is significant provincial activity that offers greater protection. "It is important to recall that in Canada [,] [the] employment relationship of workers is primarily governed by provincial statutes enacted by the legislative power of the province in which the work takes place." Notes/Remarks, *Source and Scope of Regulations (2012)*, International Labour Organisation (ILO) EPLex Database, *available at* <http:www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=CA> (last visited May 6, 2013).

4. Decker, *supra* note 2, at 731 ("The at-will employment doctrine emerged in the United States not as an outgrowth of English common law, but as a unique development catalyzed by a single legal treatise", in reference to HORACE G. WOOD, LAW OF MASTER AND SERVANT 277 (1877). "Many legal historians have observed that the at-will employment doctrine's ready acceptance reflected its compatibility with the era's contractual law and prevailing principles of *laissez faire* economic theory.").

statutory wave to substitute it. It has, however, resulted in efforts by some state courts to curtail the negative effects of this doctrine by a series of disorganized, vague, and sketchy exceptions.[5] Those mainly judicial remedies don't come close to offering the same protection a comprehensive statutory regime would generate.

Scholars have also constantly reminded themselves that only three U.S. jurisdictions serve as exceptions to the at-will rule. Many legal articles routinely reference Montana, Puerto Rico, and the U.S. Virgin Islands as alternatives to the at-will model.[6] Yet, none has taken the trouble to actually embark on an in-depth look at these regimes to see what they could teach the rest of the states.[7] Most mentions to Puerto Rico's wrongful discharge statute are done by passing reference in a footnote.[8] Those who have actually taken the time to stretch out a sentence or two, or even a paragraph,[9] have

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5. *See* Decker, *supra* note 2, at 733-34 (discussing judicial efforts to carve out exceptions to the doctrine, such as implied contract, good faith requirements, and public policy concerns); Hirsch, *supra* note 1, at 89 (describing the current condition of state and federal rules governing wrongful dismissal as an uncertain, complicated web); Hutchinson, *supra* note 1, at 209-10 (describing the current state of the doctrine as being somewhat "regulated," yet still "predominant"); McGinley, *supra* note 1, at 1491 (describing state courts' efforts to plug "holes" in the at-will doctrine, carving out exceptions such as public policy, implied in fact contracts, good faith requirements, and so on).

6. For a look at Montana's wrongful dismissal regime, see Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge From Employment Act (WDEA)*, 57 MONT. L. REV. 375 (1996).

7. More thought should be given to the idea of a federal wrongful discharge statute, given preemption concerns. Were Congress to approve such a statute, it should serve as a *minimum* regime that does not prevent individual states from adopting broader protections for individual workers. We can be safe in assuming many states would be willing to offer workers greater benefits, which should not be sacrificed in order to achieve a minimal U.S.-wide consensus. If a federal statue were to preempt state law, the end result could be that, while many workers would receive some sort of protection they currently lack, workers in Puerto Rico, for example, may find themselves less protected.

8. Bedikian, *supra* note 1, at 113 n.3 ("Only Montana and Puerto Rico have statutes preventing the discharge of employees without just cause."); Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LAB. LAW 405, 408 (2003); Finkin et al., *supra* note 1, at 95 n.4; Hirsch, *supra* note 1, at 112 n.127 (mentioning that Puerto Rico's Act No. 80 has an enumerated list of what is a just cause); Hutchinson, *supra* note 1, at 208 n.6; Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Work Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 103, 107 n.9 (1997) ("Employment at will is the default rule in every American jurisdiction except Montana, Puerto Rico, and the Virgin Islands."); Lofaso, *supra* note 1, at 63 n.37 (after mentioning Montana, the author references that Puerto Rico also has a statute on wrongful discharge); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 751 n.173 (1991); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 839 n.4.

9. Wulfsohn, *supra* note 1, at 621 ("Puerto Rico legislation contains a list of examples of 'good cause.' Wrongfully or constructively discharged employees may recover one month's salary plus one week's salary for each year of service."). As we will see, the indemnity award has

either only scratched the surface,[10] or have erroneously characterized it.[11]

The purpose of this Article is to offer a new model for a possible wrongful termination regime that can be adopted by the states; one which has been constantly referenced but never actually discussed: Puerto Rico's Act No. 80 and the cases that have developed it. In that sense, my contribution is not a product of my own imagination.[12] On the contrary, it's the result of more than half a century of legal reality and experience in a jurisdiction with close to four million residents. In particular, my objective is to describe in detail the current status of Act No. 80 as to the main issues related to wrongful dismissal, such as: the definition of employee for its purposes; definition of a dismissal; just cause; burden of proof; remedies; and forum. As we will see,

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significantly increased and, more significantly, it is not quite correct to state that Act No. 80 contains a list of examples of "good cause." What it actually does contain is a list of exhaustive reasons for a discharge, from which concrete examples may be derived.

10. McGinley, *supra* note 1, at 1504 n.381 ("The wrongful discharge statute in Puerto Rico provides less protection for the average worker suffering from wrongful discharge [as compared to the U.S. Virgin Islands]. Generally, it provides that an employee fired without just cause can collect one month's pay plus one week's pay for each year of service"; also mentioning section 185b's six reasons that may justify a dismissal). Not one of the articles researched makes any reference to Puerto Rico case law on the subject, currently the primary source on the current state of the wrongful discharge regime. *See also* Girshon, *supra* note 2, at 641.

11. For example, Arnow-Richman, *supra* note 1, at 55 states that "[l]ike U.S. common law, Act 80 broadly defines cause to include a wide range of economic circumstances *and places the burden of proof on the employee to demonstrate the wrongful dismissal.*" (Emphasis added). It is incorrect to state that the burden of proof for demonstrating a wrongful dismissal is on the employee. Actually, the reverse is true. Once the fact of the dismissal has been established, it triggers an evidentiary presumption that the discharge was unlawful, shifting the burden of proof to the employer who must then prove, through a preponderance of the evidence, that the termination was justified under the statutory definitions of just cause. *See infra* note 53. In this case, Arnow-Richman confused the burden to demonstrate the dismissal with the burden to prove that the discharge was wrongful. As we will also see, the burden of proof on the employee to establish the fact of his dismissal is only with "sufficient evidence." *See infra* note 77.

Another example of an erroneous characterization of Puerto Rico's Wrongful Discharge statute can be identified in Decker, *supra* note 2, at 760-61 ("Piecemeal state legislation has been adopted in Missouri, *Puerto Rico*, South Carolina, South Dakota, and the Virgin Islands... Montana is the only state that has adopted a comprehensive wrongful termination statute.") (emphasis added). Although Decker may be referring to the fact that Puerto Rico is not a state by stating that Montana is the only "state" to have a comprehensive wrongful termination statute, his inclusion of Puerto Rico in the "piecemeal" list points more in the direction that he actually believes Puerto Rico's statute is more "piecemeal" than "comprehensive." If that is so, he is mistaken. As we will see, Puerto Rico's statute is considerably more protective of workers' rights than Montana's Wrongful Discharge in Employment Act (WDEA).

12. The states' unwillingness to adopt wrongful termination statutes based on the *Model Employment Termination Act* (META) or on Montana's WDEA has led several scholars to propose new creative solutions designed by them. *See* Arnow-Richman, *supra* note 1, at 2 (proposing a "pay or play" model based on advance notice or wages in lieu of notice); Hirsch, *supra* note 1, at 107 (proposing a "Law of Termination" based on substantive and procedural fairness).

Puerto Rico's regime is quite different from all the models to which scholars have been accustomed. In that sense, I hope this Article will help in advancing the conversation towards generating justice for workers all over the United States who labor every day under the shadow of possible dismissal without warning and without a valid reason.[13] Even if rejected as an ideal model – be it because of its seeming incompatibility with state common law or its many particular faults – the Puerto Rico statute has a lot to offer to the general conversation about unjust termination.

Finally, some scholars who have discussed the issue of wrongful discharge in general and who have analyzed the particular models – be they the Model Employment Termination Act of 1991 (META) or Montana's Wrongful Discharge in Employment Act (WDEA) – have stated that these models, especially the WDEA, are the most comprehensive regimes, superior to Puerto Rico's Act No. 80.[14] I believe such claims are unfounded and are a result of the lack of detailed knowledge of what Puerto Rico's statute actually does. As we will see, Puerto Rico's wrongful discharge regime is, with all its faults and gaps, far more worker-protective than any of the available models, even those proposed by scholars. First, I will present in detail the current status of Act No. 80 as it pertains to wrongful discharge claims.[15] Second, I will attempt to make a comparison with Act No. 80 and the most important alternative models currently under discussion by the academic community.

II. WHY: THE SUBSTANTIVE REASONS FOR PUERTO RICO'S ACT NO. 80

In 1976, the Puerto Rico Legislative Assembly passed Act No.

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13. I also intend to point out gaps, inconsistencies, and flaws in the statute.

14. *See, e.g.*, Decker, *supra* note 2, at 760-61; Wulfsohn, *supra* note 1, at 621.

