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February 8, 1984

TO STRIKE A NEW BALANCE

A Report
of
the Adhoc Committee on Termination at Will and Wrongful Discharge
Appointed by the Labor and Employment Law Section
of The State Bar of California

William B. Gould, co-chair
R. Wayne Estes, member
Mark S. Rudy, member
Helena S. Wise, member
*Howard C. Hay, co-chairman
*Maureen McClain, member

Co-Chairman Howard Hay and Maureen McClain dissent from many of the positions taken in this report and have issued a separate dissenting statement which commences on page 35.

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THE STATE BAR OF CALIFORNIA

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FEBRUARY 8, 1984

TO MEMBERS OF THE LABOR AND EMPLOYMENT LAW SECTION,
STATE BAR OF CALIFORNIA

In January, 1983, the Executive Committee of the Labor and Employment Law Section appointed an ad hoc committee of six outstanding labor lawyers throughout the state to review the increase in litigation relating to termination at will and wrongful discharge. William B. Gould and Howard Hay were appointed as co-chairs of this committee. Serving with them were R. Wayne Estes, Maureen McLain, Mark Rudy and Helena Wise. The committee has met throughout the state with all segments of the Labor Bar including the Los Angeles County Bar Association, Labor and Employment Law Section; San Diego County Bar; and other interested groups. Furthermore, the committee met numerous times through the year preparing interim reports which were presented to the Executive Committee on January 20, 1984.

At its January 20th meeting, the Executive Committee reviewed the final report submitted by the committee. Due to the controversial nature of the report and the time and effort that has been put into this challenging task, the Executive Committee voted to allocate from its budget sufficient money to produce a special edition of the Labor and Employment Law News. In this edition you will find a majority report produced by co-chair William Gould and concurred in by Wayne Estes, Mark Rudy and Helena Wise and a minority report produced by co-chair Howard Hay, concurred in by Maureen McLain.

Within the next month a survey, prepared by the Section's executive committee will be forwarded to you requesting your response to this material. The Executive Committee has not taken a position on either the majority or minority report at this time. We have reviewed in depth both reports and have set aside time at our next Executive Committee meeting on April 6, 1984, to further review the reports and responses received from the survey. I would like to urge your participation in filling out the survey and submitting it to the State Bar office so that we can have available your opinions on this very important issue prior to our April meeting.

On behalf of all the members of the Executive Committee and the Section, I wish to express appreciation and thanks to the six members of this ad hoc committee who have spent innumerable hours of dedicated research and writing to prepare, what is in our opinion, the most comprehensive dissertation on termination at will and wrongful discharge in California.

Very truly yours,

Lawrence H. Kay

Lawrence H. Kay, Chair
Labor and Employment Law Section

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This Committee was created by the Labor and Employment Law Section of the State Bar of California on January 8, 1983, and in a letter of March 11, 1983 Chairman Lawrence Kay communicated this assignment to the undersigned. The charge to the Committee is to issue a report on the question of what legislation, if any, should be enacted in California.

The Committee held a series of meetings with members of the Labor Bar and others in San Francisco, Los Angeles, and San Diego. Experts and interested parties both in and outside of California were queried about their views in areas that the Committee perceived to be significant. The Committee has held a number of internal meetings in both northern and southern California.

I. The Need For Legislation

The Committee is of the view that legislation is needed in California. In the first place, regardless of the state of the common law, it is the view of the Committee that the right to work is a fundamental and critical right and must be recognized by our society as such. In a sense, modern labor legislation in the form of statutes like the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Occupational Health and Safety Act of 1970, the Employment Income and Retirement Act of 1974 (ERISA), and a host of other labor statutes persuade us to believe that this is the case.

These rights, of course, must be balanced against our society's interest in efficiency and productive enterprise. But it is our view that job security can promote morale and productivity and that, in any event, the balance has been traditionally weighed against employees and that therefore, in this critical area of terminable at will disputes or wrongful discharge, a new balance between employees and employers must be struck. As Pope John Paul II has said:

> We must emphasize and give prominence to the primacy of man in the production process, the primacy of man over things. Everything contained in the concept of capital in the strict sense is a collection of things. Man, as the subject of work and independent of the work he does--man alone is a person. This truth has important and decisive consequences.[1]

The right to work is a fundamental one which is intertwined with one's home and family. As the Court of Appeals for the

Fifth Circuit has said, the right to work in an environment is fundamental because it "deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses."[2]

The Termination of Employment Convention promulgated by the International Labor Organization obligates employers to provide a valid reason in the case of dismissal. The member nation states are obligated to establish machinery through which employees are afforded a hearing or procedure in which the propriety of their dismissal can be established. The United States is a member of the ILO.

In large measure the ILO Convention simply mirrors legislation enacted throughout Europe which was pioneeered by Germany[3] and protects employees against an 'unfair dismissal' in Britain[4] and Sweden or 'socially unwarranted dismissals' in Germany." The United States seems strangely out of step with not only European consensus on the subject of discharge, but also -- even more importantly --international law as well.

This then, in our view, is the basic framework for legislative proposals in the so-called wrongful discharge arena. But there are other considerations as well--and foremost amongst them is the basic tension or, in the view of some, inconsistency between the evolution of the common law in California and statutory law. For in California the Labor Code, Section 2922, states the following: "An employment having no specified term may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." Thus California has codified by statute the view that the employment contract is terminable at will. The thrust of decided California judicial authority, however, appears to place secondary or peripheral emphasis on this provision.

We turn at this point to a brief sketch of California law that has evolved. As Professors Miller and Estes[5] have noted, a new California Trilogy has established the framework for law in this state. The first decision, both chronologically and insofar as its significance is concerned, is Tameny v. Atlantic Richfield Co.[6] in which the Supreme Court of California concluded that employer dismissals of employees that violate public policy create a cause of action which sounds in tort. The Court, speaking through Justice Tobriner, noted that the terminable at will doctrine is anachronistic in light of contemporary employment relations. As Professors Miller and Estes have noted: "...one would take this phrase to mean that in the present economic marketplace the employee is at a disadvantage: he cannot terminate his employment at will because he has a great economic and psychological dependency upon his job, whereas the employer's task of finding a replacement is rarely burdensome."[7] The violation of public policy may be established through reference to either statute or "sound morality."[8]

Tameny created tort liability and thus punitive damages. Its focus is upon the motivation of the employer and whether the employer has a "wrongful motive." The Tameny branch of the California Trilogy has been held by the Court to apply, under some circumstances, to employee protest against retaliatory measures undertaken in response to employee use of protective statutes, such as health and safety legislation.[9]

A second line of cases is best represented by Cleary v. American Airlines, Inc. [10] which establishes the existence of an implied covenant of good faith and fair dealing which is to be found in the employee contract. Again, however, the remedy for violations of this obligation is both compensatory and punitive damages inasmuch as the cause of action sounds in tort. Again, through the court's rejection of the contractual concept of mutuality of obligation and the need for independent consideration in the employment relationship, the decision seems to be at odds with the above-quoted portion of the California Labor Code, which codifies the terminable at will theory. This decision is not clear about the standard to be imposed upon the employer, although it appears as though the court intended just cause to be applicable. Whether this is a just cause analagous to the standard contained in collective bargaining agreements negotiated between unions and employers is similarly unclear.

The third case in the trilogy is Pugh v. See's Candies, Inc.[11] which is a contract case and limits the employer's right to discharge an employee, again without much concern with mutuality or independent consideration, but rather on a totality of circumstances standard. Here the court examined the considerations such as previous employer commendations provided the employee, the employee's longevity of service, the personnel practices of the employer, and the absence of good cause for discharge to imply a contract between the employer and employee. Other courts have implied contracts on the basis of personnel manuals and the like, even without reference to reliance by the employee upon the manual or any communication between the employer and an employee that may have taken place with reference to it.[12] The measure of damages in the California contract cases, at least as adumbrated in Pugh, is not clear. Again, there is a tension between the Labor Code and judicial authority because of the court's seeming reluctance to accord any presumption to the terminable at will approach and contract doctrines which go with it.

Thus, whatever may be said about the kind of legislation which should be enacted in California, it is clear that some legislation should be enacted by the California Legislature, given the tension between the above referenced California decisions and others[13] and the common law terminable at will doctrine codified in the statute. For reasons which we make clear, we are of the view that the California Labor Code 2922 should be repealed and that the terminable at will approach should be banished and consigned to the laissez faire philosophy

of a previous age of which it is a relic.

