Hastings Law Journal

Volume 26 | Issue 6 Article 4

1-1975

A Common Law Action for the Abusively Discharged Employee

Daniel A. Mathews

A COMMON LAW ACTION FOR THE ABUSIVELY DISCHARGED EMPLOYEE

During the latter part of the nineteenth century, the American legal system incorporated into the common law a rule that an employer, unless otherwise limited by an express term in the employment agreement, could discharge an employee for any reason whatsoever without legal liability.[1] This absolute right of discharge has been undercut during the last fifty years by statute,[2] by judicial decisions,[3] and by the evolution of collective bargaining.[4] Beyond the restraints imposed by these developments, however, the basic principle of the employer's absolute right to discharge has remained unimpaired.[5]

In *Monge v. Beebe Rubber Co.*,[6] the Supreme Court of New Hampshire reevaluated the vitality of the rule under contemporary legal, social, and economic conditions. The court, in a summary fashion that belies the importance of its decision, concluded that the rule inade-

1. 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913) [hereinafter cited as LABATT]; Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480 (1970); Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942).

2. See text accompanying notes 50-63 *infra*.

3. See text accompanying notes 79-92 *infra*.

4. See text accompanying notes 64-78 *infra*.

5. *See, e.g.*, Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); Elliott v. Delta Air Lines, Inc., 116 Ga. App. 36, 156 S.E.2d 656 (1967); May v. Santa Fe Trail Transp. Co., 189 Kan. 419, 370 P.2d 390 (1962); Copeland v. Gordon Jewelry Corp., 288 So. 2d 404 (La. App. 1974); *See also* 9 S. WILLISTON, CONTRACTS § 1017 (Jager ed. 1967); RESTATEMENT (SECOND) OF AGENCY § 442 (1958); RESTATEMENT OF TORTS § 762 (1939) (no change presently contemplated by RESTATEMENT (SECOND) OF TORTS). *See generally* 53 AM. JUR. 2d *Master and Servant* § 43 (1970); Annot., 51 A.L.R.2d 742 (1957).

The principle has, however, been challenged for various reasons by academic commentators. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) [hereinafter cited as Blades]; Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279 (1971); Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report*, 18 RUTGERS L. REV. 428 (1964); Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22ND ANNUAL CONFERENCE ON LABOR 171 (1970); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

6. 316 A.2d 549 (N.H. 1974).

quately protected the employee's interest in retaining employment. In so concluding, it held that a discharge "which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract."[7] The court, by its broad holding, abrogated the settled common law rule uniformly applied in other jurisdictions and adopted in its place a rule which will afford employees the opportunity to seek adjudication of claims for abusive discharge.

This note will examine the factual and legal premises underlying the employer's right of discharge, both historically and in light of the realities of the modern employment relationship. It will discuss the necessity of discarding the principle of an absolute power of discharge. Finally, it will suggest an alternative basis for the *Monge* decision which would achieve the same result reached by the majority, while avoiding the limiting factors incorporated into the decision by the court's reasoning.

Monge v. Beebe Rubber Company

In September 1968, the Beebe Rubber Company hired Olga Monge to work in the company's unionized factory. The employment agreement was oral, and no mention was made by either party of the expected duration of employment. Initially, Monge worked without incident. After three months, she applied for a job opening at a higher wage and was told by her foreman that she would have to be "nice" if she wanted the job.[8] She was granted the promotion and her foreman soon asked her to go out with him. She refused, however, explaining that she was married and had three children. Shortly thereafter, Monge was transferred to another position at a lower wage and her overtime was discontinued. During this same period the personnel manager, aware that Monge's foreman used his position to force himself on female employees, warned her not to make trouble.

In July 1969, the foreman assigned Monge an extra task she believed could not be done without falling behind in production. When she complained to the union steward, the foreman ordered her to get to work and discharged her when she refused to obey; she was reinstated with the assistance of the union. Immediately thereafter she missed work for over a week due to illness. Upon returning, Monge was ridiculed by the personnel manager for showing up. Later that night, she was found unconscious and taken to the hospital. Five days after her release from the hospital, Monge was discharged by the personnel manager for the stated reason that she had been absent from work three consecutive days without notification.

7. *Id.* at 551.
8. *Id.* at 550.

Monge sued Beebe Rubber Company for breach of an at-will employment contract, claiming that her discharge was the result of her foreman's hostility, which allegedly stemmed from her refusal to go out with him. The jury found in her favor.[9] On appeal, the Supreme Court of New Hampshire upheld the decision on the issue of liability, remanding on the issue of damages.[10]

In support of its decision, the court first invoked and relied on developments in landlord and tenant law. In that field, the court noted, the traditional common law rules had been heavily weighted against the tenant. When asked to reappraise those rules in light of the realities of the contemporary landlord-tenant relationship, New Hampshire had joined a growing number of states in determining that they could no longer be justified, and, accordingly, had updated the common law to reflect modern conditions.[11]

The court recognized that the realities attending the relationship between employer and employee had also changed over the years, necessitating that the prevailing common law rule insulating the employer from liability for a wrongful discharge be similarly abrogated. The court reasoned that "[i]n all employment contracts, whether at-will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."[12] The holding of the court was

9. The dissent notes, but does not discuss the ramifications of, Monge's failure to pursue the grievance procedures contained within the collective bargaining agreement. *Id.* at 553. As a general rule, national labor policy requires that an employee must at least attempt to exhaust grievance and arbitration procedures established by the bargaining agreement before resorting to the courts. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This requirement must, however, be raised as a defense by the employer, an action apparently not taken in the instant case and thus not dealt with by the court. *See* Vaca v. Sipes, 386 U.S. 171, 184 (1967); Letter from Joseph M. Kerrigan, attorney to defendant, Mar. 5, 1975. For a discussion of whether the court could have imposed liability irrespective of the terms of the collective bargaining agreement, see text accompanying notes 112-46 *infra.*

10. The case was remanded on the damage issue because the jury had awarded Monge damages for mental suffering. Because the court characterized the right involved as contractual in nature, it felt damages for mental suffering were not generally recoverable. The court also noted that the plaintiff had failed to present any medical testimony to support an allegation of mental suffering. *See* 316 A.2d at 552. The different measure of damages which may be applied depending on whether the action is characterized as contract or tort is discussed in note 103 *infra.*

11. *See* Sargent v. Ross, 308 A.2d 528 (N.H. 1973) (abolishing traditional rule of landlord tort immunity); Kline v. Burns, 276 A.2d 248 (N.H. 1971) (abolishing common law rule that a landlord is under no duty to maintain leased dwellings in habitable condition); *cf.* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (proof of retaliatory motive on the part of the landlord constitutes a good defense to eviction proceedings).

12. 316 A.2d at 551.

very explicit: "We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."[13]

Foundations of the Absolute Right of Discharge

The rule that an employment contract for an indefinite period is at will and may be terminated at any time "for good cause, bad cause or no cause" and "for any reason or no reason"[14] evolved during the nineteenth century. This rule was thoroughly consistent with the deeply rooted laissez-faire convictions of the time and was regarded as part of a progressive reaction to the status concepts which had previously dominated the employment relationship.[15] In the century since the rule was formulated, however, vast changes in the economic, social, and legal conditions in American society have occurred. In order to understand fully how contemporary factual and legal realities attending the employment relationship justify and even compel restricting the traditional right of discharge, it is necessary to examine the bases of the adoption of the common law rule establishing that right.

The law of employment from the fourteenth century to the nineteenth was founded upon status principles. Although the relationship was consensual, the rights and duties arising from it depended upon the positions that master and servant occupied in the relatively stable feudal society. The legal conception of those positions developed by analogy from the feudal relation of lord and tenant, and, consequently, ideas of paternalism and subordination pervaded legal attitudes toward the master-servant relationship.[16] The legal consequences flowing

13. *Id.* The court correctly made no attempt to prejudge when a dismissal would expose an employer to liability under this standard. Because of the nature of the action, a breach of the imposed obligation cannot be judged in the abstract, but must turn on all the facts of each case. Professor Blades has, however, listed some illustrations of discharges which he feels should be considered abusive and which may be useful under some circumstances in ascertaining whether a discharge is actionable. Blades, *supra* note 5, at 1406-10.