15. Although Act No. 80 is mainly a wrongful discharge statute, it does contain some provisions regarding retaliatory dismissal. However, it must be said that Puerto Rico has adopted a different and comprehensive anti-retaliation statute that has overshadowed Act No. 80's provisions to that effect. In fact, the references to anti-retaliation made in Act No. 80 are the product of the passage of Act No. 115 of 1991, P.R. LAWS ANN. tit. 29 §§ 194-194b, better known as the Anti-Retaliation Act. Among the many effects of that Act, it amended Act No. 80 so as to leave no doubt that a dismissal that is the product of retaliation can never be regarded as made with just cause. For a detailed explanation of the interaction between these statutes, see Cordero Jiménez v. Universidad de Puerto Rico, 2013 T.S.P.R. 25. As such, scholarly comments that Puerto Rico's anti-retaliation regime is weak fails in that they do not take into account Act No. 115, which is considered to be far more effective than Title VII and other statutory regimes on the subject. But that, of course, is the subject of another paper. *See* Wulfsohn, *supra* note 1, at 621.

80, better known as the Wrongful Discharge Act.[16] That statute is the one currently operating in Puerto Rico. However, Act No. 80 is but a link in a longer chain of statutory protections for workers against arbitrary dismissal that predates 1976.[17] In that sense, it is part of Puerto Rico's historical commitment in favor of worker's rights and against unilateral employer action. As a result, the right protected by these statutes is the preservation of employment itself. This public policy, which enjoys both constitutional and statutory rank, is based on the judgment that job security is beneficial to the common good, to the social and economic development of the country, and to the individual himself.[18] In Puerto Rico, the right to retain one's employment is considered to be "important."[19] Even though Act No. 80 doesn't actually prevent the unlawful discharge itself, it does penalize employers who do so. As we will see when discussing the indemnity provisions of the statute, the economic penalty imposed on employers has a double purpose: (1) to discourage the wrongful discharges themselves by exposing the employer to harsh economic consequences; and (2) to offer the worker economic sustenance while he searches for new employment.[20]

In addition to the statutory development, Puerto Rico's wrongful discharge regime has constitutional roots. Nearly one out of every four provisions of the Puerto Rico Constitution's Bill of Rights is worker oriented, be it in the collective arena (commonly referred to as "labor law") or the individual sphere ("employment law").[21]

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16. Act No. 80 of May 30, 1976, 1976 P.R. Laws 251 (codified at P.R. LAWS ANN. tit. 29 §§ 185a-m (2010)).

17. *See* Act No. 50 of April 20, 1949, 1949 P.R. Laws 126; Act No. 84 of May 12, 1943, 1943 P.R. Laws 196; Act No. 43 of April 28, 1930, 1930 P.R. Laws 356. As can be appreciated from these dates, Puerto Rico has had a non-at-will statutory regime for more than eighty years.

18. Rivera Figueroa v. The Fuller Brush Co., 180 P.R. Dec. 894, 902 (2011).

19. *Id.* at 901.

20. *See infra* at part IV. While it is difficult to judge the effectiveness of Act No. 80 in terms of its dissuading value as to unjust termination, some employers offer severance packages that include payment equivalent to the actual penalty they would have to pay in the event of a successful lawsuit. This may demonstrate some degree of dissuasive effect or, at least, some recognition of the high probability the employee will prevail in her suit. While it does not stop the employer from carrying out the dismissal in the first place, it allows the employee to quickly receive economic compensation, without the risk of losing an eventual lawsuit or having to go through the tedious and time consuming legal process. By paying the penalty upfront, the employer saves himself the legal costs of a lawsuit, not only as to his own lawyer fees, but as to the employee's lawyer fees, which are to be paid by the employer and are computed at between 15 and 25 percent over the total penalty to be paid to the employee. Hernández Maldonado v. The Taco Maker, Inc. 2011 T.S.P.R. 42; Ortiz y Otros v. Mun. de Lajas, 153 P.R. Dec. 744 (2001).

21. *Rivera Figueroa*, 180 P.R. Dec. at 902 n.9. The court points to five sections in Article II (Bill of Rights): section 12 (prohibiting indentured servitude); section 15 (prohibiting the

Although in some jurisdictions labor law and employment law are different and independent subjects, in Puerto Rico they are very much linked. For example, as a general rule, *all* legislative graces that protect individual workers – wrongful discharge regimes, discrimination statutes, health and safety rules, pay raises, and so on – are *automatically* included in all collective bargaining agreements.[22] Unions need not bargain for them; they go without saying.

There is a strong constitutional policy in favor of collective bargaining as an instrument for workers to receive more benefits than those already established by the Legislature. A unionized worker can never be worse off than a non-union employee. In fact, there is heated debate in Puerto Rico as to whether, since employers are legally obligated to negotiate in good faith, they are prohibited from including in a collective bargaining agreement only those benefits that already have been legislated.[23] In other words, it is not only that unionized workers can never be worse off than non-unionized employees, it is that they can't be in the same exact situation either, for that would mean the employer never negotiated anything in addition to that which, by law, he was already forced to give to all of his employees. In that sense, there is no tension between individual statutory protections and unionization. Greater statutory protections for individual workers only elevate the starting point for unionized employees.[24]

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employment of minors under the age of fourteen); section 16 (recognizing the right of workers to freely choose their profession, *to resign*, to receive equal pay for equal work, to receive a reasonable minimum wage, to be protected from risks against their health and bodily integrity, and to an eight hour work day); sections 17 and 18 (recognizing the right to unionize, bargain collectively, picket, and engage in strikes and other concertized activities); section 20 (recognizing the right to obtain employment).

Although section 20 of Article II was eventually eliminated by the U.S. Congress in 1952, the Puerto Rico Supreme Court has constantly made reference to it; it lives on in case-law.

22. JRT v. Vigilantes, 125 P.R. Dec. 581, 592 (1990).

23. See the debate among the Justices of the Supreme Court in *Departamento de Asuntos del Consumidor v. Servidores Públicos Unidos*, 2012 T.S.P.R. 58 and in *Confederación de Organizadores v. Servidores Públicos Unidos*, 2011 T.S.P.R. 47.

24. In that sense, Puerto Rico resembles some Latin American countries' approaches to the interaction between the individual and collective in the labor arena, unlike some U.S. states where unionized employees can actually end up worse off than nonunionized workers. For a description of the Latin American context, see OSVALDINO ROJAS LUGO, EL DESARROLLO DEL DERECHO LABORAL EN PUERTO RICO E IBEROAMÉRICA Y SU INTERRELACIÓN CON EL DESAROLLO POLÍTICO (1997). As to the situation in the States, see Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L REV. 687 (1997); Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMP. & LAB. L. 1 (1996). However, this Puerto Rico-Latin America similarity and the corresponding daylight between Puerto Rico and other U.S.

The vast amount of statutory provisions protecting individual employees can be traced to a period in which pro-labor political parties held broad influence in Puerto Rican politics. These political forces were, in turn, created by the labor unions themselves as political instruments to achieve legislatively what they were fighting for in the bargaining arena with individual employers. Actually, the first legislative goals of the organized labor movement were statutes directed at non-unionized workers.[25] That is why the constitutional provisions related to individual and collective labor rights are very much connected. It is part of a constitutional design that has generated a judicially recognized constitutional labor policy that weighs heavily in the adjudicative functions of the courts when interpreting employment statutes and applying them to concrete facts.

In an opposite direction from the common law employment at-will doctrine that justifies itself by equalizing the right to fire with the right to resign, the Supreme Court of Puerto Rico has held that the constitutional design itself requires different treatment for those actions. The right to resign has constitutional rank; not so the right to fire.[26] As such, it is constitutionally permissible, some would say even required, that the Legislature protects workers against wrongful terminations as a matter of public policy. In that sense, the at-will tension has been constitutionally settled in the worker's favor.

Historically in Puerto Rico, individual statutory protections have been seen as a residual minimum aimed at covering those workers that are not organized in a labor union. The sharp decline in union membership in the private sector has made Act No. 80 the main tool in favor of job security, replacing collective bargaining agreement provisions. The relative strength of the statute in comparison with the complete absence of federal or state counterparts makes all the difference: "Although the United States provides some of the most comprehensive protection in the world for unionized employees, it stands virtually alone as one of the last major industrialized

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jurisdictions is not a matter of civil law versus common law traditions. On the contrary, it is the product of policy considerations and shared social values that are neither inherent nor alien to either system or tradition.

25. ALBERTO ACEVEDO COLOM, LEGISLACIÓN PROTECTORA DEL TRABAJO COMENTADA 3 (7th ed. 2001); ROJAS LUGO, *supra* note 24, at 75-76; Pedro J. Salicrup, *La Política Pública Laboral Puertorriqueña: como Factor de Desarrollo Económico Social*, 54 REV. COL. DE ABOGS. DE P.R. 31, 58 (1993).

26. *Rivera Figueroa*, 180 P.R. Dec. at 902-03. In particular, the Supreme Court of Puerto Rico has made constant reference to the fact that *all* constitutional provisions related to labor and employment favor workers. *Id.* at 902 n.9.

democracies without legislation preventing the wrongful discharge of non-union employees from their jobs."[27] In other words, the decline in union membership in the U.S. and in Puerto Rico has resulted in very different situations: Puerto Rico's individual worker can rely on the safety net provided by Act No. 80, while similarly situated workers in other jurisdictions face the at-will doctrine almost entirely on their own in what is an uphill battle.[28]

As we will see in greater detail, there are two principal weapons workers have under Act No. 80: (1) a list of specific pro-worker evidentiary presumptions; and (2) a constitutional, statutory, and judicial policy in favor of liberal constructions of the statute. As to the latter, the starting point is, as in other jurisdictions in the United States, a rule of interpretation which states that general remedial statutes are to be broadly construed. That policy has been adopted by the Supreme Court as a general rule of interpretation and by the Legislative Assembly specifically. Many ordinary remedial statutes in Puerto Rico have express legislative commands ordering courts to interpret them as broadly as possible, settling all doubts in favor of the protected party.[29] That statutory command merely codifies a long-established judicial rule of interpretation.