A third reason for the enactment of legislation is the lack of clarity in California law at this time. Cleary appears to adopt just cause, but there are those who believe that the decision and its progeny only encompass arbitrary employer conduct or conduct which is engaged in in bad faith. Equally important is the point made by some of the commentators to the effect that the availability of damages in tort makes a standard less exacting and severe than just cause an appropriate one.

Pugh is even more ambiguous with regard to the standard to be employed in contract cases. The Pugh opinion speaks of good cause sometimes as though it is to be regarded as interchangeable with the just cause language contained in collective bargaining agreements. On the other hand, the opinion speaks of the employer's conduct regulated by "good faith." It is not clear whether the opinion refers to the arbitral law evolving under collective bargaining agreements or good cause as a matter of common law. The opinion notes that arbitral decisional authority may not be appropriate in many circumstances. It also makes reference to the fact that greater deference must be given to employer discretion where managerial employees are the plaintiffs (a managerial employee was involved in Pugh).

Jury instructions in these cases which have been provided to the Committee compound and confuse the matter further. These instructions appear to proceed upon the assumption that good faith or something less than just cause as understood in the arbitral context applies to employee dismissals.

The lack of clarity contained in the decisions may make legislation desirable. At the same time, we express our caution about the potential for defining standards with clarity. In the employer-employee relationship in the organized sector of the economy one can speak with a fair degree of certainty about basic principles that have emerged in the case law of just cause discharge disputes.[14] But the fact is that the term is necessarily vague, and one cannot gainsay the point that the problems of ambiguity and lack of clarity will not disappear with enactment of the legislation that we propose--or indeed, in our judgment, any legislation at all.

A fourth reason for legislation relates to the forum in which wrongful discharge cases are presently being heard in California and in other jurisdictions, i.e., before judges and juries. This, it seems to us, is undesirable for a number of reasons. The first is that judges and juries traditionally possess less expertise in such matters than is possessed by labor arbitrators and labor boards who are by nature specialized agencies or institutions. But a more important objection to the forum is the unpredictability and the volatility involved with the process itself.

That it is impossible for employers and employees to speak with any degree of certainty about the extent of liability has become clear. Juries impose punitive and compensatory damages in what is frequently an erratic fashion. This lack of predictability may encourage employers to employ inefficient employees who should be dismissed.

In this connection, it is important to take note of a survey of wrongful discharge cases between 1980 and 1982 which concluded with a jury verdict. The study was conducted by Frederick Brown of San Francisco. In the first place, it is significant that plaintiffs recovered in 32 cases and failed to recover in only 9 cases--one of them being the Pugh case itself. But, more relevant to our point is that in the 32 cases in which plaintiffs prevailed, there was an award of punitive damages in 17! The lowest award was $17,000. In 13 of the 17 cases the award was $100,000 or above. In six cases it was $600,000 or above. All of this, of course, is in addition to general damages awards in the 32 cases which, as the Brown report notes, have not been inconsiderable.

We do not intimate that these or other cases in which plaintiffs have prevailed lack merit or that no defendant's conduct has not been egregious in some sense of the word. We are of the view, however, that the prospect of large and uncertain damage awards has both introduced an element of destabilization in the employer-employee relationship and also promoted considerable litigation in its wake.

Lured on by the prospect of an indeterminate amount of compensatory and punitive damages, relatively frivolous litigation may be filed and instituted by those who hope to gain a windfall from the existing process. This means an increase in litigation when the judiciary is already clogged and burdened with such cases. Moreover, in addition to potential employment of inefficient employees, it means an excessive number of settlements which may bear no relationship to the merits of the case.

But there is another problem which is related to the question of a forum. At common law, prior to the evolution of modern labor legislation, the courts did not fashion reinstatement remedies in the case of wrongful dismissals, and this is a feature which appears to remain intact in contemporary wrongful discharge litigation. As we point out below, it may well be that the scales have tipped too far in the direction of reinstatement as a remedy, and that institutions like the National Labor Relations Board and arbitrators fashion it with a near automaticity which is indiscriminate. This may well be unwise. But so is the antithesis under which we operate at present, i.e., no reinstatement as a remedy.

The unavailability of reinstatement is a major deficiency in the existing law. We believe that the average employee who loses his job and perceives the termination to be unjust or unfair

generally would prefer reinstatement. If this remedy could be obtained through a process that worked fairly expeditiously and economically, it might prove to be more attractive to most affected employees. This would seem to be preferable to relatively lengthy litigation which has as its objective the remedy of damages. Moreover, to the extent that reinstatement is substituted for unlimited damages as we propose below, the process becomes a more predictable one for both employee and employer. In our judgment this is beneficial to society in part because of the greater potential for conciliating or resolving disputes prior to litigation or to the litigation running its full course.

Penultimately, we perceive another deficiency in the existing common law as defined by the California courts to be its narrow scope of coverage in terms of protection of employees. Aside from the public policy branch of the wrongful discharge doctrine established by the California Supreme Court in Tameny, the theories adumbrated by the California courts appear to establish long-term employment as a prerequisite for protection. Indeed, a number of cases have been dismissed already on this basis. Cleary was based upon the number of years that the worker had been employed as well as the approach adopted by the employer reflected in its grievance procedure. A substantial portion of the contract which was implied in Pugh was based upon recommendations and the like received by the employee over a substantial portion of time.

It would seem as though other jurisdictions, such as Michigan,[15] which have stressed the implied nature of employment contracts, are not as preoccupied with length of service as is California. But this is the law here, and the important point which we must consider is the fact that the public policy cases, albeit not predicated upon long-term employment, will undoubtedly represent a relatively small minority of the litigation which will take place within the existing framework or any future statutory scheme devised by the Legislature. We believe that the exclusion of such a substantial group of employees is undesirable as a matter of policy.

Finally, a selectivity of protection manifests itself in another, and at least equally important, manner as well. This has nothing to do with the theories as enunciated by the California courts. It relates rather to the economic realities of litigation. While a substantial number of lawyers represent plaintiffs in California and have made contingency fee arrangements based upon the prospect of compensatory and punitive damages, the fact is that most competent counsel require a fairly substantial payment in the interim which, in the event of success, presumably can be deducted from the contingency fee award. We estimate that a bare minimum payment for fees and costs, as of 1983, is approximately $7500 to $8000. This tends to exclude the average worker who might believe that he had been terminated unfairly, particularly that substantial portion of blue collar workers who are not protected by collective

bargaining agreements or civil service, let alone a whole host of white collar employees who are by no means necessarily impecunious.

The lengthy process that is inherent in litigation leading to a jury trial, the necessity of undertaking discovery and utilizing complex procedures such as depositions and interrogatories, compounds the problem and makes it likely that only managerial or professional employees who have an income reserve are in a position to stay the course. Scholarly commentary, which has undertaken a profile of plaintiffs in wrongful discharge cases, tends to confirm this view.[16]

We are of the view that the economic realities of litigation exclude potential litigants who simply cannot stay the course economically. Indeed, it may be said that the system may tempt an undesirable group of plaintiffs into the court, i.e., those who have no interest in the prompt resolution of disputes leading to reinstatement because they have no need for such. In any event, our view is that any new legislation must take into account this reality and allow for greater access to whatever institutions the California Legislature may chose to create.

Thus, for all of the reasons stated above, the Committee holds the view that legislation is necessary.

> **Concurring Statement of Ms. Wise:** Ms. Wise believes that legislation which will provide for the review of employee discharges, in other than the union setting, is long overdue. Such legislation will eliminate unnecessary demurrers brought pursuant to antiquated Labor Code Section 2922, while at the same time affording employees with a better forum in which to adjudicate problems in their employment relationships.

> **Concurring Statement and Note of Reservation of Professor Estes:** Professor Estes states that he believes that the primary need for legislation is based on the tension between California judicial decisions and statutory law and many areas of uncertainty that exist in the California common law in this area. He further states that while he does not concur with some of the recommendations of the majority report, he chooses not to set out any specific dissents to the majority report.

II. Proposed Legislation: An Overview of Prospects and Problems

We believe that the appropriate statutory scheme should consist of three basic ingredients: (1) The arbitration process as a mechanism which will provide for the resolution of disputes in a relatively inexpensive and prompt fashion; (2) just cause as

a standard for dismissal, albeit a just cause standard which, while reflecting a standard similar to that contained in collective bargaining agreements throughout the Nation, nevertheless provides deference to an employer's subjective judgment in connection with managerial and supervisory employees, all of whom we believe should be covered by a new statute; (3) a wide variety of remedies, including reinstatement, back pay with interest, income and related losses for a period up to two years subsequent to the time that reinstatement would have imposed if reinstatement is perceived to be inappropriate on one ground or another, attorneys' fees and costs to the prevailing plaintiff, and the same for prevailing defendant where the litigation is initiated for vexatious reasons or for the sake of harassment.