14. See cases cited note 5 *supra.*

15. *See* H. MAINE, ANCIENT LAW 173-74 (10th ed. F. Pollack 1906). *See also* Timberg, *The Decline and Renaissance of Economic Liberties*, 47 NW. U.L. REV. 147 (1952).

16. *See* 1 LABATT, *supra* note 1, § 1, at 6-8, § 3. *See generally* R. POUND, THE SPIRIT OF THE COMMON LAW 20-31 (1921); 1 G. TREVELYAN, HISTORY OF ENGLAND 204 (1953). Many viewed the legal status of master-servant as essentially forming one of the domestic relationships. One nineteenth century treatise writer stated that "[w]ere the writer . . . untrammelled by authority, his treatment of this topic [master and servant] as one of the domestic relations, would be confined to what are denominated at common law menial servants . . . . But . . . legal precision must sometimes be sacri-

from this conception included the imposition of reciprocal rights and duties designed to protect the relationship.[17] In so protecting the indefinite employment relationship, common law courts recognized implied-in-law obligations prohibiting an unjust termination by either party. It was presumed that an indefinite hiring was for a term of one year.[18] Dismissal before the end of this implied term was restricted by a requirement of just cause.[19] Although initially accepted in American jurisdictions,[20] these protective restraints were increasingly disfavored and were ultimately repudiated during the latter part of the nineteenth century.

The substituted approach stemmed from a rule formulated by a treatise writer in 1877:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed or whatever time the party may serve.[21]

---

ficed to legal usage; and as terms have been carried in both instances beyond their original signification, for the sake of analogy, we are bound to follow . . . ." J. SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 600 (1870).

17. The original purpose behind this policy appears to have been to protect the employer. The known source of legal concern with the employment relation is the Ordinance of Labourers, 23 Edward III, c. 2 (1349), which was followed by a series of Statutes of Labourers beginning in 1351. These fourteenth century statutes were enacted during the extreme labor shortage following the Black Death and sought to protect the employer from unauthorized quitting before the end of the agreed term without just cause. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-60 (3d ed. 1923). However, there is some documentation that, beginning with the sixteenth century, these restraints upon wrongful termination were imposed to protect the worker and to curb unemployment. *See* R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 17-18 (1946).

18. 1 LABATT, *supra* note 1, § 156; *see, e.g.*, Fawcett v. Cash, 110 Eng. Rep. 1026 (K.B. 1834). Blackstone states that this presumption was based upon equitable principles. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *425.

If the parties continued the employment beyond the year, it was further presumed that the parties intended to be obligated for an additional one-year term. "If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five, or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties: such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it." Beeston v. Collyer, 130 Eng. Rep. 786, 787 (C.P. 1827).

19. 1 LABATT, *supra* note 1, § 183; C. SMITH, LAW OF MASTER AND SERVANT 37, 112 (7th ed. C. Knowles 1922).

20. *See, e.g.*, Adams v. Fitzpatrick, 125 N.Y. 124, 127, 26 N.E. 143, 145 (1891); Davis v. Gorton, 16 N.Y. 255, 257 (1857); Bascom v. Shillito, 37 Ohio St. 431, 433-34 (1882).

21. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272

By the beginning of the twentieth century, this doctrine had become the prevailing rule governing the right of discharge.[22] In the absence of a written contract for a specific term, the employment was at will, and the employer's freedom to discharge was absolute; the employment relation was considered to be strictly contractual.

The courts offered little explanation or analysis of this reversal in policy from a status-oriented protection of the relationship to a contractual approach with no legal restriction on the power of dismissal. The factual and legal premises underlying the shift may be inferred, however, from an examination of how the legal community and that portion of society whose views influenced the law perceived the economic and social needs of the period. The rule was adopted in the milieu of an emerging industrial society. The latter part of the nineteenth century was a period of tremendous economic development. It was also a period in which entrepreneurs ran heavy risks; business failure was common and could be avoided only by great skill and good fortune.[23] So that these risks might be minimized and industry encouraged to expand, courts created a legal framework to protect the employer.[24] This protection of industry was accomplished, in part, by generally incorporating the law of employment into a developing body of contract law.[25]

(1877) (citations omitted). Although Wood cited four American cases as authority, none supported his proposition. *See* Annot., 11 A.L.R. 469, 476 (1921). Despite this lack of authority, courts adopting the rule soon after generally relied upon Wood's treatise for support. *See, e.g.*, The Pokanoket, 156 F. 241, 243-44 (4th Cir. 1907); Greer v. Arlington Mills Mfg. Co., 17 Del. 581, 582-83, 43 A. 609, 610-12 (Super. Ct. 1899); McCullough Iron Co. v. Carpenter, 67 Md. 554, 557-59, 11 A. 176, 178-79 (1887); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895).

22. 1 LABATT, *supra* note 1, § 159; Annot., 11 A.L.R. 469, 470-71 (1921).

23. E. JOHNSON & H. KROOSS, THE AMERICAN ECONOMY 242 (1960). There were three financial panics and a severe seven year depression during the last third of the nineteenth century. Moreover, it was a period of generally falling prices. T. COCHRAN & W. MILLER, THE AGE OF ENTERPRISE 136 (rev. ed. 1961).

24. The policy considerations underlying the development of judicial doctrines of the period were examined by the Supreme Court: "Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry." Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943) (citations omitted).

25. L. FRIEDMAN, CONTRACT LAW IN AMERICA 18-23 (1965). Even tort principles governing the employment relationship were interwoven with contract law. The assumption of risk doctrine discussed by the Supreme Court (see note 24 *supra*) was justified by courts on the ground that the employees were free to allocate the risk in the contract of employment. *See, e.g.*, Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49,

It is not surprising that such a legal policy was developed. Americans in the nineteenth century placed an extremely high value on economic growth. As Professor Hurst has noted, they were thoroughly convinced it was "socially desirable that there be broad opportunity for the release of creative human energy," particularly in the "realm of the economy."[26] All society, it was believed, would share in the social benefits that would flow from rapid economic growth. Furthermore, this nineteenth century preoccupation with the market as a social institution fed upon, and in turn promoted, prevailing laissez-faire beliefs.

Laissez-faire formed the keystone of legal policy during this period. That the employment at will doctrine reflected this philosophy is illustrated in two Supreme Court decisions in the early twentieth century. In interpreting the due process clauses of the Fifth and Fourteenth Amendments, the Court elevated the absolute power of discharge to a constitutionally protected right of liberty and property. Both cases involved the discharge of an employee solely because of union membership. In both cases, the Court invalidated the legislation which had proscribed discharges for that reason.

In the first case, *Adair v. United States*,[27] the specific charge was that the defendant, an agent of the Louisville and Nashville Railroad Company, had violated a federal statute barring common carriers from dismissing employees for their union membership. The Court, in striking down the statute, declared that the employer and employee each had an equal right to terminate the relationship for any reason, and any legislation disturbing that "equality" was an "arbitrary interference with the liberty of contract which no government can legally justify in a free land."[28] Although the Court was only characterizing the right of discharge in the constitutional sense, the philosophy expressed parallels the attitude of common law courts in this area. The intertwining of common law and constitutional rights is underscored by the Court's analysis. In justifying its decision, the Court quoted approvingly from Cooley's treatise on torts:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons, neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if

56 (1842). For a general discussion of the employer's common law liability during the nineteenth century, see H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT §§ 258-76 (1877).

26. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 5-6 (1956).

27. 208 U.S. 161 (1908).

28. *Id.* at 175.

> he is wrongfully deprived of this right by others, he is entitled to redress.[29]

A few years later, in *Coppage v. Kansas*,[30] the Court elaborated on its reasons for concluding that the absolute right of discharge was constitutionally protected. At issue was the constitutionality of a state statute outlawing yellow dog contracts.[31] In striking down the statute, the Court clearly expressed its firm belief in both unrestricted freedom of contract and rights of private property:

> [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[32]

These two opinions of the Court implicitly make extreme assumptions about an employee's capabilities and freedom of choice which are justified only by a philosophy of economic individualism and laissez-faire. These assumptions are also reflected in judicial decisions which applied the terminable at will doctrine. Although a possible inequality within the relationship was recognized, it was assumed that the employee could always overcome any economic handicaps. It was taken for granted that an employee was free either to contract for any needed protection[33] or to terminate employment at any time and seek a better bargain elsewhere.[34] One may question whether these assumptions

29. *Id.* at 173, *quoting* T. COOLEY, LAW OF TORTS 278 (1880).