In the labor context, this general rule acquires greater force. Although most labor statutes also include provisions commanding their broad and liberal interpretation, courts have been consistent in their statements that they will, as a matter of judicial policy, construe labor statutes as broadly as possible, resolving all doubts in favor of the employee and of statutory coverage.[30] This perfect storm of constitutional, statutory, and judicial policy in favor of workers' rights fits in perfectly with the express provisions of Act No. 80 and its interpretation by the courts. In that sense, the Constitution, the

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27. Girshon, *supra* note 2, at 635.

28. Still, when Act No. 80 was adopted in 1976, the lack of reinstatement, among other things, was seen as a victory for employers, because the statute only imposed a penalty and not an actual prohibition on unjust terminations. For a summary of the contemporary criticism to Act No. 80's lack of reinstatement, see Confederación v. Servidores Públicos Unidos, 2011 T.S.P.R. 47 (Fiol-Matta, dissenting). Yet, with the passage of time, the statute has become one of the few remaining and powerful weapons in the employee's arsenal to protect himself from arbitrary employer conduct.

29. *See, e.g.*, López Echevarría v. Adm. Sist. Retiro, 168 P.R. Dec. 749 (2006) (as to the general rule for remedial statutes); S.L.G. Sierra v. Rodríguez, 163 P.R. Dec. 738 (2005) (as to procedural provisions that have remedial qualities); Fernández v. Adm. De los Sitemas de Retiro, 159 P.R. Dec. 248 (2003) (as to disability pension statutes); Dorante v. Wrangler, 145 P.R. Dec. 408 (1998) (as to the general civil tort provision in Article 1802 of the Civil Code).

30. *Rivera Figueroa*, 180 P.R. Dec. at 906.

Legislature, and the Supreme Court of Puerto Rico have acted in unison.

This policy of liberal interpretation in general with respect to remedial statutes and specifically in regards to labor laws is closely connected to the inclusion of evidentiary presumptions in employment statutes. All of them favor employees and are the result of a legislative judgment that, ordinarily, it's hard for an employee to successfully pursue his cause of action if he has the burden of proof as any ordinary plaintiff has in a civil suit. To be sure, at the very beginning, the employee does start out as an ordinary plaintiff that carries the burden of proof. However, the existence of multiple presumptions – which will be discussed shortly – almost instantly reverses the roles between employee and employer as plaintiff and defendant. This comprehensive system of favorable presumptions is the backbone of Puerto Rico's entire employment law generally, and of its wrongful termination statute in particular, and holds the main lesson it can teach other jurisdictions as they tackle this issue. As a model, Act No. 80's greatest strength is its evidentiary regime.

It must be stressed that Puerto Rico has never been part of the common law employment at-will tradition. Its wrongful termination statute should not be seen as a mere departure from that doctrine.[31] Quite the contrary, Puerto Rico has made a willful decision to embark on an entirely different path.[32] My proposal is that other jurisdictions should do the same. Puerto Rico's Act No. 80 may serve as a model or, at least as a starting point. But the first step in favor of a comprehensive wrongful discharge statute is the adoption of a public policy in favor of job security and against arbitrary termination: policy should predate and dictate the exact regime to be

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31. Finkin et al., *supra* note 1, at 95 n.4 ("While Montana is the only state to have passed legislation modifying the archaic at will doctrine . . . it is not the only U.S. jurisdiction to have done so, as both Puerto Rico . . .and the U.S. Virgin Islands . . . have legislation *modifying* the harshness of the *doctrine.*") (internal citations omitted) (emphasis added); Verkerke, *supra* note 8, at 839 n.4 ("In Montana and Puerto Rico, courts *now* must apply legislatively adopted good cause standards *in place* of the common law employment at-will *default.*") (emphasis added). Puerto Rico's wrongful termination regime is not recent, nor can it be seen as a mere modification of the at-will doctrine. That doctrine was abolished in the 1930s. As to the at-will doctrine serving as the default norm, this is a testament to the U.S. influence after the 1898 invasion, for the normal default rule would have been the Civil Code and civil-law breach of contract doctrines that include just cause provisions.

32. Vélez Rodríguez v. Pueblo Int'l, Inc., 135 P.R. Dec. 500, 510 (1994). This does not mean Puerto Rico has embarked on a civil-law approach to this issue. Its treatment of this area has been less about tradition and more about conscious policy choices. Act No. 80 is a Puerto Rican response to a Puerto Rican problem. Yet, this problem of unjust termination is not exclusive to Puerto Rico, and neither should its proposed solutions be.

implemented. Even if other jurisdictions don't emulate Puerto Rico's Act No. 80 in terms of how, when, where, and who, they should at least follow the why.

III. WHO: THE DEFINITION OF AN EMPLOYEE UNDER ACT NO. 80

Act No. 80 does not cover everyone who works for a living, although it comes very close to it. There are those who fall outside the statute's protection. However, two important factors must be present at the outset of any analysis of Act No. 80 with regards to this issue. First, exceptions to Act No. 80 are to be interpreted very narrowly.[33] By the same token, the definition of who is an employee is to be broadly construed so as to include as many people as possible, so long as they reasonably fit the statutory definition and purpose.[34] As we have said, because of constitutional, statutory, and judicial policy, employment law statutes are to be liberally interpreted, settling all doubts in favor of the worker. In this particular context, that analysis requires that, in case of doubt on whether a particular employee is covered by Act No. 80, such controversy is generally resolved in favor of coverage. The defining factor will not be the particular details of the worker's employment status or conditions, but the issue of coverage. In that sense, situations in which other states' doctrines are fuzzy, for instance the question of whether a senior manager is covered by these remedial schemes, Puerto Rico's wrongful termination regime answers it plainly: yes, they are covered.[35] Second, while analysis of other jurisdictions tends to include discussions about the definition of who is an *employer* covered by wrongful dismissal statutes, Act No. 80 settles the question quite neatly: all private establishments.[36] Therefore, the primary question is not who is an employee for purposes of Act No. 80, but, instead, who is not.

The statutory definition of an employee covered by the Act is simple enough. Act No. 80 states that "every employee" who (1) works for a private establishment, (2) in exchange for "any kind" of remuneration, and (3) is hired for an indeterminate period, shall be subject to the protections of the statute.[37] This broad statutory

33. López Santos v. Tribunal Superior, 99 P.R. Dec. 325, 330 (1970).

34. Landrón v. JRT, 87 P.R. Dec. 94, 98 (1963).

35. García Burgos v. AEELA, 170 P.R. Dec. 315 (2007).

36. Act No. 80 covers all employees who work for any business, industry, or any other company or place of employment, collectively to be known as an "establishment." P.R. LAWS ANN. tit. 29 § 185a (2010).

37. *Id.*

definition, coupled with the above-mentioned liberal statutory construction, is the reason behind why even management is covered by the Act.

But, what about independent contractors? What about workers hired for a pre-determined time period or to do specific tasks? Does the fact that they are not "hired for an indeterminate period" mean that they are not covered by Act No. 80? Not so fast. Like many other jurisdictions, Puerto Rico makes a distinction between independent contractors and employees. The first are not covered by the statute, the latter are. How to distinguish between them? The Puerto Rico Supreme Court has answered that question, establishing a set of factors to be taken into account to decide, as a factual basis, whether a specific person is an independent contractor or an employee. We must keep in mind that these factors are to be analyzed through the prism of the statutory construction rule that, in case of doubt as to whether a person is an independent contractor or an employee, such controversies must be settled in favor of statutory coverage, independently of the title which the contract gives to the particular employment relationship.[38] In that sense, the statutory interpretation rule serves as a thumb on the scale. The above-mentioned factors are:

> (1) Nature, breadth and degree of control that the employer holds over the person who carries out the task;
>
> (2) Degree of judgment or initiative carried out by the person;
>
> (3) Means of compensation;
>
> (4) Power to hire or fire other workers;
>
> (5) Opportunity to share in the profits and the risk to incur in losses;
>
> (6) Title over the equipment and the physical installations provided by the principal;
>
> (7) Retention of taxes;
>
> (8) If, as a matter of economic reality, the person who performs the service depends upon the business for which he works;
>
> (9) If the work relationship is permanent;
>
> (10) If the services rendered are an integral part of the principal's business or they can be considered as a separate and independent business.[39]

These factors generally lead to determinations of fact that characterize the worker as an employee covered by Act No. 80. But, being an employee instead of an independent contractor is not

38. Whittenburg v. Col. Ntra. Sra. del Carmen, 182 P.R. Dec. 937, 952 (2011).
39. *Id.* at 952-53.

enough to be automatically covered by the statute. Many employers hire people for specific tasks or for a determined time period. The most common example is hiring someone by way of a renewable one-year contract of employment. What happens if that person is fired during those twelve months? What happens if at the end of that year the contract is not renewed? Is the non-renewal a discharge subject to the provisions of Act No. 80? Is this person an employee for the purposes of the statute?