These then should be the portions of the legislation which should form its bedrock. Through our proposals we would supplant the common law theories utilized in the California Trilogy and the jurisdiction of the courts over such controversies. Specifically, we would override those California decisions which have formulated (1) the public policy wrongful discharge action in tort and contract; (2) the implied covenant of good faith and fair dealing in an employment contract and (3) breach of implied contract. Except for fraud, which is so frequently intertwined with the just cause issue itself, we do not alter other causes or actions which are often bound up with employment controversies such as libel, slander, defamation, loss of consortium, and assault. While logic does not completely separate these actions from the scope of this report, we believe that such litigation is a step removed from the litigation theories bound up in the California Trilogy, and we do not therefore seek to alter California law in other respects.

We provide more detail below with regard to other aspects of legislation.

Forum

Arbitration is a basic part of our proposal. While we are not certain that the industrial jurisprudence that has emerged in the labor arbitration arena is completely synonymous with industrial justice, as well as practicality, we believe, for a number of reasons, that the process is infinitely preferable to the existing common law system which utilizes judges and juries. The first consideration relates to delay which, as we have noted, is inherent in the existing procedure and which excludes not only the impecunious but those who have simply less resources than those contained in the contemporary plaintiff profile. True, arbitration has developed more delay problems in recent years. Nevertheless, its record still appears to be superior in terms of providing an expeditious forum and relief, as compared to the common law system of litigation which now governs these cases.

Moreover, the arbitral form provides considerably more expertise than does the existing system. Generally, arbitrators,

whether they are full or part time, specialize in labor cases and are expert not simply in fact finding but also by virtue of an awareness of basic rules which apply to the employer-employee relationship. Judges and, more particularly, juries do not possess comparable expertise. It is this lack of expertise which makes the existing system unwieldy and unpredictable and which encourages the initiation of frivolous complaints, the employment of inefficient employees, the negotiation of settlements which may reflect blackmail rather than the merits, and the availability of large punitive and compensatory damage awards which bear no relationship to actual losses suffered. Because of this, we have, at present, the worst of two worlds, i.e., one in which neither employee rights nor the employer's legitimate interest in productivity and efficiency can be protected adequately because of the lack of any expection that guidelines or rules will be adhered to by some expert body. This contrasts rather sharply with the organized sector of the economy where an arbitral common law has governed the parties' relationships and where settlements may be entered into, based upon assessments of what an arbitrator is likely to do. There is no logical or practical reason why a similar approach should not be adopted in the unorganized sector of the economy.

It goes without saying that whatever the increased problems which exist in labor arbitration today because of the increased use of lawyers, stenographers, transcripts, and the like, the expense should be considerably less than that which applies in a procedure which contains pleadings, motions, briefs, substantial discovery in the form of interrogatories, depositions, and subpoenas, as well as the trial itself. As we note below, in arbitration, under the proposed statute, most of the discovery can take place in conjunction with an attempt to mediate or conciliate.

Finally, we believe that the arbitration process is superior because it is an informal one and therefore one in which both the employee and employer are likely to feel more at ease. In this connection, we recommend that legislation specifically provide employees with the right to be represented in arbitration by whomever they choose, whether it be a lawyer or union official or co-employee or corporate representative. The employer, of course, would have the same right to be represented by its representative, including members of the bar. It is important to note, however, that we believe that the arbitration process and its informality are mutually beneficial for both employee and employer and, thus, the public interest.

The most oft-repeated objection that we have heard is that by providing for arbitration as a forum, and easier and more immediate access on the part of a wider group of employees, employers and arbitrators will be inundated with a substantial number of claims, many of them frivolous in nature. While noting that the volume of common law litigation has swelled enormously,[17] we recognize that the prospect of a heavy volume of claims is a very real one. It is true that in Canada where

legislation was enacted in 1978 to cover approximately 300,000 employees within federal jurisdiction in that country, only 378 complaints were filed during the first two years. Yet Canada, while more similar in cultural and other respects to the United States than Europe and nations on other continents, may not be nearly as litigious as America, let alone California. Our response to this concern is to attempt to devise procedures which mediate complaints short of arbitration, to impose costs upon the parties themselves, as well as to provide deference to employer-devised procedures, thus encouraging the peaceful settlement of disputes without resort to state-mandated procedures and perhaps any third party at all. The fact that Great Britain has been able to conciliate or settle more than half of its unfair dismissal claims without the need for a hearing is of some relevance to the quest for effective dispute resolution procedures.[18]

Another related concern expressed by management labor lawyers in particular is that if the volume of cases is heavy, there simply will not be a sufficient number of competent arbitrators to handle and hear them. To some extent this problem can be addressed through new arbitrator training programs which have been instituted here in California as well as elsewhere throughout the country.[19] But, in fact, it must be recognized that new arbitrators not only can be trained, they are now on the rosters of both the American Arbitration Association and the Federal Mediation and Conciliation Service already. Many are simply not chosen because they are not known. This is the classic catch 22 process whereby one can only demonstrate one's talents after one has the opportunity. Many arbitrators simply do not get the opportunity.

A more vexatious problem relates to potential bias on the part of arbitrators. Inasmuch as labor arbitrators will hear the cases--and if the volume of cases swells as anticipated, many of the arbitrators will be fledglings--they will be confronted with something fundamentally dissimilar from labor arbitration in the organized sector. In labor cases the arbitrator is dealing with two institutions and knows that he cannot entirely displease one side--or at least labor or management as a group in the community--through lack of care and attention, for it takes two to select him in the future. Here, most likely, the arbitrator will only see one of the parties again, i.e., the employer. The individual, unlike the union, will not be likely to appear before him again, and thus one party's consent is not necessary to the arbitrator's well-being. We recognize this problem, and yet believe that the Legislature should repose confidence in the integrity of most arbitrators who we believe will act in an impartial and unbiased manner.

Finally, it is said that a statute such as this will impair the development of employer procedures. A number of employers, particularly in California, have devised their own arbitration and dispute resolution procedures. To this there are two responses. In the first place, legislation is in part

necessitated by the fact that so few employers have devised arbitration and other sophisticated machinery which provides substantive protection. The second, as noted in this report, is that this legislation would defer to the parties' own procedures so long as they meet statutory standards.

> **Note of Reservation of Mr. Rudy:** Mr. Rudy recommends that all claims be initially processed through the judicial system. However, smaller claims with anticipated recovery of $25,000 or less and where extraordinary relief is not sought should be assigned to binding arbitration. All other claims should be processed through the judicial system.

Standard For Dismissal

We believe that the just cause standard is the appropriate one as it relates to the case of discharge. While some of the cases and jury instructions in California have spoken in terms of a good faith obligation which is to be imposed upon employers, as we note below, employers will reap considerable advantages and benefits from this statute. Accordingly, it would be a rigid and short-sighted, inflexible approach which would simply carry over the case law--whatever it is--that has arisen at common law.

Moreover, if something other than just cause was used, i.e., good faith or reasonable basis, the Legislature would be confronted with an insoluble dilemma. On the one hand, failure to address the issue of progressive discipline would indicate that the statute contemplated an anti-progressive discipline approach and an abandonment of the labor arbitration authority to the effect that employers, except in connection with certain kinds of offenses, have an obligation to counsel and, in some instances, to take less severe disciplinary steps than discharge. The just cause standard has become, during this past century, virtually synonymous with the progressive discipline concept.

On the other hand, if the Legislature wished to provide employers with greater flexibility but, at the same time, did not wish to abandon progressive discipline, it could do so with a proviso. One difficulty here, however, would be that the next question would then relate to what offenses, if any, should be exempted from the progressive discipline concept. Invariably, in the collective bargaining context, certain offenses such as theft, dishonesty, gross insubordination, violent behavior, and the like have been exempted. But this task seems hardly desirable or, indeed, feasible through statute. In labor arbitration either the parties have addressed this matter through the negotiation of the collective bargaining agreement or the arbitrator must make a judgment based upon the particular facts before him. It would be difficult, if not impossible, for the

Legislature to undertake a similar task in vacuo.