30. 236 U.S. 1 (1915).

31. A yellow dog contract is a contract in which the employer requires the employee to agree, as a condition of employment, not to become or to remain a member of any labor union.

32. 236 U.S. at 17. As in *Adair*, the Court stressed the parties' mutual right to terminate the employment relationship at any time: "To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other . . . ." *Id.* at 21.

33. Indeed, the doctrine of freedom of contract, the paramount policy underlying general contract theory, was premised upon an assumption that parties have approximately equal bargaining power. *See generally* Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

34. Many decisions applying the terminable at will doctrine have expressly acknowledged this assumption. For example, the Louisiana Supreme Court rationalized: "An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of 'mutuality.'" Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 69, 139 So.

underlying the rule of an absolute right of discharge were realistic at the time of the rule's incorporation into the common law. Regardless of their soundness at that time, however, the validity of those assumptions and of the rule must be judged in light of contemporary social conditions and modern legal values.

The Modern Employer-Employee Relationship

The modern employment relationship negates any assumption that an employee is free to protect himself contractually from wrongful discharge. Only the most unusual employee possesses sufficient bargaining power to insist upon a restriction of the dismissal power. For most individuals, the terms of the employment contract are imposed on a take-it-or-leave-it basis by the corporate employer. Commentators,[35] legislatures,[36] and courts[37] have on numerous occasions substantiated the existence of this inequality of bargaining power.

It may be argued that unionization in effect equalizes bargaining power and, hence, that the employee does not need judicially fashioned legal protection for his job because he is able to achieve that same protection through organization and collective bargaining. This argument fails, however, for several reasons. In the first place, unionization provides no protection for the individual employed in a business where the employer has successfully resisted organizing attempts.[38] Second,

760, 761 (1932); *accord*, Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 590 (1967).

35. *See, e.g.*, A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 32-33 (1954); J. GALBRAITH, AMERICAN CAPITALISM 114 (2d ed. 1956); *cf.* J. GALBRAITH, THE NEW INDUSTRIAL STATE (2d ed. rev. 1971); Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1252 (1967).

36. *See, e.g.*, NLRA § 1, 29 U.S.C. § 151 (1970); CAL. LABOR CODE § 923 (West 1971).

37. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937); American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921); Kansas v. Coppage, 87 Kansas 752, 759, *rev'd*, 236 U.S. 1 (1915). In *Jones & Laughlin*, the Court declared: "Long ago we stated the reason for labor organizations. We said . . . that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . . ." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

38. Union protection under the NLRA is premised upon the concept of majority rule. If the union fails to prove (generally through an election) that it has majority support, the employer is under no duty to bargain on other than an individual basis. *Compare* NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), *with id.* § 9(a), 29 U.S.C. § 159(a) (1970). Furthermore, the Supreme Court has held that an agreement between an employer and a minority union is unlawful. This is true whether the agreement purports to bind all employees in the company or only those who consent to it. *See* ILGWU v. NLRB, 366 U.S. 731 (1961).

unions are concerned with the interests of the collective body, often at the expense of the individual employee who feels that he has been wrongfully discharged. Because the union usually maintains exclusive control over the right to utilize the grievance-arbitration machinery, a decision to sacrifice the individual's interests in return for a larger benefit for the majority may lawfully strip the employee of job protection.[39] Finally, the argument overlooks the fact that many employees prefer not to be represented by labor unions. For these individuals, it is no solution to insist that they join labor unions in order to obtain basic protection against abusive discharge.

The seriousness of the employee's inability to protect himself from discharge is compounded by the importance of employment. Traditional assumptions about economic individualism are no longer compatible with actual conditions of employment. Professor Tannenbaum states that

> [w]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.[40]

Moreover, modern studies show that this dependence is not exclusively economic. Within the employment relationship, the employee seeks fulfillment of many of his needs for social status and identity.[41] For many it is the decisive context from which they draw their social aspirations and beliefs.[42] Discharge from employment cuts the

39. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335, 349-50 (1964); J.I. Case Co. v. NLRB, 321 U.S. 332, 337-39 (1944). The duty of fair representation has been developed to afford some protection against this threat. For a discussion of the present inadequacy of this protection, see text accompanying notes 117-26 *infra*.

40. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis deleted). The modern economic conditions of our society were summarized by C. Wright Mills: "[T]he centralization of property has shifted the basis of economic security from property ownership to job holding; the power inherent in huge properties has jeopardized the old balance which gave political freedom . . . . For the employees, freedom and security, both political and economic, can no longer rest upon individual independence in the old sense. C. MILLS, WHITE COLLAR 58 (1951). *See also* Reich, *The New Property*, 73 YALE L.J. 733, 771-73 (1964).

41. Kahn, *The Meaning of Work: Interpretation and Proposal for Measurement*, in THE HUMAN MEANING OF SOCIAL CHANGE (A. Campbell & P. Converse eds. 1972); SPECIAL TASK FORCE TO THE SECRETARY OF HEW, WORK IN AMERICA 4-10 (1973).

42. "Every study of workers shows that they consider the social function of the enterprise the most important one. They place the fulfillment of their demands for social status and function before and above even the fulfillment of their economic demands. In survey after survey the major demands of industrial workers appear as demands for good and close group relationships with their fellow workers, for good rela-

employee off from these pyschic gratifications, causing loss of self-esteem.[43]

Modern employment conditions have not only eroded assumptions underlying the principle of an absolute power of discharge, but they have also generated basic expectations in the employment relationship concerning the exercise of that power. Employees working within a corporate structure have developed expectations that they will be treated fairly and equally with other employees.[44] These expectations stem in part from seniority and retirement policies implemented by employers to encourage corporate loyalty and employment stability,[45] but they also appear to be a product of the modern corporate environment. In most contemporary businesses, the employer in the old sense has been replaced by a boss who is himself an employee. Because management thus participates in the employee role, other employees feel that management should recognize basic rights to job security.[46] Employers, on the other hand, have also accepted the idea of restraints on their discretion to discharge.[47]

Of course, the conditions and meaning of employment vary, and the character of expectations regarding employee rights will similarly vary. Nevertheless, enough cumulative evidence from different sources now exists to confirm that contemporary conditions of employment "provide an environment favorable to managerial self-restraint and mutual expectations regarding employee rights."[48] The existence of this environment does not diminish the need for judicial protection against abusive discharge; the employer cannot be relied on to be responsive to these expectations. Rather, it supports the conclusion that judicial restriction of the right to discharge corresponds with the reali-

---

tions with their supervisors, for advancement, and above all, for recognition as human beings, for social and prestige satisfactions, for status and function. Wages, while undoubtedly important, rank well down the list." P. DRUCKER, THE NEW SOCIETY 47-48 (1950).

43. M. AIKEN, L. FERMAN & H. SHEPPARD, ECONOMIC FAILURE, ALIENATION, AND EXTREMISM 2 (1968).

44. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 185-93 (1969).

45. G. BLOOM, & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 294 (5th ed. 1965); G. PALMER, H. PARNES, R. WILCOCK, M. HERMAN & C. BRAINERD, THE RELUCTANT JOB CHANGER (1965); M. REDER, LABOR IN A GROWING ECONOMY 490 (1957).

46. H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 143 (1960). *See also* E. GINZBERG & I. BERG, DEMOCRATIC VALUES AND THE RIGHTS OF MANAGEMENT 47-49 (1963).

47. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 84-89 (1969); Fisher, *When Workers are Discharged—An Overview*, 96 MONTHLY LAB. REV. 4, 5 (June 1973).

48. H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 3 (1960).

ties of the modern employment relationship and protects reasonable expectations arising from that relationship.

