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Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

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The dismissal of employees in the United States

Jay E. GRENIG *

From the latter half of the nineteenth century until quite recently, the nearly universal American rule was that employers, in the absence of a fixed-term contract of employment, could dismiss their employees for good cause, for no cause, or even for morally wrong cause. In his 1877 treatise, H. G. Wood argued that, since hiring was done for an indefinite period, either the employer or the employee could sever the employment relationship at any time for any reason.[1] It has been estimated that approximately two-thirds of all American workers are still "employees at will".[2]

While the employment-at-will doctrine is still fairly pervasive, it has been eroded by three factors: (a) employee rights legislation; (b) the grievance arbitration process laid down in union-management collective bargaining agreements; and (c) various court decisions.[3] Because employment at will is primarily a question of state law, it is necessary to devote considerable attention to state legislation and state appellate court decisions.

The United States is the last major industrialized country that does not have comprehensive statutes protecting employees against arbitrary dismissal,[4] or "discharge" as it is usually termed in American parlance. Existing employee rights statutes generally protect a particular group, not the workforce as a whole, against discharge for specified reasons.

Most collective bargaining agreements between unions and employers now provide that covered employees may be discharged only for "good" or "just" cause. These "just cause" provisions are normally enforced through contractual grievance arbitration procedures.

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* Professor of Law, Marquette University Law School, Milwaukee.

[1] H. Wood: *A treatise on the law of master and servant* (1877), section 134; see J. Feinman: "The development of the employment at will rule", in *American Journal of Legal History* (Philadelphia), 1976, Vol. 20, p. 118.

[2] L. Gioia and P. Rumfjord: "Reforming at-will employment law: A model statute", in *University of Michigan Journal of Law Reform* (Ann Arbor), 1983, Vol. 16, p. 389, n. 1.

[3] H. Perritt, Jr.: *Employee dismissal: Law and practice* (New York, Matthew Bender, 2nd ed., 1987), sections 1.5-1.9.

[4] Ibid., section 2.1.

During the past 20 years, the employment-at-will doctrine has been modified in approximately 40 states, mostly by judicial action. The State of Montana, Puerto Rico and the Virgin Islands have adopted statutes requiring "good cause" for the discharge of an employee.

I. Sources of restrictions on employee discharge

A. Legislation

1. State legislation

Six states (California, Georgia, Louisiana, Montana, North Dakota and South Dakota) have statutes that codify the employment-at-will rule, although California courts have been among the most progressive in creating judicial exceptions to the rule.[5] Many states have enacted laws restricting the right of employers to discharge or discriminate against their employees. Most of these statutes are intended to prevent employers from discriminating against employees because of race, age, sex, handicap or religion. Some, generally referred to as "whistleblower statutes", aim to protect employees who report employer violations of state or federal laws to enforcement agencies. Most states have laws protecting employees from discharge because of absenting themselves for jury duty or for exercising the right to vote; 45 states have passed laws prohibiting the discharge of an employee solely because the employee's wages have been garnished by creditor (i.e. attached in payment of a debt); statutes in 25 states limit the right of an employer to discharge an employee because of the latter's refusal to take a lie detector test.[6]

Puerto Rico provides an indemnity, consisting of one month's salary and an additional payment equivalent to one week's earnings for each year of service, to employees under indefinite term contracts who are discharged without good cause.[7] The Virgin Islands statute describes permissible grounds for an employee's discharge and provides for reinstatement and back pay where the discharge does not fall within the statutory limits.[8] A discharged employee can sue for compensatory and punitive damages.

Montana's Wrongful Discharge from Employment Act provides that employment for an unspecified term is at will unless: (a) the discharge was in retaliation for the employee's refusal to violate public policy or for reporting

[5] L. Larson and P. Borowsky: *Unjust dismissal* (New York, Matthew Bender, 1991), Vol. 1, section 5.02.

[6] Ibid.

[7] Puerto Rico Laws Annotated, Title 29, section 185a et seq.

[8] Virgin Islands Code Annotated, Title 24, sections 76-79.

a violation of public policy; or (b) the employee completed the employer's probationary period of employment and the discharge was not for good cause; or (c) the employer violated express provisions of the written personnel policy.[9] Remedies are limited to wages and fringe benefits for a period not to exceed four years from the date of discharge, together with punitive damages in specified situations.