Moreover, we can perceive that there would be other issues in which a good faith or reasonable basis standard would give rise to problems and would necessitate the articulation of provisos. For instance, under a just cause provision in a collective bargaining agreement, the mere fact that the employer has engaged in a good faith investigation of the employee's claim is not dispositive of the question of whether the discharge will be upheld. A good faith or reasonable basis standard would seem to reverse or, at a minimum, create a presumption against such a rule. We believe that acceptance of or support for such a result would be intrinsically undesirable. On the other hand, any attempt to strike a balance in the form of statutory language seems to us to be equally unacceptable.

We are of the view that this issue and that of progressive discipline constitute simply the tip of the iceberg, so to speak. There are a substantial number of problems that have been dealt with in a particular way under just cause language and questions about arbitral rules in other areas would undoubtedly be created. This would result in either an unsatisfactory attempt to address the problem through statutory language or some of the same uncertainty which we find to be so vexatious in connection with the law as it is today.

Although managerial, confidential, professional and upper level supervisory employees would be protected by the just cause standard, we subscribe to the view that more substantive deference must be given the managerial decision making process with regard to such employees because of the subjective nature of their work. More deference to management should also be given in connection with more junior (in terms of period of tenure) employees.

> **Concurring Statement of Ms. Wise:** Ms. Wise agrees that the just cause standard is appropriate when reviewing the discharges of rank and file and lower supervisorial employees. The standard, however, should be substantially less for upper management, especially since changes in administration quite often precipitate changes in higher level management.

Applicability of the Standard to Non-Disciplinary Dismissals and to Discipline Other than Dismissal

We are of the view that the statute must extend to the question of selections of employees to be laid off for economic reasons. An economic basis for the discharge is a valid basis. However, if the question of selection of which employees were to be selected was not addressed, an employer could easily circumvent our legislative proposals by simply selecting an employee for layoff that could not be dismissed for valid reasons absent economic circumstances when there was a bona fide reason

to dismiss workers. We do not intend to impose anything so procrustean as a seniority system upon nonunion employers. But we do believe that some review is appropriate under the circumstance of layoffs for economic reasons. In the context of layoffs we believe that the standard should be a prohibition against selection on the basis of bad faith or arbitrary considerations.

Layoffs that are covered by these standards should be for a substantial period of time, i.e., six months. The presumption under such circumstances is that the layoff has some permanency and thus more closely resembles a discharge and the severance of the relationship.

Just as the law should not become enmeshed in the regulation of layoffs of shorter duration which are essentially temporary in nature, so also it should avoid entanglements with discipline which is less than discharge. We are of the view that a resignation which is a constructive discharge should be circumscribed by the same just cause standard applicable to discharges generally. But a majority of the Committee would exclude discipline in the form of reductions in pay, demotions, transfers, assignments, suspensions and the like on the ground that employers, and ultimately the recommended arbitral process, will be besieged and unduly burdened by a large volume of cases, some of which will be trivial in nature. These considerations, in our view, outweigh the potential for harassment which will accomplish the same objective as unjust discharges. If employees resign from the company as the result of such practices, they may protest the complained of conduct in a constructive discharge context.

While we do not propose that legislation touch upon discipline, we do not address the question of whether jurisdiction over wrongful discipline actions should be withdrawn. Although we are aware that wrongful discipline actions have been instituted, thus far California judicial authority has not been brought to our attention. Accordingly, it would be premature to provide recommendations relating to common law theories which have not been yet sufficiently tested before the judiciary.

> **Note of Reservation of Messrs. Gould and Rudy:** Messrs. Gould and Rudy dissent from the views expressed on applicability of the standard to discipline other than dismissal. Messrs. Rudy and Gould recommend that all disciplinary actions be covered by this legislation.

Remedies

The third essential portion of our proposal relates to remedies. Here, in contrast to payment of compensatory damages now available in common law litigation, we propose that back pay

with interest, front pay or losses of future earnings, and incidental losses[20] directly attributable to the dismissal, up to a period of two years from the time that reinstatement would have taken place where reinstatement is not appropriate, and reinstatement where appropriate be provided. It is important to note that employers will gain considerably, albeit within the context of what will undoubtedly be a greater number of cases filed because of the easier access which we propose. The savings attributable to elimination of both punitive and compensatory damages, as both litigation and settlements arrived at within the context of contemporary litigation, will be considerable indeed. This is an important part of the reasons why the business community, as well as employees, should regard such legislation as a valuable change in the current legal framework.

With regard to the issue of reinstatement itself, we believe that reinstatement is presumptively an appropriate remedy where a violation of the statute has been found. But we are of the view that reinstatement should not be provided with automaticity as it seems to be under both the National Labor Relations Act and arbitration proceedings.[21] There may be circumstances in which reinstatement is not appropriate where, for instance, (1) a confidential or executive type relationship is involved and where the employer or employee relationship is both delicate and complex; (2) contact with the public, for instance, is involved and in the employer's judgment the employee presents an image which is not suitable; (3) where evidence of serious misconduct is found to have taken place subsequent to the occurrences which have given rise to an invalid discharge. Under such circumstances it should be not only within the arbitrator's discretion to deny reinstatement, but also, within the boundaries outlined above, to determine the extent of front pay which should be available to the employee. We note that this flexibility is particularly desirable in nonunion situations where the employee, if reinstated, will not have a union available to him or her which can guard against employer behavior which, if it does not constitute recidivism, would at least discourage the employee from retaining the gains of reinstatement.

Again, it is important to note that employers, in what one would assume would be a limited number of cases in which reinstatement is not the appropriate remedy, would benefit as they have not been able to do under comparable labor legislation. Employees will benefit from the legislation because, as we note elsewhere, the remedy of reinstatement has not been available at common law, and employees do not seem to have been able to reverse this trend in the wave of litigation which has taken place over the past few years.

We are of the view that interest should be provided in connection with back pay because it compensates the employee for loss of monies which were properly his or hers. Because of this loss, the employee has not been able to make an investment which would produce the interest which is awarded. Accordingly, we do not believe that the award of interest can be characterized as

either punitive or inappropriate in a statutory scheme such as this.

Back pay would be reduced by interim earnings or earnings that could have been obtained with reasonable diligence, just as is the case under the National Labor Relations Act and most arbitration proceedings. However, we believe that interim earnings should not be deducted where the employee has been engaged in whistleblowing and discharged for that reason. A whistleblowing violation would be defined like New York Senate Assembly Bill S9566 and 12451 which states in relevant part that an employer may not discharge an employee because the employee has done any of the following:

> Discloses, or is about to disclose, to a supervisory authority or to a public body, an activity, policy or practice of the employer that the employee reasonably believes to be a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety; or provides public information to, testifies before, or otherwise cooperates with the public body conducting an investigation, hearing, or inquiry; or objects to, or refuses to participate in, an activity, policy or practice that the employee reasonably believes involves a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety...

Although compensatory and punitive damages would be eliminated, we believe that our proposals go some way to providing a deterrent against what we would characterize as more egregious public policy types of violations.

We are of the view that reasonable attorneys fees and costs should also be awarded to the employee when he prevails. The costs of arbitration should be placed upon the parties, and both sides should be required to provide $500 as a down payment which would be credited against the arbitrator's bill for fees and costs. While it might be desirable to have the state pay the fee in light of the public significance of this kind of arbitration proceeding, we do not believe that this is the practicable approach. On the other hand, where the employee is impoverished, i.e. in forma pauperis, we are of the view that the state may be constitutionally obliged to pay the mónies that would have been provided by the employee.

We provide attorneys fees for the defendant only when the action by the employee has not only been defeated but also brought for the purpose of harassment, etc. This is similar or identical to the standard utilized in connection with employment discrimination cases. In most instances, the employee is economically disadvantaged and therefore in need of the kind of approach which we advocate. Indeed, this economic imbalance is,

in substantial part, a basic reason for the desirability for the legislation itself.

The plaintiffs' lawyers will undoubtedly view the elimination of punitive and compensatory damages and the contingency fees involved and the substitution of back pay as a setback. The fact is that the purpose of the statute is to address the concerns and grievances of employees and employers and, in any event, an award of attorneys fees, coupled with the likelihood of an increased caseload, will mean that attorneys will not suffer unduly.

Note of Reservation of Mr. Rudy: Mr. Rudy dissents from the views expressed on remedies. Mr. Rudy strongly favors legislation that will permit the trier of fact to award compensatory and punitive damages only when the conduct of the employer is found to be egregious. One of the purposes of legislation is to create some order out of a potentially chaotic situation and to curtail the burgeoning litigation that is occurring between nonunion employees and their employers. By providing the full breadth of relief, employers will be very careful in making the decisions regarding the status of their employees. On the other hand, the trier of fact will be instructed that they can award compensatory and punitive damages only when they find the employer's conduct to be outrageous.