Act No. 80 allows for this type of temporary hiring. Such contracts are not void in themselves. However, *they are not favored by the statute.* Actually, they are treated with much skepticism. As such, the statute *only* allows for these types of employment contracts if they are *bona fide.*[40] This is due to the legislative concern that many employers use temporary contracts (say, one-year renewable contracts) to disguise indeterminate employees by characterizing them as "temporary," but endlessly renew their contracts as if they were regular workers. In those cases, when they wish to fire the employee, they merely let the contract run out and then would be immune to any insinuation of wrongful dismissal because, technically, there has been no discharge.[41] How do we determine if a particular contract is *bona fide* and not a regular worker disguised as a temporary one?

As we have noted, one of the main features of Act No. 80 is the use of evidentiary presumptions to set default rules for these types of situations. In this particular case, the presumption states that anybody hired as a temporary worker for either a specific task or for a determinate time period *is presumed to be a regular employee hired for an indeterminate period* and, therefore, subject to the protections of the statute.[42] In other words, temporary employment contracts are presumed not to be *bona fide.* The burden of proof is on the employer to demonstrate, by a preponderance of the evidence, the *bona fide* nature of the contract; that is, that there is a substantive justification for hiring a person in that fashion and not just as a ploy to evade the obligations set out in Act No. 80. If the burden is not met, the non-

40. P.R. LAWS ANN. tit. 29 § 185a.

41. The statutory text quite clearly expresses that the mere fact that a person is hired by way of a temporary employment contract does not exclude him or her from the protections of Act No. 80. In its findings, the Legislative Assembly details how many employers had, in fact, been abusing the concept of "temporary contracts" to hire regular employees by endlessly renewing those contracts, thus becoming *de facto* employees hired for an indeterminate period. 1976 P.R. Laws 251.

42. P.R. LAWS ANN. tit. 29 § 185k.

renewal becomes a dismissal.[43] The same analysis would apply if the dismissal is made during the life of the contract.

To satisfy the burden of proof, the employer must offer a valid reason for hiring a person through a temporary contract. Although both the statute and the Puerto Rico Supreme Court have offered specific examples of what could be considered reasons for those contracts, it is still a case-by-case analysis. There is, however, an over-arching question: is the task performed by the person one that normally would be done by a regular employee. Think of a janitor in a school or a teller in a bank. In other words, there must be an objective justification for the temporary contract according to the needs of the establishment and the circumstances of its operations.[44]

The statute also offers examples of what would be a *bona fide* temporary worker: a substitute for someone on sick leave, seasonal workers like those hired by retail stores during the Christmas season, and so on.[45] As to the evidence needed to establish the *bona fide* nature of the contract, the Supreme Court of Puerto Rico has held that the contract itself is not enough to justify the relationship. The employer must offer something else to back it up.[46]

If the employer fails to present such justification, or if the proof that is offered is not enough to rebut the presumption through a

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43. The leading case on this issue is *Whittenburg v. Col. Ntra. Sra. del Carmen*, 182 P.R. Dec. 937 (2011). In that case, a physical education teacher in a private school was hired by way of an annual renewable contract that phased out every June. *Id.* at 944-45. Although the contract would be eventually renewed in November, with retroactive effect to August, the plaintiff would routinely arrive at the school for start of term preparations in August. In other words, although his contract had ended in June and would not be renewed until November, he nonetheless started working in August. *See id.* at 945-46. Such were the working conditions of *all* the employees at the school, even the custodial staff. *Id.* at 944.

After the plaintiff suffered a car accident, the school decided not to renew his contract and told him so at the start of term. *Id.* at 945-46. He sued for wrongful discharge. *Id.* at 946-47. The school did not introduce any evidence to establish the *bona fide* nature of the temporary contract, limiting itself simply to relying on the words of the contract, which characterized the relationship as temporary. The school portended to show the validity of the contract by way of the contract itself. *Id.* at 964, 982. The Puerto Rico Supreme Court found that to be insufficient, and since the school did not offer any additional evidence to support its hiring practices, it concluded that the presumption against temporary contracts held and that the teacher was, in fact, an employee hired for an indeterminate period and, therefore, subject to the protections of Act No. 80. *Id.* at 954-65, 982-84. In addition, since the school did not allege any substantial justification for the dismissal, the court concluded that the presumption that all discharges are wrongful also survived. *Id.* at 984.

From the date of the case we can appreciate that this particular presumption is of recent creation. How it will work and, more importantly, how effective it will be when it comes to putting a stop to sham temporary contracts is still to be seen.

44. *Whittenburg*, 182 P.R. Dec. at 957.

45. *Id.* at 997.

46. *Id.* at 964-65.

preponderance of the evidence, then the presumption survives and the person shall be considered a regular employee hired for an indeterminate period and, therefore, subject to Act No. 80. But, even if the employer manages to meet his burden of proof, it is up to the courts to determine if the development of the relationship between the employer and the employee is such that it generated a reasonable expectation of continued employment. If it did, then the worker, although hired by way of a *bona fide* temporary employment contract, will nonetheless be considered a regular employee.[47] The Supreme Court of Puerto Rico has yet to define what would classify as a reasonable expectation of continued employment in the private sector.[48] Most cases end at the first stage of the analysis.

Finally, it is worth noting that these temporary employment contracts also have to meet certain formal requirements: they must be in writing, given to the employee the first day of work, and must include in detail the reasons for the temporary nature of the contract.[49]

In conclusion, all people hired to work for a private establishment are presumed to be regular employees subject to the protections of Act No. 80. Only independent contractors and *bona fide* temporary employees who do not enjoy a reasonable expectation of continued employment are excluded. Any doubt is to be settled in favor of coverage, and the burden of proof is always on the employer. However, it is worth noting that, even those temporary workers excluded from Act No. 80 have legal remedies at their reach in case of dismissal. If they are fired *during* the time period mentioned in their contracts, they have a breach of contract claim under the Civil Code, and, if no justification exists for the breach, they are entitled to damages for the remaining life of the contract.[50]

It is also worth mentioning that probationary periods in Puerto Rico are also regulated by Act No. 80. The statutory maximum for a

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47. *See id.* at 963-64.

48. For a discussion on the available options for the Supreme Court of Puerto Rico on this issue, see Yarissa Molina-Olivera, *Análisis Comparado: El Contrato a Término Fijo y la Expectativa de Continuidad en el Empleo*, 82 U.P.R. L. REV. ___ (forthcoming 2013).

49. López Fantauzzi v. 100% Natural, 181 P.R. Dec. 92, 127-28 (2011). As we have seen, the written references to the reasons for the temporary contract are not sufficient by themselves to prove its *bona fide* nature, but they are a necessary condition for the formal validity of the contract. It is up to the employer to independently prove what is textually laid out in the contract.

50. *Whittenburg*, 182 P.R. Dec. at 958-59. This is probably one of the few instances where Puerto Rico's civil law roots make an appearance in this area of the law.

probationary period is three months or six months if the Secretary of Labor and Human Resources allows it. If the day after the end of the probationary period the worker is retained by his employer, he automatically becomes an employee hired for an indeterminate period subject to all the protections of Act No. 80.[51]

IV. WHAT: ACT NO. 80'S PRESUMPTION THAT ALL DISMISSALS ARE WRONGFUL TERMINATIONS TO BE INDEMNIFIED BY WAY OF A STATUTORY COMPUTATION

Unlike other jurisdictions and META,[52] the burden of proof under Act No. 80 to determine whether a dismissal is wrongful or justified is *always on the employer*. In Puerto Rico, *all* discharges are presumed to be without cause.[53] It is up to the employer to offer proof to establish, by a preponderance of the evidence, just cause. The mere fact of the dismissal triggers the statutory presumption. If the employer fails to produce evidence or if the evidence is not enough to overcome the presumption, the employee can simply rely on the presumption to win her lawsuit.

To trigger the presumption, an employee need only establish, under a relaxed standard of "sufficient evidence," the following elements: (1) that she was hired for an indeterminate period in exchange for remuneration, (2) by a private establishment, and (3) was dismissed from her position.[54] As we have seen, there is a strong statutory presumption in favor of the first element. The second factor is rarely challenged. In the next section of this article, we will discuss the statutory definition of a dismissal. For now, I will analyze the presumption triggered by the presence of all these facts: that the dismissal was without cause. That is, all dismissals of employees hired (or presumed to be hired) for an indeterminate period are considered, by themselves, to be unjust. It is up to the employer to prove the existence of just cause. But, what is just cause?

The definition of just cause is laid out in the statute itself. It must be said at this point that, although the statute does not offer an exhaustive list of specific examples *per se* of what might be considered just cause for dismissal, it does provide an *exhaustive* list of *reasons*

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51. P.R. LAWS ANN. tit. 29 § 185h (2010).

52. *See* Hirsch, *supra* note 1, at 103 (META). *See generally* Arnow-Richman, *supra* note 1, at 1.