Legal Developments Restricting The Right to Discharge

Legal values and policies have undergone a dramatic transformation since the late nineteenth century when the principle of an absolute power of discharge was reocgnized by common law courts. The trend of the law has been to recognize exceptions, qualifying the right to discharge in a variety of situations. The increasing number of these exceptions evidences society's apprehension of the employer's power to discharge and challenges the vitality of a doctrine sanctioning the unrestricted exercise of that power. Although many of the restraints have resulted from collective bargaining, they are today so pervasive that they suggest a "new climate prevailing generally in the relationship of employer and employee" which the courts can no longer ignore.[49]

Statutory Restraints

During the 1930's, aided by judicial rejection of the constitutional philosophy embodied in *Adair* and *Coppage*,[50] legislatures took a decisive turn toward regulating the employment relationship. This change in policy was emphasized in the National Labor Relations Act (NLRA),[51] the enactment of which has restricted the employer's power of discharge in two ways. First, the act makes unlawful the discharge of any employee as a result of his exercising rights protected under the act. Basically, these are the rights to organize and join a labor organization and to bargain collectively with the employer.[52] More importantly, the NLRA has fostered the growth of collective bargaining, which in turn has led to a new body of labor law barring abusive discharges.[53]

Since the enactment of the NLRA, there has been extensive statutory regulation of the power of discharge by both the federal government and the states. Unfortunately, this flurry of legislative activity has for the most part resulted in a patchwork scheme which safeguards

49. Monge v. Beebe Rubber Company, 316 A.2d 549, 551 (N.H. 1974).

50. "The course of decisions in this Court since *Adair v. United States* . . . and *Coppage v. Kansas* . . . have completely sapped those cases of their authority." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941). Justice Black later wrote for the majority: "This Court beginning at least as early as 1934 . . . has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949).

51. 29 U.S.C. §§ 151-68 (1970), *formerly* ch. 372, 49 Stat. 449 (1935).

52. *See* NLRA §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1) (1970).

53. See text accompanying notes 67-78 *infra*.

only certain classes of employees from wrongful discharge.[54] For example, public employees,[55] veterans,[56] debtors,[57] and the aged[58] are all protected by various federal and state statutes circumscribing the employer's power to discharge.

Other statutes restrict the power of discharge, not because of a direct concern with the dismissal power, but as a means to effectuate or implement other policies. Thus, the federal government[59] and the majority of states[60] have enacted statutes prohibiting any discharge on the basis of race, color, religion, national origin, or sex. Many statutes similarly proscribe discriminatory discharge because of physical handicap,[61] or political activity or affiliation.[62] In addition, numerous statutes provide that an employer may not discharge an employee for exercising any rights recognized by or opposing any practices forbidden by those statutes, or for testifying or taking part in any proceeding under those statutes.[63]

54. The United States is currently the only major industrial nation in the world having enacted no statutory provision to protect all employees from wrongful discharge. INDUSTRIAL RELATIONS RESEARCH ASS'N, THE NEXT TWENTY-FIVE YEARS OF INDUSTRIAL RELATIONS 106 (G. Somers ed. 1973); *cf.* INTERNATIONAL LABOR CONFERENCES 1919-66, Recommendation No. 119, § 2(1), at 1060-63 (1967).

55. *See, e.g.*, 5 U.S.C. § 7501(a) (1970); PA. STAT. ANN. tit. 71, § 741.807 (Supp. 1974); S.C. CODE ANN. §§ 1-49.11 to .14, -66.11 to .16 (Supp. 1973).

56. *See, e.g.*, Military Selective Service Act of 1967, 50 U.S.C. App. § 459(b) (1970); CAL. MIL. & VET. CODE § 394 (West 1955).

57. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1970); CAL. LABOR CODE § 2929 (West Supp. 1974); D.C. CODE ANN. § 16-584 (1973); HAWAII RET. STAT. tit. 21, § 378-32 (1974 Supp.).

58. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1970); CAL. LABOR CODE § 1420.1(a) (West Supp. 1974); GA. CODE ANN. § 54-1102 (1974); PA. STAT. ANN. tit. 43, § 955 (Supp. 1974).

59. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970).

60. *See, e.g.*, ALASKA STAT. § 18.80.220 (1974); CAL. LABOR CODE § 1420(a) West Supp. 1975); OHIO REV. CODE ANN. § 4-12.02(A) (Page 1973); PA. STAT. ANN. tit. 43, § 955 (Supp. 1974).

61. *E.g.*, CAL. LABOR CODE § 1420(a) (West Supp. 1975); MASS. ANN. LAWS ch. 149, § 24k (Supp. 1975); MINN. STAT. ANN. § 363.03(2) (Supp. 1974); R.I. GEN. LAWS ANN. § 28-5-7 (Supp. 1973); WASH. REV. CODE ANN. § 49.60.180 (Supp. 1973).

62. *See, e.g.*, CAL. LABOR CODE § 1102 (West 1971); COLO. REV. STAT. ANN. § 80-11-8 (1963); NEV. REV. STAT. § 613.040 (1973). One of the most comprehensive human rights laws restricting the right to discharge, enacted by the District of Columbia, prohibits any discharge based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, school matriculation, or political affiliation. *See* Human Rights Law, D.C. CODE ANN. § 34-11.1 (8 BNA LAB. REL. REP. 451:265 (Sept. 1974)).

63. *See, e.g.*, Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3) (1970); Occupational Health & Safety Act of 1970 § 11(c), 29 U.S.C. § 660(c) (1970); Employee Retirement Income Security Act of 1974 §§ 502(a), 510, 29 U.S.C.A. §§ 1132(a), 1140 (Supp. 1975); CAL. LABOR CODE § 1420(e) (West Supp. 1975).

Restraints Due to Collective Bargaining

One of the primary reasons for the growth of unionism and collective bargaining was the employees' desire to modify and regulate the employer's power of discharge.[64] It has been estimated that as many as 82 percent of collective bargaining agreements contain some general restriction, such as just cause, on the employer's power to dismiss.[65] These agreements customarily provide for a grievance procedure, and at least 94 percent of the collective bargaining agreements in effect in the United States contain a clause for binding arbitration of grievance disputes.[66] Thus, the employer's common law absolute power of discharge has been severely restricted by the modern collective bargaining agreement.

In interpreting bargaining contracts, arbitrators have developed a "common law of the industry." The governing principles are not based upon the common law, but rather on the social realities of the relationship: the practices, assumptions, understandings, and aspirations within the industry and the enterprise.[67] The existence of this new framework of principles is perhaps best exemplified by the variance between the common law and arbitral approaches when an employee is discharged for what the union contends is insufficient cause during the term of an agreement that does not expressly qualify the employer's right to discharge. Rejecting the principle of an unrestricted power to discharge, arbitrators have almost uniformly implied just cause or other requirements into the bargaining contract.[68] This development is based in part upon a recognition of the drastic nature of discharge. "It is repugnant to our basic beliefs about fair conduct that an employee be summarily discharged without any recourse to test either the possibility of error or the fairness of the discipline relative to the conduct alleged."[69]

In the landmark decision of *Textile Workers Union v. Lincoln Mills*,[70] the Supreme Court began to lend its support to the development of this private system of jurisprudence. In that case, the Court

64. *See* W. BAER, DISCIPLINE AND DISCHARGE UNDER THE LABOR AGREEMENT 1 (1972); Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: U.S. Report*, 18 RUTGERS L. REV. 428, 434 (1964). *See also* American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921).

65. BNA, [1969] LABOR RELATIONS YEARBOOK 35-36.

66. BNA, [1970] LABOR RELATIONS YEARBOOK 38.

67. *See generally* M. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES (1974); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

68. *See, e.g.*, Peerless Laundry Co., 51 Lab. Arb. 331 (1968); Keeney Mfg. Co., 40 Lab. Arb. 974 (1963); Continental Air Transp. Co., 38 Lab. Arb. 778 (1962); Pilot Freight Carriers, Inc., 22 Lab. Arb. 761 (1954).