Note of Reservation of Ms. Wise: Ms. Wise agrees that reinstatements and back pay are appropriate remedies in wrongful discharge cases. Ms. Wise, however, dissents from that portion of the report which would limit to two years of losses of future earnings. All losses of this nature should be recoverable. Ms. Wise disagrees that both parties to an arbitration should share in the cost of arbitration. Ms. Wise would impose the cost of arbitration entirely upon the employer which for the most part is not like the employee, economically disadvantaged. With respect ot the elimination of punitive and compensatory damages, Ms. Wise agrees that such an elimination is appropriate. Ms. Wise notes that quite frequently discharged employees in the union setting question why they are unable to recover punitive and compensatory damages like their colleagues in the non-union setting.

Other Concerns of Unions and Employers

As noted above, employers are concerned with the easier access that employees will have to our procedures. But we believe that these concerns are outweighed by the (1) costs constraints imposed upon employees; (2) mediation and discovery mechanisms which are designed to screen out and settle complaints

short of arbitration; (3) enormous diminution in liability which exists by virtue of the elimination of punitive and compensatory damages. Employers, like employees, have much to gain through our proposals.

Similarly, there is much in our proposals for the unions as well. Traditionally, unions have opposed such proposals or been ambivalent with regard to them, because one of the prime benefits associated with organizing into a trade union and being covered by a collective bargaining agreement has been a just cause provision which protects employee job security. If the union is not able to offer the employee this benefit, so runs the argument, it will be deprived of a major selling point in its recruitment efforts and an incentive for the employees to join the union.

We are not sure that this is the case and that, even if it were the case, we are not certain that public policy should acknowledge such considerations--just as they should not acknowledge such considerations in connection with social security and unemployment compensation benefits which many unions provided before the advent of modern legislation in this area, and provide now. Moreover, there is much in the legislation which should directly benefit unions.

In the first place, however the Legislature decides to resolve the issue of the applicability of our proposals to the unionized sector, our proposals apply to employees who are involved in organizational campaigns and dismissed in that context. The significance of this is that a just cause standard applies to dismissals rather than one which involves an inquiry into motivation and a determination of whether the dismissal was based upon union considerations. However the burden of proof allocation may favor unions and the General Counsel, NLRB v. Transportation Management Corp., ___U.S.___ (1983), the fact is that provingdiscrimination is not an easy matter under any statute. Despite the fact that, as we state below, the burden of proof would be upon the employee under our proposed statute, in contrast to labor arbitration procedures where the employer generally carries the burden in the just cause context, nevertheless, the standard is a better one for unions compared to that contained in the National Labor Relations Act. Just cause would be available in an organizational setting.

Secondly, not only would the standard be beneficial to the labor movement, but the speed with which the award could be enforced would be greater under the proposed statutory scheme. That is to say, under the National Labor Relations Act, discrimination must be proved through what is essentially a five-layer appellate process. After a charge is filed, the individual or the union must convince the General Counsel (generally his agent, the Regional Director) to issue a complaint. Once that has happened, a trial takes place before an Administrative Law Judge. An appeal from that is taken to the National Labor Relations Board. From there, the matter goes to the Circuit

Court of Appeals. And, finally, certiorari may be petitioned for before the United States Supreme Court.

Under the statutory scheme which we propose, the arbitrator's award would be enforceable in state court unless there was fraud or corruption, as is the case in connection with existing California arbitration law. The award could be enforced, therefore, with a substantial degree of automaticity. The appellate process is somewhat abbreviated. Thus, on all counts, it would seem as though the standard and process of enforcement is expeditious.

We do not believe that the application of such legislation to organizing drives raises insurmountable hurdles. On the contrary, it would encounter less constitutional difficulty than legislation relating to the collective bargaining agreement itself, referred to herein.

Thirdly, it would seem as though a procedure which is an informal one would compare favorably to the judicial process. In this connection, it is of some interest to note that employees who are generally not organizable into unions seem to be those utilizing the judicial procedure. Our proposals open the way for rank and file employees who would be generally eligible for organization but, as a matter of law and practice, are not, to use the procedure.

Tied to this is a fourth consideration. The employees could choose any individual they would like to have represent them. This would mean that employees could chose union representatives whether they be nonemployees or employees. The way is open for union organizers to take a case which has potential and through a successful handling of the matter use this as an organizing tool. Just as the National Labor Relations Board's decision to provide nonunion employees with so-called Weingarten rights of representation in a disciplinary interview, Material Research Corp., 262 NLRB No. 122 (1982), affords unions with an opportunity to reach out to the unorganized who need help and to accomplish recruitment objectives simultaneously, so also are there similar opportunities here. We believe that the labor movement would make a serious mistake either opposing or taking no position on the statute or refusing to take advantage of opportunities made available under the statute.

We recognize that there are constitutional problems relating to any comprehensive wrongful discharge legislation, let alone statutes which prohibit all forms of discrimination including union discrimination such as the one that we propose, present in the preemption doctrine[22] as it relates to the National Labor Relations Act. Accordingly, assertion of state jurisdiction in this area begins a necessarily perilous constitutional journey. Although the Board's reversal of Alleluia Cushion 221 NLRB 999 (1975) and that decision's protection of a single employee's protest against certain working conditions[23] diminishes the potential for collision, even the whistle-blowing cases have

always raised serious issues of preemption.[24]

The Supreme Court's decisions in Local 926, International Union of Operating Engineers, AFL-CIO v. Jones ___U.S.___ (April 4, 1983) and Farmer v. Carpenters 430 U.S. 290 (1977) indicate that the Court provides careful scrutiny in cases involving employee claims of discrimination where state jurisdiction is present in subject matter which is arguably protected by Section 7 or prohibited by Section 8 of the Act. The question of preemption, however, under wrongful discharge litigation, let alone comprehensive wrongful discharge legislation, is more complex. See generally Note, Preemption of State Wrongful Discharge Claims, 24 Hastings L. J. 635 (1983).

The Court has carved out a considerable number of exceptions to its holdings promoting preemption, some of which have applicability to this legislation. For instance, it may be, given that the essential focus of this legislation is upon the California Trilogy and the problems alluded to in this Report, that the snares of preemption will be avoided because the subject matter is of such local concern and, on balance, peripheral to the federal statutory scheme. See, for instance, Linn v. United Plant Guard Workers of America, Local 114 383 U.S. 53 (1966). Moreover, some of the Justices appear to have accepted the view, first espoused by Professor Cox, that legislation of general application which does not differentiate between organized and unorganized employees will not be preempted. See New York Tel. Co. v. New York State Department of Labor 440 U.S. 519 (1979); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972).

We address the preemption considerations relating to the interplay between wrongful discharge legislation and grievances arising under a collective bargaining agreement below. Suffice it to say that the local concerns of California alluded to in this Report, the litigation and judicial authority which have prompted our concern, coupled with the proposed statute of general application which does not distinguish between dismissals for union activity and other grounds which would constitute just cause, make the argument against preemption here more than respectable. Nonetheless, we are of the view that an assessment of the Supreme Court's treatment of this general subject, let alone the proposed statute, requires considerable clairvoyance which we do not possess.

Finally, it is of some importance to note that the exclusion of union activity as well as other forms of discrimination from the concerns of the statute would create an infinite number of jurisdictional problems where employers resist arbitration on the grounds that the employer conduct protested falls within the purview of another statute. We return to the arguments relating to the statute's comprehensiveness below. But we believe that it is important to note that a statute such as this should promote arbitration and not litigation before the courts. To the extent that its jurisdiction is comprehensive, litigation in the courts

relating to jurisdiction will be diminished. To the extent that jurisdiction is limited in the proposed statute, litigation in the courts relating to its coverage of subject matter would be encouraged. This would undermine one of the major objectives of our proposals.

We now turn to the details of our proposal.

III. Legislation: The Particulars

Eligibility

Our view is that an employee should be protected by this statute only if he or she has been employed continuously for six months for an average of 15 hours per week. Collective bargaining agreements frequently provide probationary periods of up to 90 days. Thus, the period of time contemplated by the statute for unorganized employees would be considerably more restrictive.

Here, as well as elsewhere, we reject the idea that the proposal should simply mirror the common law as it has emerged. This would hardly be fair to employees who would no longer have punitive and compensatory damages in their arsenal.