53. P.R. LAWS ANN. tit. 29 § 185k (2010).

54. Rivera Figueroa v. The Fuller Brush Co., 180 P.R. Dec. 894, 906 (2011).

that would constitute justified termination.[55] In other words, it offers an exhaustive general list from which examples can be specified in a particular case. But all concrete examples must trace back to the statutory list of reasons.

There are six justifications for dismissal. The first three have to do with employee behavior. The last three pertain to business reasons. We must, as the courts do, look at them as two different and independent subsets of substantive reasons for termination.[56]

As to the employee's behavior, section 185b of Act No. 80 states the reasons that would constitute just cause for dismissal:

> (a) The worker *continuously* behaves in an improper or disorderly manner;
>
> (b) The worker fails to perform in an efficient and timely manner, negligently or in violation of the norms of quality for the product manufactured or handled by the establishment;
>
> (c) *Repeated* violation on the worker's part of *reasonable* rules and regulations adopted by the establishment for the orderly operations of the establishment, given that written copies of those rules and regulations are timely furnished to the employee.[57]

These specific provisions of the Act have experienced comprehensive interpretation by the Supreme Court of Puerto Rico, which are thought to be included in the statute itself. The Legislative Assembly in Puerto Rico has rarely amended Act No. 80 to overrule the court's construction of the statute in this area, and there is universal consensus that the legislature has mostly deferred to the court as to the proper development of the Act.

Consistent with the notion of a liberal interpretation of the statute and the stated public policy in favor of the retaining of employment, the Supreme Court of Puerto Rico has held that, as a general rule, only *repeated* violations to subsections (a), (b) and (c) will justify a dismissal; *a single incident is not enough.*[58] As such, Act No. 80 establishes a system of progressive discipline. That judicial interpretation is merely a development of the clearly worded statute which uses concepts such as "continuously" and "repeated" when referring to possible justifications for discharge. The text of the statute requires repetition.

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55. Almodóvar v. G.P. Indus., 153 P.R. Dec. 223, 241 (2001).

56. In this sense, it is better to say that situations governed by subsections (a), (b), and (c) should be seen as dismissals, while cases under subsections (d), (e), and (f) are layoffs.

57. P.R. LAWS ANN. tit. 29 § 185b (a)-(c) (2010) (emphasis added).

58. Delgado Zayas v. Hosp. Interamericano de Medicina Avanzada, 137 P.R. Dec. 643, 649 (1994).

However, the court has also held that in cases of "*very serious*" violations or *dangerous* conduct, dismissal may be appropriate for a first offense. Sexual harassment, violence, and larceny have been considered just cause under the first-offense version of either subsections (a), (b), or (c).[59] That is, the violation must threaten the peaceful operations of the establishment or the security of the other employees.

Subsections (a) and (c) differ very little in terms of substance. The only real difference is that subsection (a) serves as a default rule for when there is no subsection (c) type employee manual. As to the repeated violation of manual provisions, some qualifications must be made. First, *all* manual provisions must be reasonable by themselves.[60] The mere fact that a particular provision is included in the manual does not mean it will be enough to support an affirmative defense of just cause. The provision must be independently reasonable for the orderly operation of the establishment. Second, in order to satisfy the "very serious violation" exception to the first-offense rule, it is not enough that the manual itself characterize a particular provision as "important" or a violation as "serious." It is a judicial determination based on reasonableness.[61] Third, if a particular manual establishes additional protections, either procedural or substantive, for the employee, the employer is bound by them.[62] Therefore, conduct that would be grounds for dismissal under subsection (a) may be trumped by contractual protections under the employee manual. At the same time, employee manuals cannot establish causes for termination that would not be deemed reasonable under subsection (a). Again, the retention of employment is protected.

> The second subset of justifications for a dismissal pertains to business reasons:
>
> (d) Complete, temporary or partial closing of the establishment's operations;
>
> (e) Changes due to technological development or reorganization of the establishment, and also due to changes in the type, design or nature of the product manufactured or handled by the establishment or changes in the services provided to the public;

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59. *Id.* at 657.

60. Santiago v. Kodak Caribbean, Ltd., 129 P.R. Dec. 763, 776 (1992).

61. Rivera v. Pan Pepín, 161 P.R. Dec. 681, 690-95 (2004). In this case, the Supreme Court of Puerto Rico held that a provision of the manual classifying allowing dated bread to continue on the shelves to be "very serious" was not reasonable and, thus, did not justify a discharge on the first offense. *Id.* at 695.

62. *Santiago*, 129 P.R. Dec. at 776.

> (f) Reductions in payroll necessarily resulting from a reduction in the volume of production, sales or profits, whether anticipated or actually occurring at the time of the dismissal.[63]

These provisions have been narrowly interpreted. In situations of partial plant closings or reductions in the workforce, the Act expressly commands that productivity and seniority will be the controlling factors in determining who will be laid off. Note the limits made on managerial discretion. Not all good faith business related reasons will be enough to justify a dismissal; only those that are necessary.

Even though Act No. 80 clearly states that all discharges are presumed wrongful and that in order to affirmatively prove just cause the employer must limit himself to the reasons laid out in section 185b, the statute goes further by reaffirming what is prohibited: discharges resulting from "the mere caprice of the employer or without any reason related to the orderly and normal operation of the establishment."[64] This statement is meant to reinforce the rule that all section 185b causes must be free from arbitrary motivations.

Once a dismissal has been determined to be wrongful, either because the presumption to that effect prevailed or because the employee presented further evidence to back his claim, Act No. 80 establishes the corresponding remedy: an indemnity (*mesada*). This indemnity cannot be characterized as an award for damages, for it has no direct relation to back pay, front pay, or any other relevant factor. It is a punitive award that is based solely on the period in which the employee worked for his employer. The section of Act No. 80 that deals with the computation of this indemnity has been the object of several legislative amendments, all in the direction of increasing it. As it currently stands, section 185a of the statute establishes that the indemnity shall consist of a combination of computations depending on years of service.

If a worker has been employed for less than five years, his indemnity will consist of two months of pay plus one week's pay per year worked. If a worker has been employed for a period between five and fifteen years, his indemnity will be three months' pay plus two weeks' pay for every year of service. Finally, if an employee has worked for his employer for more than fifteen years, his indemnity will consist of six months' pay plus three weeks' pay for every year

63. P.R. LAWS ANN. tit. 29 § 185b (d)-(f) (2010).
64. *Id.* § 185b (author's translation).

worked. Not only do older workers get a greater indemnity by mere arithmetic, there is an exponential increase measured by years of service given. This reflects a legislative judgment that older workers, because of their prospects for reinstatement, should be protected all the more. Also, the legislature wants to deter the conduct of many employers to replace older workers with younger ones in order to start them at base salaries with little benefits. The indemnity may not be waived by an employee, unless he gets authorization by the Secretary of Labor and Human Resources.[65] The statute also commands that the base salary that will be used to compute the indemnity award be the highest rate of pay enjoyed by the employee during the last three years of employment.[66]

It must be noted that the indemnity or *mesada* is the *exclusive* remedy for unjust termination.[67] There are no additional damages, *unless* the employee can prove some other cause of action, such as discrimination or an independent tort distinct from the dismissal itself, such as the intentional infliction of emotional distress. Unlike other countries like Mexico and France,[68] there is no right to reinstatement, which is limited to special cases in Puerto Rico, like discrimination,[69] retaliation, violations of public or constitutional policy, and violations of job reserves provided for in occupational and non-occupational disabilities statutes.[70]

The lack of reinstatement in Act No. 80 has been one of the most criticized parts of the Act. Many have suggested that Act No. 80 doesn't prohibit wrongful dismissal; it simply provides a monetary penalty for doing so.[71] In the end, if the dismissal is merely arbitrary

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65. *Id.* § 185i.

66. *Id.* § 185d.

67. Arroyo v. Rattan Specialties, 117 P.R. Dec. 35, 66 (1986).

68. *See* Article 123, Section XXIII of the Political Constitution of Mexico; Article 1253-3 of the French Labor Code.

69. Puerto Rico has many anti-discrimination statutes. Act No. 100 of June 30, 1959, 1959 P.R. Laws 284 (codified at P.R. LAWS ANN. tit. 29 §§ 146-51 (2010)) is a general anti-discrimination statute, which is far more expansive than Title VII, both in groups protected and ways to prove discrimination. Other statutes are more specific, like discrimination against pregnant employees: Act No. 3 of March 13, 1942, 1942 P.R. Laws 284 (codified at P.R. LAWS ANN. tit. 29 §§ 467-74 (2010)).

70. It must be stressed that if the discharge violates a constitutional policy, the appropriate remedy is reinstatement plus damages. *Arroyo*, 117 P.R. Dec. at 64.

71. *See* Confederación v. Servidores Públicos Unidos, 2011 T.S.P.R. 47 (Fiol-Matta, dissenting), (referencing the debate in the Senate floor on whether Act No. was an effective tool for job security or merely a way to make unfair dismissals a little more expensive for the employer); Legislative History of Senate Bill 1112, Session Record of the Legislative Assembly, May 24, 1976, at 6-7.

and does not fall into one of the special categories, the employee will ultimately remain jobless. His only legal recourse is an economic award meant to sustain him during his search for new employment.