69. New Hotel Showboat, Inc., 48 Lab. Arb. 240, 241 (1967).

70. 353 U.S. 448 (1957).

interpreted section 301 of the Labor Management Relations Act[71] as a mandate to federal courts to develop a body of federal common law based on the policy reflected in the national labor laws. Under this mandate, the Court further held that a grievance-arbitration provision of a collective bargaining agreement could be specifically enforced. By so holding, the Court repudiated the common law rule that agreements to arbitrate were freely revocable at any time prior to the award.[72]

Three years later, the Court emphasized its commitment to the development of an industrial common law in a trilogy of decisions which sharply restricted judicial intervention in the arbitration process.[73] Justice Douglas, speaking for the Court, stated:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.[74]

So that this industrial common law may function free from the rigidity of the judicial common law, the Court held that apart from matters that the parties expressly exclude, all grievances fall within the scope of the arbitration clause.[75] A court must therefore confine its inquiry to a determination of whether the arbitration clause covers the particular grievance. If it does, the Court must order the parties to arbitrate the dispute.[76] The Court further concluded that the ability of courts to review the merits of an arbitration award must be similarly restricted.[77]

71. Section 301 provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States . . . without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1970). States have concurrent jurisdiction under section 301 although they must apply the federal substantive law developed under *Lincoln Mills*. Vaca v. Sipes, 386 U.S. 171 (1967).

72. 6 S. WILLISTON, CONTRACTS § 1919 (rev. ed. 1938); RESTATEMENT OF CONTRACTS § 550 (1932).

73. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). In *Enterprise Wheel*, the dispute involved the allegedly wrongful discharge of an employee. The tenor of the Court's opinion, with its emphasis upon a fair solution in light of the customs and practices within the industry, runs against the principle of an absolute power of discharge. The Court did not reach the substantive issue, however, because the union had sought to have the dispute submitted to arbitration.

74. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-79 (1960).

75. *Id.* at 581.

76. *Id.* at 582-83.

77. *Id.* at 596.

If the arbitrator's decision is based upon the contract, courts may not upset that decision by applying common law principles.[78]

Judicial Restraints

Although the legal system has abandoned the nineteenth century belief that there should be no restriction on the right to discharge, the unorganized employee has for the most part remained unprotected. When confronted with a claim based upon an allegedly abusive discharge not falling within the scope of the restrictions discussed above,[79] courts have mechanically invoked the rule that an employer has the right to discharge for any reason or no reason.[80] A very few jurisdictions have, however, created narrow exceptions qualifying that right.

In *Petermann v. Teamsters Local 396*,[81] an employee was discharged after disobeying his employer's order to testify falsely before a state legislative committee. The California Court of Appeal, while conceding that an indefinite employment relationship is generally terminable for any reason whatsoever, recognized that this rule may be modified by statute or by public policy. The court held that a discharge based on retaliation for refusal to commit perjury was wrongful, emphasizing that the fact that perjury was a criminal offense was clear evidence of a strong public policy against it. In so concluding, the court granted the employee a nonstatutory cause of action against the employer.[82]

In the later California case of *Glenn v. Clearman's Golden Cock Inn, Inc.*[83] an employer allegedly discharged his employees because they had engaged in union organizing activities. The court of appeal held that the employees had stated a cause of action for damages, reasoning that the California Legislature's declared public policy promoting freedom to unionize[84] should override the employer's interests and create an exception to the otherwise absolute power of discharge.

78. *Id.* at 599.

79. See text accompanying notes 51-78 *supra.*

80. See cases cited note 5 *supra.*

81. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

82. Upon remand, the *Petermann* case was tried without a jury, resulting in a judgment that the discharge was unlawful and an award of $50,000 as damages to the plaintiff. This judgment was subsequently affirmed by a different division of the same appellate court. Petermann v. Teamsters Local 396, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963).

83. 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961).

84. *See* CAL. LABOR CODE §§ 922-23 (West 1971). Although the court did not expressly assert the basis for its jurisdiction, it is clear that for the court to avoid the preemptive sweep of the NLRA, these parties were necessarily not subject to the jurisdiction of the NLRB. *See* Plumbers' Local 100 v. Borden, 373 U.S. 690 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

Both *Petermann* and *Glenn* contain broad language defining public policy. Nonetheless, later California courts have strictly limited the rulings in those cases to instances where an explicit declaration of public policy has been made by the legislature.[85] The reluctance of the California courts to broaden the *Petermann-Glenn* exceptions is illustrated in *Mallard v. Boring*[86] The employee had been discharged because she informed the local court that she would be available for jury service. This interference with the functioning of the legal system was described by the court of appeal as "reprehensible," "selfish," "shortsighted," and "deplor[able]."[87] The court nevertheless refused to rule for the plaintiff in the absence of prior legislation.

Recently, in *Frampton v. Central Indiana Gas Co.*,[88] the Supreme Court of Indiana also recognized a judicial exception to the terminable at will doctrine. The employee had been discharged because she filed a workman's compensation claim. In reversing the appellate court's dismissal of the action, the court acknowledged the employer's generally absolute right to discharge. But "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule must be recognized."[89]

Modern Justifications for the Rule—Geary v. United States Steel

In a recent split decision, Pennsylvania became the only jurisdiction other than New Hampshire to reappraise the terminable at will doctrine in light of contemporary conditions. Although the majority declined to modify the common law rule, its opinion proffers some modern justifications for rentention of that rule and is therefore worthy of close inspection.

In *Geary v. United States Steel Corp.*,[90] the plaintiff had been continuously employed for fourteen years selling tubular products to the oil and gas industry. In July 1967, he was summarily discharged without notice, allegedly in retaliation for having pointed out to his superiors that a new tubular casing manufactured by the company was defective and dangerous. The pipe was designed for use under high pres-

85. *Compare* Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970), *and* Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969), *with* Becket v. Welton Becket & Associates, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974), Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967), Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964), *and* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

86. 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

87. *Id.* at 394, 6 Cal. Rptr. at 174.

88. 297 N.E.2d 245 (Ind. 1973).

89. *Id.* at 428. *Contra*, Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956).

90. 319 A.2d 174 (Pa. 1974).

sure. When Geary communicated to his superiors his belief that the pipe had not been adequately tested and constituted a serious danger, he was ordered to follow directions and sell the pipe. Although agreeing to do so, Geary went to a vice-president in charge of sales of the product. As a result of this visit, the corporation reassessed the pipe's safety and withdrew it from the market. Geary was thereafter summarily discharged.

In upholding the lower court's dismissal of the plaintiff's claim, the court acknowledged that "economic conditions have changed radically" since Pennsylvania adopted the common law rule of an absolute right to discharge.[91] The court recognized the inequality in bargaining power in the employment relationship and the extreme economic dependence of the employee upon the employer. Nevertheless, the court dismissed the complaint. Although it admitted that it might "plausibly" create a cause of action where there existed a threat to a "recognized facet of public policy,"[92] the court was unwilling, under the facts presented, to abrogate the common law rule for several reasons.

The court's weakest argument for retaining the traditional rule was based upon fears that recognition of a cause of action against abusive discharge would burden the judicial system by increasing the workload and creating problems of proof.[93] Although increased litigation is a valid concern, it should not influence a determination whether to grant a class of litigants access to the courts: "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."[94]

As to problems of adequacy of proof, courts must daily separate genuine from baseless claims. "[T]he danger that the average jury will identify with, and therefore believe, the employee"[95] is not by any means a novel problem. Courts consistently find ways and means to safeguard against this danger through rules of evidence and requirements as to the sufficiency of evidence. There is no reason why they should not be similarly equal to the task in redressing abusive discharges. In formulating standards of proof, courts may draw from ju-

91. *Id.* at 176.

92. *Id.* at 180. Implicitly, the court endorsed the *Petermann* and *Frampton* decisions. In discussing and factually distinguishing those cases because each involved "clear and compelling" legislative declarations of public policy, the court stressed that "[i]t is not necessary to reject the rationale of these decisions in order to defend the result we reach here." *Id.* at 180 n.16.

93. *See id.* at 179.