Insofar as eligibility is concerned, as noted above, it seems quite clear that employees would have to be considerably more long-term than for a period of six months under either the duty of good faith and fair dealing covenant or contractual theories. But the important point is that this statute ushers in a very different procedure than that which exists under common law. One of the objectives is to include a larger number of workers than have been covered thus far. It seems to us that the 15-hour per week requirement is the appropriate one under all circumstances. The approach taken exemplifies the compromise that we advocate - the quid pro quo for limited liability.

Public employees covered by some form of civil service would be excluded, but private sector supervisory, managerial, and confidential employees should all be covered. One of the principal reasons for excluding such employees under labor legislation as related to labor-management practices has no applicability to the legislation under discussion, i.e., the presumed conflict of interest between inclusion in the bargaining unit represented by a labor organization in its dealings with employers. As noted above, insofar as the evaluation of such employees is necessarily more subjective, we would provide that arbitrators would give more deference to employers with managerial, professional and upper level supervisors than would be the case with employees who are covered under the National Labor Relations Act, as well as low and middle level supervision. This is because of the subjective nature of the work performed by the former group.

There should be two exemptions from statutory coverage, however. The first should mirror that of the Age Discrimination Act as amended in 1978. If the individual has been employed in a bona fide executive or high policy-making position for at least two years and is entitled to a pension of at least $27,000 a year, he can be excluded from protection under the statute. We are of the view that such individuals are able to protect themselvs without resort to the law. However, bona fide executives exempted may maintain breach of contract actions in arbitration and may recover damages attributable to such breaches.

Similarly, individuals who enter into written contracts of a year's duration and have four months notice provision in the contract should be exempted, as well. Although there is the potential for employer evasion of the just cause obligation adopted in this report by virtue of entering into written contracts, we do not believe that it is likely that many employers will impose the requisite burdens upon themselves to escape the statute. (Employees, of course, must be advised that they are waiving their just cause protection by entering into such a contract.) We note in this connection that legislation in both Great Britain and Canada, which provides for written contract exemptions similar to that which we propose here, has not resulted in any kind of problem relating to evasion of the law.

> **Note of Reservation of Ms. Wise:** Ms. Wise concurs with the section on Eligibility. In addition to carving out exemptions for employees under contract, Ms. Wise believes that this legislation should not apply to those employers and employees whose jobs are determined by the political process. An employee who accepts a position which is customarily redistributed with a change in administration should be deemed to have assumed the risk by agreeing to hold such a position in the first place.

Employer Coverage

Employers which employ 15 or more employees should be covered by the statute. Accordingly, employees employed by employers who do not meet the 15 or more standard cannot bring any action under either the proposed statute or common law unless it is based upon a theory excluded from the focus of this Report referred to above, i.e., libel, slander, defamation, loss of consortium, and assault. For such employees, therefore, our proposals represent a retrogression. But this fact simply highlights a basic theme which pervades our Report. We seek to propose a compromise package in which all parties both benefit and simultaneously assume new burdens. Only the public interest gains unqualifiedly.

Other employers should be excluded from statutory coverage. Where employers evidence a commitment to wrongful discharge procedures which provide substantial due process and such procedures have been devised with substantial employee involvement, employees should be obliged to exhaust such procedures and arbitral deference should be given to the results of such a procedure. Specifically, significant employee involvement should be evidenced in the following: (1) employees should be permitted to be represented at any stage of the procedure by anyone they choose, including non-employees, union representatives, or lawyers in a hearing procedure which permits full examination and cross examination of witnesses and presentation of testimony including exibits and other relevant materials; (2) employees, as well as the employer, must determine the selection of arbitrators through procedures such as those provided for by the American Arbitration Association or other panels normally utilized by unions and employers in labor arbitration cases; (3) all costs of the procedures, insofar as arbitration itself is concerned, should be shared equally by the employee and employer; (4) the arbitrator must be authorized to fashion remedies at least as beneficial to employees as those provided by statute. While we recognize that nonunion arbitrations generally provide for employer financing,[25] we believe that the potential for the appearance of impropriety is substantial where one party is exclusively responsible for costs. If employers and employees desire to have deference to their procedures, they can revise them, where necessary, to allow for an allocation of costs.

A difficult problem relating to statutory scope--and a problem upon which we express no explicit recommendation--is what relationship, if any, the new arbitration procedure created by this legislation should have to the organized sector of the economy. Specifically, assuming the constitutionality of state legislation which would impact upon the federal statutory scheme, e.g., Belknap, Inc. v. Hale, ___U.S.___ (1983); Vaca v. Sipes, 386 U.S. 171, (1967), while it is desirable, as a matter of public policy, for employees to exhaust union negotiated arbitration procedures, the question arises whether employees ought to be able to make resort to statutory procedure when the union is unwilling or unable to process the grievance to arbitration under the procedures contained in the collective bargaining agreement. The difficulty with the existing state of law at the federal level is that the union may refuse to take a meritorious grievance to arbitration and still discharge its duty to represent all employees within the bargaining unit fairly. Vaca v. Sipes, supra. But the unions, confronted with a veritable avalanche of litigation in the federal and state courts alleging a failure to represent employees fairly--a tide which resembles, in some respects, the growing number of wrongful discharge cases, are faced with two problems: (1) expansion of the duty of fair representation concept, Dutrisac v. General Motors Corp., 113 LRRM 3532, (9th Cir. 1983), and (2) liability for most of the back pay where a failure to represent in a contract violation is established, Bowen v. United States Postal

Service, ___U.S.___ (1983). The same arduous time-consuming litigation that is involved in wrongful discharge is present in the duty of fair representation cases--and the unions carry most of the financial burden because they are liable for back pay from the time when the employee would have been reinstated had an arbitration taken place--and the time which elapses from the arbitration date until trial is the most substantial period of time involved. This would indicate that, however the unions might want to jealously guard their position as exclusive bargaining representative which provides them with the ability to establish sole access to the grievance arbitration machinery, they might see statutory machinery as an acceptable alternative to duty of fair representation litigation.

But, of course, for the very same reason, the employers are likely to be against such a proposal. Up until now the employers have been able to conserve their resources and avoid taking every case to arbitration by virtue of the union's role as exclusive bargaining agent and its consequent ability to screen out grievances which it regards as inappropriate for arbitration. All this will be lost if the employee, on his own initiative, is able to utilize statutory procedures where the union does not resort to contractual procedures.

While we believe that employee protection in both the organized and unorganized sector is fundamental to the concept of fairness, it is our view that, at least for the time being, consideration of this issue--involving, as it does, separate and complex issues--should be considered anew when some experience has been accumulated with regard to statutory procedures that we propose. Perhaps consideration could be given to this in connection with amendments to the statute. On the other hand, it would not be inappropriate for the Legislature to address the matter now.

We provide no recommendation in this area. Again, however, preemption problems are complex and perhaps formidable. Compare, however, Teamsters Union v. Oliver 358 U.S. 283 (1959) with Malone v. White Motor Corp. 435 U.S. 497 (1978). See Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481, 528-531 (1976). Compare, e.g., Vaughn v. Pacific Northwest Bell Telephone Company 289 Or. 73, 611 P. 2d 281 (Supreme Court of Oregon, 1980) with Embry Pacific Stationary 114 LRRM 2940 (Oregon Court of Appeals, 1983); Burkhart v. Mobil Oil Corp. 114 LRRM 2671 (Vermont Supreme Court, 1983).

Note of Reservation of Ms. Wise: Ms. Wise believes that the statutory procedure provided for herein only applies to the organized sector.

Statute of limitations

At one end of the continuum we are urged to accept the idea that, inasmuch as the California courts have determined that employment rights are property rights triggering the two-year statute of limitations, Richardson v. Allstate, 117 Cal. App. 3d. 8, this should be the appropriate standard. And it is contended that the Supreme Court acceptance of the six-month statute of limitations, contained in Section 10(b) of the National Labor Relations Act in duty of fair representation cases in Del Costello v. Teamsters, ___U.S.___ (1983), marks out the appropriate standard. In connection with the latter proposition, it is contended that a relatively informal system, promoted by the National Labor Relations Act, is analagous to the statutory scheme devised here. We believe that both positions have merit and that an intermediate position between these two is acceptable, and we therefore recommend the Legislature enact a statute of limitations for wrongful discharge claims which is one year.

Note of Reservation of Ms. Wise: Ms. Wise disagrees that a one-year statute of limitations is appropriate. Ms. Wise would seek to preserve the two-year statute of limitations presently recognized in California.