V. WHEN: DEFINING A DISMISSAL

Act No. 80 describes three forms of dismissal: (1) outright express termination, (2) suspensions that last more than three months, and (3) tacit or constructive dismissals. Situations (1) and (2) are pretty clear and form the most common adjudicated cases: employees merely include in their lawsuit a letter of dismissal or employers simply stipulate that fact. Constructive dismissals are trickier. By definition, it is the employee who actually acts, in this case, by resigning. As such, most resignations that form the basis for a wrongful termination action are characterized by employers as a mere resignation, while employees allege it was really a dismissal disguised as a resignation. Therefore, a factual controversy arises that mixes issues of law and fact.

Act No. 80 considers a discharge to have occurred when the employee's resignation is

> motivated by those acts on the part of his employer that are directed at inducing or forcing him to resign, such as imposing or attempting to impose on him more onerous working conditions, reducing his salary, demoting him, or submitting him to humiliations, both in fact or through statements.[72]

In particular, the Supreme Court of Puerto Rico has held that "the willful and unjustified actions of the employer directed at forcing the employee to leave his job, constitute a dismissal when the employee's only reasonable alternative is to resign."[73] However, those actions must be of a "substantial magnitude;" light burdens or a mere unfriendly environment will not suffice.[74] The standard is an objective one.[75] There is no presumption in this situation: We must also remember that the presumption that all dismissals are unjust depends on the initial existence of a dismissal. Therefore, the presumption that a dismissal was unjust will not be triggered until the employee proves that he was, in fact, the object of a termination. Once he proves his resignation was a dismissal, only then does the presumption of

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72. P.R. LAWS ANN. tit. 29 § 185e (2010).

73. Rivera Figueroa v. The Fuller Brush Co., 180 P.R. Dec. 894, 908 (2011) (quoting Vélez de Reilova v. R. Palmer Bros., Inc., 94 P.R. Dec. 175, 178 (1967)).

74. *Id.*

75. *Id.*

wrongful termination come into full force.[76] Furthermore, the act by the employer need not be specifically targeted against a particular employee. If it is proven that the employer acted in such as way so that any reasonable person would have resigned under those circumstances, this would be enough to prove the fact of the dismissal, even if the challenged action by the employer was directed at an entire group of employees.

Then, how does an employee prove his resignation was a dismissal? We have already seen the substantive legal requirements. As to proof, *an employee need not establish this initial fact by a preponderance of the evidence.* A standard of "sufficient evidence" will be applied.[77] That is, if sufficient evidence exists to establish that an employee was forced, pressured, or intimidated into resigning, he would have successfully established the fact of his dismissal and, therefore, have triggered the presumption that his termination was unlawful. Although the Supreme Court of Puerto Rico has expressed that courts should be very mindful when dealing with constructive discharge allegations, since they are by definition dismissals disguised as resignations, it has been very cautious in reversing trial court determinations that a particular resignation was not, in fact, a discharge. That is, while it has said that courts should settle doubts in favor of finding for the existence of a dismissal, in reality, this has been one of the areas where the court has been most lacking.[78] Earlier case law that had stated the employee need only establish that the acts of his employers were *intended* to make him resign, irrespective of degree, has been replaced with a degree based analysis. If an employer wishes that his employee resign, he may be able to disguise his intentions by employing a not-too-aggressive campaign.[79]

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76. This is one of the important areas of Act No. 80 in which no pro-employee presumption operates. However, the Supreme Court of Puerto Rico has attempted to slightly correct this situation by lowering the evidentiary burden in order for the worker to establish this fact. *See Rivera Figueroa*, 180 P.R. Dec. at 912-13.

77. *Id.*

78. Narrow constructions of *Rivera Figueroa* by the Court of Appeals have gone unchecked by the Supreme Court. *See, e.g.,* Morales Hernández v. Puerto Rico Wireless, Inc., 2012 WL 1672999 (TCA, 2012) and Rosado Ruiz v. Amcor Packaging Puerto Rico, Inc., 2012 WL 3107939 (TCA, 2012).

79. *Rivera Figueroa*, 180 P.R. Dec. at 908. I should also point out that the courts, slowly but surely, have been recognizing the existence of a cause of action for "mobbing" in which the employee doesn't have to resign – and therefore present a claim for wrongful dismissal under Act No. 80 – in order to sue his employer for workplace harassment. Although the Legislature has yet to pass a particular "mobbing" statute, some appeals courts in Puerto Rico have found a cause of action in the general tort provision of the Civil Code. *See* Marquez Soliveras v. Departamento de la Familia, 2013 WL 940256 (TCA, 2013). In other words, a *sufficiently*

VI. WHERE AND HOW: JUDICIAL ROLE IN WRONGFUL DISCHARGE ACTIONS AND STATUTE OF LIMITATIONS

As a general rule, individual claims by an employee against his employer are not always subject to arbitration.[80] In Puerto Rico, the courthouse doors tend to be open for labor controversies, even in cases where there is a collective bargaining agreement.[81] Furthermore, some actions can be filed under a summary process that severely limits the employer's power to delay the action.[82] This summary process is created to allow the worker to have access to economic resources in the absence of wages.

While Act No. 80 lays out the substantive rules in cases of non-discriminatory wrongful discharge, it is Act No. 2 that establishes the procedural mechanism.[83] It is a statutory regime that heavily favors the employee. The following are a couple of examples of the provisions in Act No. 2:

> (1) The court, not the plaintiff, is responsible for processing the summons;
>
> (2) The employer has 10-15 days to answer the complaint;
>
> (3) The employer may ask for only one extension of that term if he asks for one during the 10-15 day period and only for good cause;
>
> (4) The employer may only file a single answer to the complaint, and must include all affirmative defenses, if not, they are irrevocably waived;
>
> (5) There is limited discovery (only one deposition or one questionnaire);
>
> (6) The employer is not allowed to file a counterclaim against the employee;
>
> (7) In case the employer fails to meet any of these requirements, default judgment must be entered. There is no judicial discretion to

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harassed employee has two available options: if he resigns, he may have a wrongful discharge claim, if he is able to establish that his resignation was a dismissal; or, he may opt to continue in his employment and sue for damages.

80. Nazario v. Tribunal, 98 P.R. Dec. 846, 853-54 (1970).

81. The Puerto Rico Supreme Court has held that discrimination claims can always be brought in court, even if there is a governing collective bargaining agreement. Quiñones v. Ass'n de Condómines, 161 P.R. Dec. 668, 676 (2004).

82. Act No. 2 of October 17, 1961, 1961 P.R. Laws 447 (codified at P.R. LAWS ANN. tit. 32 §§ 3118-32 (2010)). This statute has its roots in Act No. 10 of November 14, 1917, 1917 P.R. Laws 216. This, however, has not prevented many cases from dragging on in court but, compared to other civil actions, employment law cases tend to be speedier in their adjudication.

83. Act No. 2 is not only used for wrongful discharge actions. It can be used for any employment related actions, including discrimination, retaliation, wages, and so on. P.R. LAWS ANN. tit. 32 § 3118.

act otherwise.[84]

Finally, contrary to META and Montana's WDEA,[85] Act No. 80 creates a three-year statute of limitations for claims of wrongful dismissal.[86] Also unlike Montana's statute,[87] Act No. 80 is not eligible for arbitration if it means closing the courtroom's door.[88]

VII. SOME COMPARISONS AND CONCLUSIONS

Briefly, I wish to compare some aspects of Act No. 80 with META and Montana's WDEA. Right from the outset, we can appreciate the main difficulty in such a comparison: Puerto Rico's Act No. 80 is of a very different nature; some of its provisions overlap with those in the other statutes, but others simply reflect an entirely different approach altogether. The main difference between Act No. 80 and the other approaches is the establishment of powerful pro-employee evidentiary presumptions.

As we have seen, the most important presumptions included in Act No. 80 are: (1) all workers are regular employees hired for an indeterminate period and (2) all dismissals are without cause. This is closely connected to the liberal statutory interpretation rule: (1) all doubts to be settled in favor of the worker; (2) all doubts to be settled in favor of coverage; (3) if it is not clear if a particular worker is an independent contractor or an employee, he shall be found to be the latter; and (4) if a resignation may plausibly be ruled a discharge, the court should so determine. The same works in the opposite direction: (1) just cause should be narrowly interpreted and always traced back to the text of the Act; (2) first offenses normally don't justify a dismissal; and (3) the very serious exception to the first offense rule should be narrowly interpreted.

Since 1991, META has been analyzed by the scholarship as a possible alternative for the at-will regime, although it has yet to be enacted anywhere.[89] As to this Article, I wish to offer a contrast of

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84. P.R. LAWS ANN. tit. 29 § 1851 (2010). In some circumstances, the employer may ask for the summary process to be transformed into an ordinary one under the Rules of Civil Procedure. In those cases, that switch does not allow the employer to start over again. For example, if he failed to include an affirmative defense before the process is changed into an ordinary one, he may not revisit that issue. *See generally* Rivera v. Insular Wire Prods. Corp., 140 P.R. Dec. 912 (1996).

85. Hirsch, *supra* note 1, at 102; Wulfsohn, *supra* note 1, at 621.

86. P.R. LAWS ANN. tit. 29 § 1851.

87. Hirsch, *supra* note 1, at 102; Wulfsohn, *supra* note 1, at 621.

88. *See* Vélez v. Servicios Legales de P.R., Inc., 144 P.R. Dec. 673 (1998).