94. W. PROSSER, THE LAW OF TORTS § 12, at 51 (4th ed. 1971) [hereinafter cited as PROSSER].

95. Geary v. United States Steel Corp., 319 A.2d 174, 179 n.13 (Pa. 1974), *quoting* Blades, *supra* note 5, at 1428.

dicially developed standards and procedures for proving unlawful discharge under the various statutes that restrict the right to discharge.[96]

The *Geary* court supported its speculation that sifting out fictitious claims will be difficult by quoting extensively from an article by Professor Blades which considers the potential for fraud if the courts recognize a cause of action for abusive discharge.[97] Professor Blades expressed the fear that juries may tend to favor the employee's version of the facts and, consequently, he believed that problems of proof present a strong argument against permitting discharged employees to seek adjudication of their claims. He concluded, however, that "[t]he problem of proof is not insurmountable, for there are a number of evidentiary techniques available to the courts by which the genuineness of a claim might be reasonably guaranteed . . . ."[98] Substantiating this conclusion, he discussed how courts may, for example, create presumptions or increase the employee's burden in order to ensure sufficiency of proof.[99] In short, the *Geary* court's arguments reveal an unwarranted lack of faith in the ability of the judicial system to deal with the problem of groundless or fraudulent claims.

The majority in *Geary* stressed that "[o]f greater concern is the possible impact of such suits on the legitimate interests of employers in hiring and retaining the best personnel available. The everpresent threat of suit might well inhibit the making of critical judgments by employers concerning employee qualifications."[100] This argument has substantial merit, but it can be refuted on two grounds.

First, the court's contention greatly exaggerates the inhibiting effect of the recognition of a cause of action on the employer's power of discharge. Recognizing an action for bad faith, malicious, or retaliatory discharge should only minimally interfere with the employer's right to discharge. It in no way interferes with the normal exercise of the discharge power which is necessary to manage a business. Actual experience provides significant support for this conclusion. Under

96. For a discussion of some of these statutes, see notes 50-63 & accompanying text *supra*. Almost all of these statutes have some case law solving problems of proof in discharge cases. Abundant precedent dealing with proof of discriminatory discharge exists under the various civil rights statutes. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishes standards of proof for employment discrimination cases under Title VII). *See generally* Sutter, *Current Procedural and Evidentiary Considerations Under Title VII of the Civil Rights Act of 1964: Ready for the Defense*, 6 GA. L. REV. 505 (1972); Note, *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107 (1949).

97. *See* Blades, *supra* note 5.

98. *Id.* at 1429.

99. *See id.* at 1429-31. *See also* Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1044-47 (1970).

100. Geary v. United States Steel Corp., 319 A.2d 174, 179 (Pa. 1974).

collective bargaining contracts, many employers have long been restricted in the exercise of the right to discharge by just cause requirements.[101] Over the years, these employers have been able to operate businesses efficiently and profitably. There is no reason to assume that judicial restriction on abusive and retaliatory discharge will greatly impinge upon the employer's ability to make critical decisions when the broader restrictions imposed by collective bargaining have not done so.

Second, and more fundamentally, while the employer obviously has a significant interest in freely exercising the right to discharge without fear of legal liability, that interest does not exist in a vacuum. Certainly, the public interest in protecting against wrongs and doing substantial justice should qualify the right to discharge. The economic and social realities of the employer-employee relationship, discussed above,[102] demonstrate the employee's need for protection. In light of the employee's vulnerable status, courts should treat abusive discharges as injurious wrongs in need of redress. In this way, moreover, courts may help to deter abusive exercise of the discharge power.

An Alternative Basis

The *Monge* decision represents a laudable step toward affording employees protection against abusive discharge. However, while the remedy fashioned by the court may provide relief for many employees who have been wrongfully discharged, limitations engendered by the court's reasoning may deny redress for others similarly wronged. This shortcoming in *Monge* stems from the use of contract principles as the basis for the new common law action. By characterizing the action as one in tort, the court could have avoided these limitations. Two distinct advantages flow from the application of tort principles.[103] First, the court can prohibit contractual waiver of restrictions on the power of discharge. Moreover, the court can recognize an independent state cause of action for unionized employees.

101. See text accompanying notes 64-69 *supra*.

102. See text accompanying notes 35-48 *supra*.

103. This note analyzes substantive differences between contract and tort. Beyond the scope of this discussion is the potential difference in recovery of damages. The importance to litigants of whether a contract or tort measure of damages is utilized is obvious. *Monge* illustrates one resulting difference. Characterizing the action as contract, the court precluded damages for mental distress. *See* Monge v. Beebe Rubber Co., 316 A.2d 549, 552 (N.H. 1974). While this represents the general contract rule, damages for emotional stress are normally recoverable in a tort action. *Compare* RESTATEMENT OF CONTRACTS § 341 (1932), *with* PROSSER, *supra* note 94, § 12, at 52. An additional potential difference in recovery arises from contract and tort rules regarding exemplary damages. Punitive damages are not recoverable in contract actions, but may be imposed under tort theory. 5 A. CORBIN, CONTRACTS § 1077 (1964) [hereinafter cited as CORBIN]. *See generally* PROSSER, *supra* note 94, § 2.

Contractual Waivers

By grounding its decision on contract principles, the *Monge* court leaves open the question whether its holding may be negated by contractual disclaimers of obligations or waivers of rights. If the employment agreement expressly permits a discharge for any reason whatsoever, courts would, under contract theory, be helpless to protect the employee from abusive discharge. To be sure, contract law has traditionally protected individuals from overreaching contracts or terms by voiding those contracts which violate public policy.[104] Such action, however, has always been purely negative in nature.[105]

Even the recently developed doctrine of unconscionability[106] fails to provide protection in this situation. Under the unconscionability concept, a court is no longer restricted, as it seems to have been traditionally, to a simple choice between enforcement and nonenforcement of the contract if it finds a single term obnoxious to public policy. Instead, it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of the unconscionable clause as to avoid any unconscionable results.[107] While these additional alternatives authorize explicit judicial policing of socially undesirable contractual provisions, they do not provide a basis for creating affirmative duties.

It may be argued that the concept of unconscionability could be utilized to invalidate an express clause in the contract which sanctions the absolute right of discharge and, subsequently, that a court could imply or impose contractual obligations restricting the right to exercise the discharge power. This argument fails, however, to take into account the doctrinal limitations of contract theory. Under contract doctrine, although courts may add terms to the contract for reasons of public policy and irrespective of the parties' presumed intentions,[108] these

104. *See* 6A CORBIN, *supra* note 103, §§ 1373-78.

105. *See id.* §§ 1373-78, 1534-35; Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MODERN L. REV. 635, 641 (1967); *cf.* 6A CORBIN, *supra* note 103, § 1515.

106. The term, as used here, encompasses notions of the need to protect individuals from contracts of adhesion. *See generally* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

107. RESTATEMENT (SECOND) OF CONTRACTS § 234 (Tent. Drafts Nos. 1-7 rev. 1973). The comments to section 234 fail to cite a single case in which a clear disclaimer of obligation was invalidated by a court. *Cf.* UNIFORM COMMERCIAL CODE § 2-302.

108. *See* Martin v. Campanaro, 156 F.2d 127, 130 n.5 (2d Cir.), *cert. denied*, 329 U.S. 759 (1946); Parev Prods. Co. v. I. Rokeach & Sons, 124 F.2d 147, 149 (2d Cir. 1941); 1 CORBIN, *supra* note 103, §§ 17, 19, at 46-47; 3 *id.* § 561. "You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy . . . ." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

terms may nonetheless be excluded by an express contract clause precisely to the contrary.[109] Of course the suggestion that affirmative obligations be imposed under the guise of contract irrespective of the contract terms does recognize the inequality of bargaining power between employer and employee and, perhaps, may be applauded as far as social result is concerned. But such an action would be unacceptable in view of the fact that already legitimated principles exist which may be drawn upon to deal with the problem.

By characterizing the action as one in tort, the court would recognize a cause of action for abusive discharge regardless of the terms of the contract.[110] While the tort obligation arises from the contractual employment relationship existing between the parties, the duty exists independent of the contract. At the same time, the parties may still agree in advance that the employee will not hold the employer liable for any discharge. By applying tort theory, however, the court sounds a warning that this agreement will not be upheld where the employer is at an obvious advantage in bargaining power and uses that superior power to neutralize the protection provided by the court.[111]

109. One author notes that obligations of good faith and reasonableness are imposed in all contracts within the scope of the Uniform Commercial Code and may not be disclaimed; he suggests that similar obligations be applied by analogy to employment contracts to proscribe abusive discharge. Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 238 (1973). This proposition not only ignores the precedented limits of contract doctrine discussed here, but it also blurs the distinctly separate nature of statutory and contractual obligations. *Cf.* L. FRIEDMAN, CONTRACT LAW IN AMERICA 17 (1965); Macneil, *Whither Contracts?*, 21 J. LEGAL ED. 403, 411 (1969).