Procedure

A claim is to be filed within one year of the occurrence of the action and lodged with the California State Mediation and Concilation Service. The claim must state why the employee believes the termination to be wrongful if the employee is aware of any reason. Information within the employee's possession is an integral part of his prima facie case.

If the employer resists arbitration, a petition to enforce must be granted without examination of the merits so long as the employee alleges that the dismissal was not for just cause. (As noted above, the award itself is enforcable under existing standards of California arbitration law.)

Within ten days of the postmark date on the claim, each party must provide a deposit for the arbitration of $500. While, in an ideal world, the state should pay for such services, and while we recognize that thrusting the burden of cost upon the parties puts employees at a disadvantage, nevertheless, we are of the view that this will be one vehicle toward discouraging what might otherwise be a veritable avalanche of cases.

Subpoenas shall be available for discovery, but interrogatories and depositions shall be prohibited. The California agency shall assign a mediator to the matter who shall attempt to both resolve the differences between the parties and attempt to facilitate discovery and exchange of information, as

well as to bring about a settlement. Within thirty days of the filing of a claim the employer would be obliged to file an answer which would set forth his reasons for dismissal. Again, it is important to attempt to mediate the matter short of arbitration so as to avoid whole-scale and indiscriminate resort to hearings.

Accordingly, we propose here that the Legislature specifically require the employer to state the reasons for dismissal when a claim of wrongful discharge is filed. We do not intend to restrict the employer completely to the reasons stated in subsequent proceedings. (The same is true of the reasons set forth by the employee in his or her claim.) But, again, we believe that this is an issue which cannot be addressed in the statute itself. Arbitrators, confronted with the problem of whether employers can rely upon other reasons which are not part and parcel of the original reason, have often stated that either the new reason must be reasonably related to the old one or, alternatively, have considered the gravity of the new offence as well as the reasons for the employer's unwillingness or inability to provide it at an earlier stage in the proceedings. The stage at which the new reason is given may also be important. We believe, therefore, that the statute should be silent on the issue of the relationship between subsequent proceedings and the employer's statement of reasons. Involvement of this issue creates more problems than it resolves.

However, if the matter cannot be resolved through mediation the Service shall certify that the matter cannot be resolved and provide the parties with a list of arbitrators. Such certification shall take place no longer than 15 days after the employer's answer has been filed. Both sides should be permitted to strike as many names as they wish, and if no mutually agreeable arbitrator can be agreed upon between the employee and the employer, then the Service shall chose the arbitrator for the parties.

> **Note of Reservation of Ms. Wise:** Ms. Wise basically concurs with the procedure described, except for the statute of limitations referred to and the demand that both parties pay for the cost of arbitration.

Burden of Proof in Arbitration

Unlike labor arbitrations under existing collective bargaining agreements, we believe that the employee should carry the ultimate burden of proof in establishing a just cause claim. We take this position for two reasons. In the first place, as noted above, the lack of a screening device similar to that utilized in union-employer collective bargaining agreements may encourage the use of the filing of frivolous grievances. A more pro-employee position could inundate whatever arbitration mechanism is established with an excessive number of cases. While it is important to note that, in part, the severe strains

which are imposed upon the judiciary at present and the deficiencies alluded to above warrant our proposals, we do not wish to substitute new burdens and impose excessive cost upon other institutions and mechanisms. Accordingly, we believe that a burden of proof which places the ultimate burden upon the employee is appropriate.

Secondly, we note that the court in Pugh has subscribed to a Title VII approach.[26] While we agree with the court's pronouncement insofar as the prima facie portion of the allocation of burden of proof is concerned, we are of the view that once the prima facie case is established, a burden of persuasion is upon the employer, as is the case under the National Labor Relations Act.[27] If that burden is met, the burden ultimately shifts to the employee to persuade the finder of fact, i.e., the arbitrator, that a violation of a just cause standard has been made out. Accordingly, we explicitly reject a standard which would employ the relatively light employer burden subscribed to by the Supreme Court in Burdine.[28]

Public Law Issues in Arbitration

Discrimination claims relating to race, sex, religion, national origin, etc. as well as union activity may be raised. While there is some doubt about the preemption of wrongful discharge litigation by California antidiscrimination legislation, Strauss v. A.L. Randall 144 Cal. App. 3d 514 (July 6, 1983), we are of the view that jurisdictional issues alluded to above, and economy and speed are served if arbitration is comprehensive in its jurisdiciton. Even if the employee loses, new facts and the costs involved may discourage further litigation.[29]

State agencies and state courts should stay their own proceedings until an award is issued if this statute is invoked.

The arbitrator should have authority to determine public law issues and state courts and agencies should give "great weight" to such determinations where the standards adumbrated by the Supreme Court in Alexander v. Gardner Denver[30] are met. We assume that the same would be true in connection with federal agencies and courts although, quite obviously, legislation explicitly affecting their review of arbitration awards is beyond the scope of our report and any Californa legislation.

> **Concurring Statement of Ms. Wise:** Ms. Wise agrees that an arbitrator should be given authority to determine public law issues; however, such authority should not be exclusive.

Prospective or Retroactive Legislation

We believe that the legislation should be prospective in nature. It would be unfair and disruptive to affect litigation already initiated under other expectancies and previously established guidelines with this new legislation. Any action, commenced from the date of this proposed legislation onward would be governed by the considerations set forth here.

Conclusion

The thrust of modern labor legislation at both the federal and state levels is that of a movement away from laissez-faire. Our society has already recognized the importance of employment for one's home, family and the educational aspirations of one's children. The mere fact that Europe, through social welfare legislation, has achieved many of the objectives set forth in our antidiscrimination law in this country, does not detract in any way from this point. We are of the view that the spirit and indeed the requirements of international law are compatible with our recommendations.

We therefore reject the idea that we can protect workers who lack the protection of a collective bargaining agreement, statute or civil service legislation by leaving them unprotected. We seek a new balance in our proposals. It is a balance which, in our judgment, is in the public interest. For it is not in the California public interest to promote the employment of inefficient employees, time-consuming and expensive procedures, jury verdicts which are erratic and unpredictable, institutions which benefit primarily the more affluent and their lawyers, and increased resort to an already burdened judicial system.

We have not advocated complete transplantation of all the principles that have evolved in the common law area, e.g., protection for only long service employees, because our proposals constitute a carefully crafted compromise which is designed to take into account a variety of competing interests -- and especially the public interest. We advocate an informal and more inexpensive arbitration system in lieu of judge and jury -- and yet we have qualified access to it through imposing costs upon the opposing parties, attempting to stave off indiscriminate use of the arbitration process through conciliation and mediation, deference to employer-devised procedures, as well as the requirement that the employee carry the burden of proof.

We have provided for limited liability to employers and thus an environment of predictability in which management can do business profitably and effectively. Employers are likely to be better off if their own dispute resolution procedures are reviewed by arbitrators rather than by judges and juries, with no limit to company liability.

We have attempted to devise effective procedures through which both the efficiency of business as well as the dignity of human labor can be recognized and promoted.

Only this last month, Chief Justice Burger has again warned the Nation about the perils inherent in our American addiction to litigation and the need to substitute new procedures for those of the courts.[31] The public interest is hardly well served by clogging the courts with more wrongful discharge litigation. Our proposals would strike a new balance for both employee and employer. The public interest demands no less of us and no less of California's elected officials.

William B. Gould, co-chairman
R. Wayne Estes, member
Mark S. Rudy, member
Helena S. Wise, member

February 8, 1984

Footnotes

1. Laborem Exercens on Human Work by Pope John Paul II in Issues in the Labor-Management Dialogue: Church Perspectives, edited by A. Maida, p. 219,239 (September 14, 1981).

2. Culpepper v. Reynolds Metals Co.,421 F.2d 888,891 (5th Cir. 1970).

3. Law of August 10, 1951. An Act to Provide Protection Against Unwarranted Dismissals [1951] BGBI I 499, translated in 1951 ILO Legislative Series 1951 Ger. F.R.

4. The unfair dismissal protection in Britain was first enshrined in law in the Industrial Relations Act of 1971, it is now part of the Employment Protection Act of 1978 as amended in 1980 and 1982. See generally, B. Hepple, The British Experience with Unfair Dismissals Legislation in Arbitration Issues of the 1980's: Proceedings of the Thirty Fourth Annual Meeting of the National Academy of Arbitrators,(1982), p. 18.