89. Hirsch, *supra* note 1, at 103.

that proposal with Puerto Rico's Act No. 80.

Both regimes set a uniform just cause rule in exchange for limited remedies.[90] But the devil is in the details: Puerto Rico's definition of what constitutes just cause is much narrower and is subject to a first-offense limitation. Yet, META does allow for an arbitrator to order reinstatement, severance, and backpay as remedies for a wrongful discharge,[91] while Act No. 80 only allows for an objective indemnity.[92] This is the only area that META can be said to be more worker protective than Puerto Rico's regime.

However, as to the concept of "good cause," META's definition is considerably broad and vague. Like Act No. 80, it divides possible justifications for a dismissal between those that are the product of employee conduct and those that are related to the employer's business interests. As to the former, section 1(4)(i) of META defines good cause as "a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job..., job performance, and employment record." As to the employer's motives, section 1(4)(ii) allows for a dismissal if it's the result of the

> exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing and reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.[93]

From the previous provisions we can identify a clear contrast with Act No. 80's definition of just cause. Without a doubt, META's approach only allows for non-arbitrary reasons for dismissal, but Act No. 80 further limits that criterion, particularly with regards to employer discretion to operate the business: it's not that the employer

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90. Arnow-Richman, *supra* note 1, at 15.

91. MODEL EMP'T TERMINATION ACT § 7(b) (1991).

92. *See* P.R. LAWS ANN. tit. 29 § 185a (2010). Also, META allows for an employee to waive his rights under the act in exchange for a severance of one month pay per year worked, for a maximum of 30 years. MODEL EMP'T TERMINATION ACT § 4(c) (1991). This is somewhat similar to Arnow-Richman's proposal that employees get notice of their termination in advance, or a payment in lieu of, to facilitate the transition but not to prevent the termination. Arnow-Richman, *supra* note 1, at 2.

93. MODEL EMP'T TERMINATION ACT § 1(4)(ii) (1991). META defines "good faith" as "honesty in fact." *Id.* § 1(5).

must offer a non-arbitrary reason to fire the employee; it is that he must meet the statutory definition of just cause. In other words, nominally non-arbitrary reasons may yet fail Act No. 80's definition of just cause.

We can fully appreciate this narrower definition in both employee-centered causes for dismissal and business-interests ones. For example, Act No. 80 quite clearly requires that the employee's conduct be part of a broader trend: the first-offense rule.[94] Also, the business interests that may allow a dismissal all have in common economic hardship on part of the employer which forces him to change the mode of operation in his establishment. That is, his managerial discretion to fire is limited to those circumstances, not just good faith decisions as to the composition of his workforce. In summary, Act No. 80's definition of "just cause" favors the employee more than META does.

Under META, the burden of proof to establish that a particular dismissal was without cause is on the employee if he initiates the claim.[95] As we have seen, Act No. 80 takes a different approach. Although *initially* the employee has the burden of proof *as to his general claim*, like any other plaintiff in a civil suit, that burden shifts as soon as the worker establishes that (1) she worked for a private establishment in exchange for some king of remuneration, (2) was hired for an indeterminate period – which the statute presumes – and (3) was fired.[96] That triggers another presumption that the dismissal was without cause. This contrast cannot be overstated. The existence of pro-employee evidentiary presumptions that shift the burden of proof, forcing the employer to establish just cause by a preponderance of the evidence is the greatest reason for Act No. 80's success as a deterrent to wrongful termination in Puerto Rico. If it weren't for that presumption, dismissed workers would have a very steep uphill climb to receive a legal remedy. Any wrongful

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94. *See* Delgado Zayas v. Hosp. Interamericano de Medicina Avanzada, 137 P.R. Dec. 643, 649 (1994). META does include comments to this section that state, as an example of just cause for dismissal, "excessive absenteeism or tardiness," which resembles Act No. 80's requirement of repetition. Yet, this example stands out as an exception. Also, the comments reference "progressive discipline," yet this element is missing from the actual text of the model Act. MODEL EMP'T TERMINATION ACT § 1 cmt. (1991).

95. Hirsch, *supra* note 1, at 103.

96. While META maintains the burden of proof on the employee, in ordinary cases it is employers who must present their evidence first. The only exception to this order of turns is when the claim brought by the employee alleges a constructive discharge. MODEL EMP'T TERMINATION ACT § 6(e) (1991).

termination regime that leaves the burden of proof on the employee as to the existence of cause is doomed to fail as a tool for justice. The superiority of Act No. 80 in this respect is unquestionable. If only one idea is to be extracted from this statute as a model for other jurisdictions, it is this one.

As to who is covered by both acts, META only covers private employers with at least five employees;[97] Act No. 80 covers all private employers.[98] While both exclude independent contractors – with Puerto Rico having a presumption against them – META *expressly excludes* workers hired for a specified period.[99] Also, it limits its coverage to those employees who have worked for at least a year prior to their dismissal, allowing thus for a probationary period of twelve months.[100] Meanwhile, Puerto Rico's regime only allows for a three-month probationary period, subject to a three-month extension if allowed by the Secretary of Labor and Human Resources.[101] In this respect, Act No. 80 protects workers more broadly than META both in terms of the definition of employees and the maximum period a person can labor under a probationary contract.

In terms of the definition of a dismissal, both Acts are quite similar. META defines termination as "a dismissal, including that resulting from the elimination of a position, of an employee by an employer."[102] It also states that a suspension that lasts more than two consecutive months shall be considered a dismissal.[103] This is a month less than the maximum allowed in Puerto Rico.[104] Finally, META has an almost identical definition of what constitutes a constructive discharge.[105]

As to the statute of limitations, META only allows for 180 days for the employee to bring a claim,[106] while Puerto Rico's Act No. 80

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97. *Id.* § 1(2).

98. P.R. LAWS ANN. tit. 29 § 176 (2010).

99. MODEL EMP'T TERMINATION ACT §§ 1(1), 3(a), 4(d), 2(b) (1991) ("This [Act] *does not* apply to a termination at the expiration of an express oral or written agreement of employment for a *specified duration*, which was valid, subsisting, and in effect on the [effective] date of this [Act].") (emphasis added).

100. *Id.* § 3(b).

101. P.R. LAWS ANN. tit. 29 § 185h (2010).

102. MODEL EMP'T TERMINATION ACT § 1(8)(i) (1991).

103. *Id.* § 1(8)(ii).

104. P.R. LAWS ANN. tit. 29 § 185e (2010).

105. MODEL EMP'T TERMINATION ACT § 1(8)(iii) (1991).

106. *Id.* § 5(a). While the Act does establish a tolling period in case an employee wishes to use an internal grievance procedure before making a formal claim, META does not require the employee to exhaust those internal procedures in order to raise a claim.

establishes a three-year period.[107] While META favors arbitration, Puerto Rico favors the judicial forum.[108] Yet, *both* Acts express that if an employer increases substantive and/or procedural protections for the employee in a written personnel policy manual, he is bound by that commitment.[109] Finally, while META completely preempts other common law actions by the employee,[110] Puerto Rico's Act No. 80 allows for exceptions to its exclusive remedy by way of some other special legislation, constitutional public policy considerations, or torts independent from the very act of the dismissal itself.[111]

Kenneth A. Sprang has characterized META as an unquestionable act of compromise and doubts its overall effectiveness.[112] Compared with Act No. 80, I believe META is a very weak response to the problem of wrongful terminations, although it is, at least, a response. However, the fact that is has never been tested serves as a vicious cycle against its adoption by the states. This, I think, is Act No. 80's principal advantage over META: it and its predecessors have been around in Puerto Rico for more than eighty years; it is battle-tested.

I now turn to Montana's WDEA, which some consider to be inferior to META,[113] while others feel it is superior to Act No 80.[114] The latter does not hold water, not only because Puerto Rico's statute is evidently superior to META – creating a logical *non sequitor* as to WDEA – but because an honest comparison between Montana's and

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107. P.R. LAWS ANN. tit. 29 § 1851 (2010).

108. *Compare* MODEL EMP'T TERMINATION ACT §§ 4(i), 4(j), 5, 6, 7, 8 (1991) *with* part VI, *supra*. Here is where the cultural and historical differences between Puerto Rico and many U.S. jurisdictions become more evident. *Like the U.S.*, Puerto Rico had a moment in its history when labor arbitration was favored over courts, as the latter was seen as a defender of employer interests. For its part, arbitration was seen as a real equal forum for both parties. The current relative weakness of the union movement and of workers in general has allowed the courts to become the preferred forum for individual workers. The central role of labor and workers' rights in Puerto Rico's legal system allows general jurisdiction courts to be quite competent in dealing with these cases, and thus there has never been a real need for specialized labor courts, although several proposals to that effect have been made in the past. For a in-detailed analysis of the historical and legal development of the labor movement and labor laws in Puerto Rico, see ROJAS LUGO, *supra* note 24.

109. P.R. LAWS ANN. tit. 29 § 185b(b) (2010); Santiago v. Kodak Caribbean, Ltd., 129 P.R. Dec. 763, 776 (1992); MODEL EMP'T TERMINATION ACT § 4(e) (1991).

110. MODEL EMP'T TERMINATION ACT § 2(c).

111. *See supra* notes 67-70 and accompanying text.

112. Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 891 (1994). Sprang particularly attacks the failure of the Act to follow the example of traditional labor arbitration which places the burden of proof on the employer. *Id.* at 894.

113. Hirsch, *supra* note 1, at 103.

114. *See supra* notes 6, 8, 11.

Puerto Rico's statutes forces that conclusion.[115] Unlike META, Montana's statute has had real life experience, although decades less than Puerto Rico's.

Curiously enough, WDEA was not enacted to broaden worker protection; it was adopted to place limits on judicially created causes of action that strayed from the orthodox at-will system. From 1982 to 1987, the Supreme Court of Montana recognized a "tort of wrongful discharge, which allowed employees fired without 'good cause' to sue for damages."[116] That tort also allowed employees to recover damages for emotional distress and punitive damages.[117] By adopting WDEA, the Montana legislature sought to limit the breadth of that judicially created tort.[118] Unlike Puerto Rico's Act No. 80, both Montana's 1982-87 judicial rule of law and its 1987 statute derive from the employment at-will doctrine.[119] Puerto Rico's statute represents a clean break from that tradition, while WDEA "purports to preserve the 'at-will' concept."[120]

Like META, Montana's WDEA "not only limits recovery but also preempts most common law wrongful termination claims."[121] Recall that Puerto Rico's Act No. 80 is the *exclusive* remedy for wrongful terminations claims, *unless* the employee can establish a cause of action (1) under a more specific regime – like Puerto Rico's several anti-discrimination statutes – (2) resulting from an independent tort arising from the dismissal, or (3) for violations of constitutional public policy, like the right of privacy. WDEA's preemption of common law claims is due, however, to the fact that the statute itself "incorporates common law causes of action based on public policy, lack of good cause, and express contract theory."[122] In other words, Montana's WDEA didn't do away with the traditional

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115. Some have disputed META's superiority over the WDEA. Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMP. RTS. & EMP. POL'Y J. 105, 106 (1999). According to Jarsulic, while WDEA does have "a family resemblance to META, [it] departs from the model statute significantly." *Id.* Others have said that, in fact, META was modeled after the WDEA. *See* Robinson, *supra* note 6, at 376.

116. Jarsulic, *supra* note 115, at 106 (citation omitted).

117. *Id.* at 107.

118. *Id.* at 106.

119. Robinson, *supra* note 6, at 376. WDEA self-identifies as an exception to the common law rule, not a substitute for it. *Id.* at 378.

120. *Id.* at 376. For some reason, Robinson also states that WDEA "is the only one of its kind adopted in the United States," completely ignoring Puerto Rico's statute and the U.S. Virgin Islands' regime.

121. Arnow-Richman, *supra* note 1, at 16.

122. Hirsch, *supra* note 1, at 101.

exceptions to the at-will rule, it codified them. In that sense, the statute protects workers from dismissals that (1) violate public policy, (2) are not for "good cause," and (3) violate the employer's own written policies.[123] Although Puerto Rico also allows for a claim in all three scenarios, only the last two are part of Act No. 80, while the first one – violation of public policy – serves as an exceptional deviation from the statute itself.

WDEA defines "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operations, or other legitimate business concerns."[124] Again, one can note WDEA's similarity with META in contrast to Act No. 80's more narrow approach to the concept of legitimate business concerns.[125] WDEA offers a general negative view of what is *not* just cause,[126] while Puerto Rico offers a positive list of what *is* just cause. However, it must be said that WDEA is closer to Act No. 80 than META.

As to public policy considerations which would make a dismissal wrongful, the substantive content of that norm is almost identical to Puerto Rico's.[127] As I have noted, the only difference is structural: Montana considers the public policy-based prohibition on dismissals *part* of WDEA, while in Puerto Rico it is considered an independent source *outside* Act No. 80. Finally, both Montana and Puerto Rico view additional substantive and procedural protections provided for in employee manuals as part of their respective regimes.

Like META and Puerto Rico, WDEA also excludes from its coverage independent contractors. But like META, *and unlike Puerto Rico*, it also excludes persons hired under a temporary contract for a specified period.[128] Therefore, "employers can avoid a cause of action, while maintaining minimal commitment to employees, by signing short term employment contracts."[129] Puerto Rico's presumption

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123. Jarsulic, *supra* note 115, at 108.

124. Robinson, *supra* note 6, at 383.

125. *Id.* at 387. In particular, Robinson mentions how in Montana employers have a right to exercise discretion "over who [they] will employ and *keep* in employment." *Id.* (emphasis added).

126. *Id.* WDEA defines legitimate business reason as one which is "neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business." Buck v. Billings Mont. Chevrolet, Inc., 811 P.2d 537, 541 (Mont. 1991).

127. Robinson, *supra* note 6, at 383-84.

128. *Id.* at 402; *see also* Farris v. Hutchinson, 838 P.2d 374 (Mont. 1992).

129. Jarsulic, *supra* note 115, at 108. Jarsulic's example contrasts heavily with Puerto Rico's leading case on the matter, *Whittenburg v. Ntra. Sra. Del Carmen*, 182 P.R. Dec. 937, 952 (2011). He mentions that all non-faculty workers at Montana State University are hired for one-year

against *bona fide* temporary contracts was established precisely to avoid that scenario.[130] Finally, the current state of managerial positions as protected by the statute is not as clear as in Puerto Rico.[131] However, like META, WDEA's definition of a discharge is very similar to Act No. 80, particularly with respect to constructive dismissals.[132]

Again like META, the burden of proof in a claim presented by an employee challenging his dismissal lies with the employee himself.[133] This has produced a complicated norm regarding summary judgments in Montana that are unheard of in Puerto Rico. Puerto Rico still stands out in its approach to the issue of burden of proof.

As to remedies, WDEA limits recovery to *up to* four years of lost wages and fringe benefits, reserving the awarding of punitive damages to cases involving "clear and convincing evidence [of] actual fraud or actual malice . . . by an employer."[134] Act No. 80's indemnity is based on an objective computation and is not subject to subjective considerations or jury discretion.[135] To makes matters worse, employees have a duty to mitigate their losses and all interim earnings shall be subtracted from the award. Since Act No. 80's computation is independent of actual wages lost, neither of those situations occurs.

Finally, under WDEA, an employee must exhaust internal grievance procedures.[136] In Puerto Rico, like META, such requirement does not automatically close the courthouse doors. While META establishes a 180-day statute of limitations and Puerto Rico allows for a period of three years, Montana's WDEA creates a period of twelve months to file a claim, which starts with the date of the notice of the termination, not date of the termination itself.[137]

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contracts! *Id.* at 108-09.

130. Montana's Supreme Court has held "that nothing in the WDEA forbids parties from entering into a contract which is exempt from the Act and which allows discretionary rights of employers to avoid renewing specific term contracts without a showing of good cause." Robinson, *supra* note 6, at 402.

131. *Id.* at 387-88.

132. WDEA defines constructive discharge as "the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative." *Id.* at 383.

133. *Id.* at 388.

134. Hirsch, *supra* note 1, at 101 (citation omitted).

135. P.R. LAWS ANN. tit. 29 §185a (2010). Actually, due to Puerto Rico's civil law roots, there are no juries in civil trials.

136. Hirsch, *supra* note 1, at 101.

137. Robinson, *supra* note 6, at 399.

Again referencing Kenneth A. Sprang, I wish to start my final comments of this Article by examining Act No. 80 using the standards he has laid out to analyze whether a particular wrongful dismissal regime is effective or not. According to Sprang, a good act should have five objectives: (1) to *deter* employers from unjustly dismissing their employees; (2) to *punish* employers who do so; (3) to make the employees *whole*; (4) provide *access* to the courts; and (5) protect employers from specious claims.[138]

For now, I only wish to address the first and second objectives, which must be analyzed jointly as they both go directly to the issue of remedy. At the end of the day, an employer will care little about adverse burdens of proof if the bottom line is not that expensive. In Puerto Rico, some employers feel it is cheaper to disregard Act No. 80 and pay up when the few former employees present claims than to fully comply with the just cause regime. In that sense, Act No. 80 is sort of a "toothless tiger." In Puerto Rico, depending on how long a particular employee has worked, it will be either very cheap or very expensive to dismiss him or her. Obviously, restitution plus an indemnity would be a powerful alternative. But money issues aside, Act No. 80 is still a worker friendly statute in terms of its internal mechanics, particularly with respect to burdens, presumptions, and substantive definitions (what is just cause, who is an employee, when has a discharge occurred, and so on). It serves as an important safety net that allows a person to have enough resources to live on while seeking new employment. But in times of severe economic crisis and structural unemployment, Act No. 80 shows its weaknesses. But, compared to WDEA, META, and current state common law rules, I can't help but see it as the most just alternative for employees and, at least, as a starting point. After all, *wrongful discharge is premised on the fact that the employee has done nothing wrong! Of course any wrongful termination statute has to be pro-worker.* The alternative would be to treat employer and employee equally when they are obviously not; not just because of the economic disparities between them, but because an employer who arbitrarily deprives a human being of his or her means of sustenance does not deserve our protection. After all, the law should exist to protect the weak, not the strong.

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138. Sprang, *supra* note 112, at 902. According to Sprang, META fails in the first three objectives, and he goes so far as to state that some employees might actually be better off under normal common law rules. *Id.* at. 903.

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