2. Federal legislation

Except for laws prohibiting employment discrimination and some other special-purpose statutes, there is no national statutory law of general application that alters the employment-at-will doctrine. A major focus of federal legislation has been employment discrimination. Title VII of the Civil Rights Act of 1964 [10] prohibits employment discrimination on the basis of race, colour, national origin, religion or sex. The Age Discrimination in Employment Act of 1967 [11] prohibits employment discrimination on the basis of age. The Rehabilitation Act of 1973 [12] and the Americans with Disabilities Act of 1990 [13] prohibit employment discrimination against the disabled.

The National Labor Relations Act [14] makes it illegal for an employer to discriminate against employees because of their union activity. The Act is enforced through administrative proceedings before the National Labor Relations Board with provision for judicial review.

The Employee Polygraph Protection Act of 1988 [15] generally restricts the use of lie detectors by private employers, and prohibits employers from retaliating against anyone who exercises any rights under the Act.

3. The model Uniform Employment Termination Act

In August 1991 the National Conference of Commissioners on Uniform State Laws approved a model Uniform Employment Termination Act. The Act was prompted by the belief that it is highly desirable to have uniformity regarding employees' substantive rights and the remedies available for violation of those rights.[16] It will become law only in those individual states which adopt it, if ever they do so.

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[9] Montana Code Annotated, section 39-2-901 et seq.

[10] 42 United States Code sections 2000e et seq.

[11] 29 United States Code sections 621 et seq.

[12] 29 United States Code sections 701 et seq.

[13] 42 United States Code sections 2000(a) et seq.

[14] 29 United States Code sections 141 et seq.

[15] 29 United States Code sections 2001 et seq.

[16] See D. Koys, S. Briggs and J. Grenig: "State court disparity on employment-at-will", in *Personnel Psychology* (Houston), 1987, Vol. 40, p. 565.

The Act prohibits terminating "without good cause" an employee who has completed his or her probationary period. "Good cause" means (a) a reasonable basis for termination in the light of all relevant factors and circumstances, including the employee's duties and responsibilities, the employee's conduct and employment record, and the appropriateness of the penalty for the conduct involved; or (b) judgment by management, made in good faith, as to the legitimate economic needs of the employer to organize or reorganize operations, make decisions about the size and composition of the workforce, or determine reasonable standards of job performance. An employer may terminate an employee without good cause at the expiration of a contract having a specified duration.

The Act gives as examples of "good cause" for termination: theft, fighting on the job, destruction of property, intoxication, drug abuse, insubordination, excessive absenteeism or tardiness, incompetence, and non-performance or neglect of duty. In determining whether good cause exists, consideration should be given to the reasonableness of the rule allegedly violated, knowledge or warning of the rule, consistency of enforcement of the rule and the penalties assessed, the use of corrective or progressively dissuasive discipline, the fullness and fairness of the investigation, and the appropriateness of the penalty in the light of the conduct involved and the employee's employment record. Consideration is also given to the character of the employee's responsibilities.

B. Judicial decisions

Since the 1970s, courts in many states have recognized causes of action in the nature of "wrongful discharge" or "unjust dismissal" grounded on theories of contract, tort or public policy.[17]

1. Implied-in-fact contract theory

Under the implied-in-fact contract theory, the employer's presumed right to discharge at will may be rebutted by evidence of an implied-in-fact employment contract. Factors which may indicate the existence of an implied-in-fact contract include duration of the employment, the employee's reasonable reliance on the terms of a handbook or company policy, communications from the employer, and industry customs.[18] Implied contract

[17] See Frampton *v.* Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (employee discharged for filing a compensation claim for employment injury could sue for wrongful discharge); Monge *v.* Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (termination of an employment-at-will contract, when motivated by bad faith or malice or based on retaliation, constitutes a breach of contract). See also Petermann *v.* Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (at-will employee who alleged he had been discharged for refusing to commit perjury could sue for breach of contract).