110. An example illustrative of the practical effect of this characterization is found in the field of products liability. Liability was for years premised upon contractual theories of warranty. Although warranties were readily implied on the basis of policy and any disclaimer construed against the seller, expert drafting could effectively preclude the imposition of any implied warranties, thus insulating the seller from liability. *See, e.g.*, Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960).

This result was swept aside by judicial recognition that the basis for the action was in tort. As stated by Justice Roger Traynor for the California Supreme Court: "Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff . . . the refusal to permit the manufacturer to define the scope of its own responsibility for defective products [makes it] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort." Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

111. *Cf.* Seely v. White Motor Co., 63 Cal. 2d 9, 26-27, 403 P.2d 145, 156-57, 45 Cal. Rptr. 17, 28-29 (1965) (Peters, J., dissenting); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960).

Recognition of an Independent State Cause of Action for Organized Employees

In *J. I. Case Co. v. NLRB*,[112] the Supreme Court analyzed the purpose and intent of the NLRA and concluded that a collective bargaining agreement supersedes and voids incompatible individual contract rights.[113] A series of subsequent decisions beginning with *Lincoln Mills*[114] has directed that courts develop a body of federal substantive law, based on the policy of the national labor statutes, that is to be applied to the exclusion of state law when the employee's claim is based upon breach of a collective bargaining agreement.[115] It is thus clear that if the basis for suit is contract and there exists a collective bargaining agreement, state regulation of wrongful discharge inconsistent with federal principles will not be permitted.[116] This same line of decisions does not, however, expressly bar state efforts to impose different substantive restrictions when the basis for the suit is grounded in tort. This raises the question of whether this different characterization of an action permits imposition of liability under the same circumstances. Although no court has dealt directly with the issue, it is submitted that the answer should be in the affirmative: if the organized employee asserts a tort right against abusive discharge that exists independently of the collective bargaining agreement, that right should be enforceable in state court. After discussing the significance of this contention, the supporting decisions and policies will be reviewed.

112. 321 U.S. 332 (1944).

113. *See id.* at 337-38. "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

114. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

115. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 655-57 (1965); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). *See generally* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

State courts have, however, concurrent jurisdiction under section 301(a) of the Labor Management Relations Act to apply federal substantive law. *See* 29 U.S.C. § 185(a) (1970); Teamsters Local 714 v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

116. This doctrine of federal preemption does not preclude state regulation where the NLRB declines to assert jurisdiction because the business involved is so small that the effect of a dispute on commerce is not sufficiently substantial, NLRA § 14(c), 29 U.S.C. § 164(c) (1970), or where the NLRB lacks jurisdiction because the employer or employees have been specifically excluded from NLRA coverage under sections 2(2) or 2(3), 29 U.S.C. §§ 152(2)-(3) (1970). *See* Hanna Mining Co. v. District 2, Marine Engineers, 382 U.S. 181 (1965).

The Need for Independent Protection

When a unionized employee is wrongfully discharged by the employer, the union generally provides effective assistance in attempting to gain reinstatement through arbitration.[117] Most injustices are corrected in this manner. It is in the exceptional case that the discharged employee needs the protection of the state cause of action; such a situation might arise, for example, where there is an abusive discharge but the union is unwilling to arbitrate. The need for independent protection in such a case arises from the present state of law which restricts the employee's right to sue upon or to arbitrate an alleged violation of the collective bargaining agreement. If an organized employee is discharged and the bargaining agreement contains a binding grievance-arbitration procedure for the resolution of disputes, the employee is required to exhaust the grievance-arbitration machinery before direct judicial redress may be sought.[118] Furthermore, the employee's right to commence suit against the employer in the event that the union refuses to process his claim or presents it only perfunctorily has been severely restricted by the Supreme Court in *Vaca v. Sipes*.[119]

The Court in *Vaca* upheld the union's right to control the manner and extent to which an individual grievance is presented. It held that a wrongfully discharged employee could bring an action against the employer only if the employee could prove that the union breached its duty of fair representation in handling the grievance.[120] The Court further stated that a breach of this duty was not established by showing that the grievance was in fact meritorious; it must be proved that the union acted arbitrarily, discriminatorily, or in bad faith in settling the employee's claim.[121] In so concluding, the Court struck a balance be-

117. *See generally* W. BAER, DISCIPLINE AND DISCHARGE UNDER THE LABOR AGREEMENT (1972).

118. "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). This requirement is founded upon the strong federal policy favoring arbitration as the desired method for settling contract disputes. *See* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

119. 386 U.S. 171 (1967).

120. *Id.* at 193. In those few instances in which the collective bargaining agreement does not contain a binding arbitration clause, the individual employee may directly bring suit for an alleged violation of rights under the contract. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

121. 386 U.S. at 193. Justice Black, in a carefully reasoned dissent, observed that under the majority's opinion, an employee who "has obtained a judicial determination

tween the individual and group interests in the collective bargaining relationship which largely subordinates the interests of the individual employee.[122]

The difficulty in proving arbitrary or bad faith conduct on the part of the union has left many discharged employees remediless within the industrial common law.[123] This has been particularly true where the union's conduct has been negligent. Courts have uniformly held that mere negligence is not sufficent to allow an action under the standards delineated in *Vaca*.[124] For example, one federal district court distinguished between "incompetence in handling a grievance and actual hostility, malice or bad faith" on the part of union officials in handling a grievance.[125] Although admitting that the union may not have exercised "professional standards of competency," the court found that the allegations did not satisfy the *Vaca* standards.[126]

Undoubtedly, many of the discharges left remediless under *Vaca* merely lack "just cause" justification under the collective bargaining agreement. Some, however, would be actionable under the more restricted criteria articulated by the *Monge* court. In such cases, the

that he was wrongfully discharged, is left remediless, and [the employer], having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct." *Id.* at 205 (Black, J., dissenting).

122. Commentators have for the most part contended that the requirement that the employee have a separate judicial remedy against his union denies an effective remedy, and, at least in cases involving an individual employee's rights, should be modified. *See, e.g.*, Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REVIEW 81; Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972); Note, *The Individual Worker's Right to Sue in His Own Name in a Collective Bargaining Situation*, 17 S.D.L. REV. 217 (1972); Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559 (1968).

123. "[W]e have, in effect, a presumption of regularity of union conduct that is not easily rebuttable. Except in cases of flagrant discrimination . . . it is not likely . . . that plaintiffs alleging union violation of the duty to represent fairly will meet with much success . . . ." Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relation Acts*, 34 J. AIR L. & COMM. 167, 202 (1968).

124. *See, e.g.*, Woods v. North Am. Rockwell Corp., 480 F.2d 644 (10th Cir. 1973); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Simberlund v. Long Island R.R., 421 F.2d 1219 (2d Cir. 1970); Berry v. Pacific Intermountain Express Co., 85 L.R.R.M. 2408 (D.N.M. 1974); Breish v. Local 771, UAW, 84 L.R.R.M. 2596 (E.D. Mich. 1973); Hines v. Teamsters Local 377, 84 L.R.R.M. 2649 (N.D. Ohio 1973). *See also* Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 90 (1972).

125. Hines v. Teamsters Local 377, 84 L.R.R.M. 2649, 2651 (N.D. Ohio 1973).

126. *Id.*

common law tort approach suggests a remedy supplemental to that devised by the Supreme Court in *Vaca*. When the discharge constitutes a deprivation of a recognized substantive state right, the employer should not be insulated from liability by the employee's lack of remedy under the contractual agreement.