5. Miller and Estes, Recent Judicial Limitations on the Right to Discharge: A California Trilogy, 16 U.C. Davis L. Rev. 65 (1982). The seminal article for the purpose of consideration of statutory proposals in this area is, of course, Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481 (1976). For a more recent examination of the idea of a statute see Bellace, A Right to Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. Mich. J. L. Rev. 207 (1983); Stieber and Murray, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U. Mich. J. L. Rev. 319 (1983). See also Blades, Employment at Will v: On Limiting the Abusive Exercise of Employer Power, 67 Col. L. Rev. 1404 (1967); Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 Ohio St. L. J. 1 (1979); Murg and Sharman, Employment at Will: Do the Exceptions Overwhelm the Rule, 23 Boston College L. Rev. 329 (1982); Glendon and Lev, Changes in the Bonding of the Employment Relationship: An Essay on the New Property, 20 Boston College L. Rev. 457 (1979). Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335 (1974). Note, Wrongful Termination of Employees At Will: the California Trend, 78 Northwestern L. Rev. 259 (1983); Committee on Labor & Employment Law At-Will Employment and the Problem of Unjust Dismissal, 36 Record of the Association of the Bar of the City of New York 170 (1981). An examination of some of the practical problems is contained in R. Coulson, The Termination Handbook (1981).

6. 27 Cal. 3d 167, 610 P. 2d 1330 (1980).

7. Miller and Estes supra at 69.

8. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 173 (1980). Public policy which is not contained in a statute has been used as a basis for finding a cause of action in a

wrongful discharge in other jurisdictions as well. See, e.g., Novosel v. Nationwide Insurance Co., 114 LRON 3105,3109,3110 (3d Cir. 1983): "While no Pennsylvania law directly addresses the public policy question at bar, the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim...the protection of important freedoms..goes well beyond the question of whether the threat comes from state or private bodies. The inquiry before us is rather the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions promulgated by the State's courts suggests that this question be answered in the affirmative." However, the trend of Supreme Court employer-employee First Amendment law may be moving in a different direction. See Connick v. Myers ___ U.S. ___ (1983).

9. Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 1959 (1982). See, however, Strauss v. A.L. Randall Co., Inc., 144 Cal. App. 3d 514 (1983) Cf.Portillo v. G.T. Price Products, Inc., 131 Cal. App. 3d 285 (1982).

10. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980). Although the Supreme Court of California has yet to address the issue, the Court of Appeals for the Ninth Circuit has spoken approvingly of Cleary as well as Pugh. See Cancellier v. Federated Departments Stores, 672 F. 2d 1312, 1318 (9th Cir. 1981).

11. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

12. Toussant v. Blue Cross Blue Shield of Michigan, 408 Mich. 579, 292 N.W. 2d 880 (1980). A discussion of a number of the cases, particularly in New York, is contained in Isaacson and Axelrod, Employment at Will: An Idea Whose Time is Done ?, Legal Times of New York, June 20, 1983, p. A29. The case law in New York has evolved quite differently than that in California. See Wiener v. McGraw-Hill, 57 N.W. 2d 458, 443 N.E. 2d 441, 457 N.Y.S. 193 (1982);Murphy v. American Home Products, 58 N.Y. 2d 293 (1983). In Murphy New York's highest court, the New York Court of Appeals, refused to take that jurisdiction into terrain which would recognize causes of action for a tort of wrongful discharge based upon public policy or a covenant of good faith and fair dealing. In Wiener, the Court of Appeals, as in other jurisdictions in the United States, recognized an implied contract based upon personel manuals and the like.

13. Note, Protecting At Will Employees Against Discharge: The Duty to Terminate Only in Good Faith, Harvard L. Rev. 1816 (1980).

14. See F. Elkouri and E. Elkouri, How Arbitration Works, pp. 610-666 (3rd ed. 1973).

15. Toussant v. Blue Cross Blue Shield, 408 Mich. 579, 292 N.W. 2d 880 (1980).

16. Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931 (1983). This important article has highlighted the bias in wrongful discharge litigation against blue collar and impecunious plaintiffs. Indeed, the article provides a profile of plaintiffs. Professor Jack Stieber, in his Presidential address to the Industrial Relations Research Association this past year has made some of the same points. See Stieber, Employment At Will: An Issue for the 1980's, (December 29, 1983, San Francisco, California). Professor Stieber has pointed out that the public policy exception adumbrated in Tameny is of little use to hourly and lower level salaried employees because they generally do not have access to the information which may involve the commission of unlawful acts or the ability to detect and protest against dangerous or illegal practices. Moreover, since most attorneys handle such cases on a contingency basis, employees who have lower wages are less likely to be able to attract counsel. See Id. at pp. 12-13.

17. We do not have precise statistics on California. But our discussions with members of the Bar as well as State court judges leads us to believe that the increase in the wrongful discharge caseload in the past few years is enormous.

18. See Unfair Dismissal Cases in 1981, Employment Gazette, December 1982, p. 520. Additionally, all Americans should be interested in the important and relevant Canadian experience. It is described in England, Unjust Dismissal in the Federal Jurisdiction: The First Three Years, 12 Manitoba L. J. 9 (1982).

19. See, C. Barreca, A. Miller and M. Zimmy, Labor Arbitrator Development: A Handbook (1983). See also, Sinicropi, Arbitrator Development: Programs and Models, 37 Arbitration Journal, no. 3, p. 24 (September 1982).

20. Representative of such losses would be fringe benefits, e.g., health care, pensions, etc. attributable to the discharge. Cf. NLRB v. Strong 393 U.S. 357 (1969).

21. It seems to us that the approach under this statute ought to be more flexible and indeed some arbitrators view the remedial role given to them as providing more flexibility. Safeway Stores, Inc., 64 Lab. Arb. 563 (1973). Cf. Sunshine Specialty Co. 55 Lab. Arb. 1061 (1970). The Age Discrimination Act is instructive with regard to remedial flexibility. See Whittlesey v. Union Carbide Corp., 32 FEP Cases 473 (S.D.N.Y. 1983).

22. San Diego Building Trades Council v. Garmon 359 U.S. 236 (1959); Cox, Federalism and the Law of Labor Relations, 67 Harv.

L. Rev. 1297 (1954); Currier, Defamation and Labor Disputes: Preemption and the New Federal Common Law, 53 Va. L. Rev. 1 (1967); Gould, The Garmon Case: Decline and Threshold of Litigating Elucidation, 39 Univ. of Detroit L. J. 539 (1962).

23. Meyers Industries Inc., 268 NLRB No. 73 (1984).

24. Magnuson v. Burlington Northern, Inc. 576 F. 2d 1367 (9th Cir.) cert. denied 439 U.S. 930 (1978); Buscemi v. McDonnell Douglas Corp. 113 LRRM 2788 (C.D. Calif. 1983); Flick v. General Host Corp. 114 LRRM 3576 (N.D. Ill. 1983).

25. See generally F. Foulkes, Personel Policies in Large Non-union Companies, 299-322 (1980); L. Littrell, Grievance Procedure and Arbitration in a Non-union Environment: The Northrup Experience, in Arbitration Issues for the 1980's, Proceedings of the Thirty Fourth Annual Meeting of the National Academy of Arbitrators, p. 35 (1982).

26. Pugh v. See's Candies Inc., 116 Cal. App. 3d 311, at 329-330

27. NLRB v. Transportation Management Corp., ___ U.S. ___ (1983)

28. Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). Cf. Gould, The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term, 53 U. of Colo. L. Rev. 1, 57-63 (1981).

29. W. Gould, Black Workers in White Unions: Job Discrimination in the United States, 234-242 (1977). Of course, there is some doubt that many plaintiffs <u>will</u> use our statutory proposals if enacted given the superior remedies available under antidiscrimination law. See Commodore Home Systems Inc. v. Superior Court 32 Cal. 3d 211, 185 Cal Rpts. 270, 649 P. 2d 912 (1982); Johnson v. Railway Express, Inc. 421 U.S. 454 (1975).

30. 415 U.S. 36 (1974). Cf. Gould, Labor Arbitration of Grievances Involving Racial Discrimination 118 U. of Penna. L. Rev. 40 (1969). The applicability of the Gardner Denver approach to this legislation and other statutes where concern with union majoritarian oppression of minority interests is not present is evidenced by the Court's decision in Barrentine v. Arkansas - Best Freight System 450 U.S. 728 (1981).

31. Sitmomer, "Costs of Justice: Burger Sets Priorities for U.S. System," Christian Science Monitor, January 3, 1984, p. 3.