Preemption

The basic issue raised by the suggestion that the cause of action be extended to organized employees is the extent to which federal labor law would preempt the state court from taking such action. Specifically, the question is whether the state judicial remedy must give way to the federal policy favoring arbitration as a means of achieving industrial peace. Resolution of this question depends upon whether the application of state law in such a case would to some extent frustrate the purpose of the national labor laws.[127]

In *San Diego Building Trades Council v. Garmon*,[128] the Supreme Court established the general rule of preemption in labor relations. In reversing a state award of tort damages against a union for peaceful picketing, the Court determined that, as a general rule, state courts do not have jurisdiction over suits which are clearly or arguably within the National Labor Relation Board's jurisdiction over protected and proscribed activities under sections 7 and 8 of the NLRA.[129] The Court reasoned that preemption was necessary in such cases because the board must have complete authority to develop uniform law in order to effectuate the policies of the NLRA. *Garmon* did not, however, address the issue created where the award of tort damages, while based on action which is not even arguably protected or prohibited under the NLRA, may frustrate the national labor policy in favor of arbitration.[130]

Only one court has been confronted with the question of applying the supremacy clause in a situation outside the focus of *Garmon*. In

127. *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963). The preemptive power of valid federal laws is granted in the supremacy clause of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI.

128. 359 U.S. 236 (1959).

129. *Id.* at 244-45. *See* NLRA §§ 7, 8(a)(1), 8(a)(3), 29 U.S..C. §§ 157, 158(a)(1), 158(a)(3) (1970). This preemption doctrine has no application to suits under section 301. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

130. Under *Garmon* and its progeny, the proposed state action would be invalidated only when the discharge is to discourage employees with respect to union membership, engaging in concerted activities, and obtaining representation for the purposes of collective bargaining. *See* NLRA §§ 7, 8(a)(1), 8(a)(3), 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3) (1970).

ITT Lamp Division of International Telephone & Telegraph Corp. v. Minter,[131] an employer argued that state welfare benefits to strikers altered the relative economic strengths of the parties and therefore infringed upon the national labor policy of guaranteeing free collective bargaining. Recognizing that *Garmon* was inapplicable, the First Circuit declared that "[i]n such a situation, a balancing process seems called for under the general approach to preemption followed by the Supreme Court, in which both the degree of conflict and the relative importance of the federal and state interests are assessed."[132] Employing the balancing test, and following the Supreme Court's conviction that state action should not be preempted under the supremacy clause "in the absence of persuasive reasons,"[133] the court upheld the challenged application of the state welfare laws.

This same approach may be used in resolving the issue raised here. As discussed above,[134] the Supreme Court has emphasized the importance of arbitration in the resolution of labor disputes. In *United Steelworkers of America v. Warrior & Gulf, Nav. Co.*,[135] the Court articulated the basis for this policy. It noted that the function of labor arbitration is to establish a substitute for industrial strife.[136] Arbitration provides "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[137] In short, the arbitration process is a flexible, peaceful method by which the parties may settle labor disputes without resort to strikes, lockouts, and similar devices. For this reason, inclusion in the collective bargaining agreement of a clause providing for binding arbitration is "[a] major factor in achieving industrial peace . . . ."[138] In attempting to promote the effectiveness of arbitration and to encourage arbitration clauses in collective bargaining contracts, the Supreme Court has consistently supported the exclusivity of the arbitral remedy.[139] Clearly, then, national policy favors arbitration as a method of resolving employment disputes.

131. 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

132. *Id.* at 992. The First Circuit again applied this balancing test in a suit challenging state payment of unemployment compensation to strikers. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973).

133. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

134. See text accompanying notes 70-78 *supra*.

135. 363 U.S. 574 (1960).

136. *Id.* at 578.

137. *Id.* at 581.

138. *Id.* at 578.

139. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); *cf.* Gateway Coal Co.

On the other hand, there is the state interest. By recognizing a cause of action in tort, the state manifests its strong policy of protecting employees from what it regards as wrongful discharge. The traditional interests of states in redressing private wrongs by granting compensation is beyond question. That this interest includes regulation of the right to discharge was recognized by the Supreme Court in the case of *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*[140] There, the Court considered whether, and to what extent, a state statute prohibiting hiring and firing based on racial discrimination was preempted by various federal statutes, including the Railway Labor Act. Concluding that the purpose of the federal laws were not frustrated by the state statute, the Court held that this exercise of the state's traditional powers was not barred under the supremacy clause.

Thus, there remains to be resolved the question of potential conflict between the federal policy favoring arbitration of labor disputes and the state policy of protecting its citizens from abusive discharge. In this regard, the Supreme Court's recent decision in *Alexander v. Gardner-Denver Co.*[141] is instructive. In that case, the Court accommodated the policy of Title VII of the 1964 Civil Rights Act against discriminatory employment practices[142] and the conflicting national labor policy promoting arbitration. The conflict between the policies arose when a discharged minority employee sued in federal court under Title VII after his discharge had been upheld by arbitral decision under both the just cause and nondiscrimination clauses of the collectible bargaining agreement. The Court rejected the appellate court's determination that the employee was bound by the prior arbitral decision and had no right to sue under the Title VII. Despite continued emphasis upon the use and finality of arbitration to resolve questions of contractual rights, the Court reasoned that the employee instituting an action under Title VII is not seeking review of the arbitrator's decision, but rather is asserting a separate and independent statutory right. In reaching its conclusion that the employee was entitled to *de novo* consideration of the claim, the Court responded to the belief of the district court and the court of appeals that to permit access to the courts would substantially undermine the employer's incentive to arbitrate and thus

v. United Mine Workers of America, 414 U.S. 368 (1974); Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). This approach has not, however, been rigidly followed where there have been positive countervailing reasons for permitting enforcement of independent substantive rights. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971); *cf.* Wilko v. Swan, 346 U.S. 427 (1953).

140. 372 U.S. 714 (1963).

141. 415 U.S. 36 (1974).

142. *See* 42 U.S.C. § 2000e-2 (1970), *as amended* (Supp. III, 1973).

would "sound the death knell for arbitration clauses in labor contracts."[143]

> [W]e disagree. The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike . . . . It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective.[144]

The Court stated further that arbitration still offers the parties a comparatively fast and inexpensive means for resolving a wide range of disputes, including grievances involving Title VII discrimination.[145] For this reason, both employer and employee have strong incentive to seek satisfactory settlement through arbitration, perhaps thereby foreclosing the need to resort to the judicial forum.

In contrast with *Alexander*, which dealt with conflicting federal policies, the issue confronted here concerns the extent of conflict between federal and state policies. Nonetheless, the reasoning of the Court is persuasive in determining whether a state would be barred from protecting organized employees from abusive discharge. The arguments advanced in *Alexander* would be equally applicable in this kind of case and suggest that a state cause of action for wrongful discharge would not frustrate or undermine the national policy promoting arbitration of labor disputes if unionized employees were permitted to pursue that remedy. Hence, weighing the strong state interest in protecting its citizens from what it regards as private wrongs against the potential minimal interference with national labor policy, it seems that such state action should not be preempted under the supremacy clause. As the Supreme Court has stated, the exercise of the state's powers should not be invalidated unless it "plainly and palpably infringes" upon federal policy.[146]

Conclusion

The court in *Monge v. Beebe Rubber Co.* discarded the common law rule that an employer may discharge an at-will employee for any or no reason. In so doing, the court held that hereafter an employee will have the opportunity to prove in court a claim for bad faith, mali-

143. Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974), *quoting* 346 F. Supp. 1012, 1019 (D. Colo. 1971).

144. Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974).

145. *Id.* at 55.

146. Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945).

cious, or retaliatory discharge. The decision of the court in *Monge* is important because it is the first to abrogate the principle that the employer's power to discharge is absolute. Unfortunately, the court articulated its reasoning in a disappointingly facile manner, enhancing the possibility that other courts will be reluctant to follow its lead. This note has attempted to demonstrate that the common law rule is incompatible with contemporary conditions and values and, thus, that the holding in *Monge* is socially desirable. It has also suggested that the recognized cause of action be grounded in tort. Such characterization will permit courts to prohibit contractual waiver of restrictions on the power of discharge, and may enable courts to protect unionized employees from wrongful discharge.

*Daniel A. Mathews**

* Member, Third Year Class