[18] Foley *v.* Interactive Data Corp., 47 Cal. 3d 654, 76 P.2d 373 (1988).

issues can generally be grouped into two categories: written personnel policies and practices; and oral promises of continued employment.[19]

In at least 14 states, courts have accepted the theory that written personnel policies or practices may constitute implied contracts. Provisions in a personnel manual or employee handbook, unilaterally and voluntarily adopted by an employer, distributed to employees at or after hiring, and providing that discharge will be for cause only, may become part of the employment contract because of an employee's "legitimate expectations".[20] An employer may be able to guard against this by having the employee sign a disclaimer that explicitly provides that the employment is terminable at will.[21] However, some courts have held that a disclaimer does not necessarily negate statements in an employee handbook.[22]

Several courts have held that oral promises by management may constitute implied employment contracts preventing termination at will.[23] For example, an employment contract may be implied from an employer's promise to an employee that he/she could continue to work unless fired "for cause".[24]

2. Implied covenant of good faith and fair dealing

Several courts have recognized a cause of action for wrongful discharge based upon an implied covenant of good faith and fair dealing. Under this exception to the employment-at-will doctrine, employees discharged because of malice or bad faith by the employer may sue the employer for breach of an implied covenant of good faith and fair dealing. Factors considered in determining whether a covenant exists include (a) length of service; (b) employee performance as demonstrated by regular receipt of increments, bonuses and promotions; (c) employer assurances that employment would continue; (d) employer practice of not terminating except for cause; and (e) no prior warning that the employee's job was in jeopardy.[25] Some courts have held that a personnel handbook is not part of the employment contract, but may be used as evidence in determining whether the contract contains an

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[19] See D. Koys, S. Briggs and J. Grenig: "The employment-at-will doctrine", in *Loyola University of Chicago Law Journal* (Chicago), 1986, Vol. 17, p. 264.

[20] Toussaint *v.* Blue Cross and Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (Mich. 1980).

[21] See also Novosel *v.* Sears, Roebuck and Co., 495 F. Supp. 344 (E.D. Mich. 1980), in which the employment application form required the employee to acknowledge that he understood that his "employment and compensation can be terminated, with or without cause, and with or without notice at any time at the option of either the Company or myself ... ".

[22] See, for example, Tirrano *v.* Sears, Roebuck and Co., 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984).

[23] See Koys et al., op. cit. (1986), pp. 266-267.

[24] Shah *v.* American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983).

[25] Koys et al., op. cit. (1986), pp. 267-268.

implied covenant of good faith and fair dealing, limiting the employer's right to discharge the employee.[26]

According to one court, no cause of action exists in tort [27] for breach of an implied covenant of good faith and fair dealing.[28] Concluding that a suit for breach of an implied covenant of good faith and fair dealing is a suit for breach of contract, the California Supreme Court explained that tort law is primarily designed to implement social policy, while contract law is designed to enforce the intentions of the parties. The court stressed that, in awarding contract damages, consideration must be given to the underlying principles of contract law, including the predictability of costs incurred by the parties to a contract.

3. Public policy

The public policy exception to the employment-at-will doctrine is based on the premise that an employer cannot terminate the employment relationship if the termination violates some public policy. Because of the vagueness of this concept, most jurisdictions that allow an employee to maintain a cause of action for wrongful discharge in violation of a public policy require that the public policy against discharge be strong, clear and well-defined.[29] Many courts limit an employer's broad authority to discharge at will only where a discharge clearly violates an express statutory objective or undermines a firmly established principle of public policy. Courts differ, however, as to what constitutes a sufficiently strong public policy to justify the exception.

Under the most limited application of the public policy theory, a discharge is wrongful only if the employee is discharged for exercising a statutory right, such as refusing to take a lie detector test or applying for workers' compensation benefits.[30] Some jurisdictions have rejected even the narrow statutory public policy exception, holding that where the legislature has created a right, the statutory remedies for violation of that right are exclusive.[31]

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[26] See, for example, Cleary *v.* American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

[27] A "tort" is a civil wrong or injury independent of a contract. There must be a violation of a duty owed to the plaintiff and generally arising by operation of law and not by mere agreement of the parties.

[28] Foley *v.* Interactive Data Corp., 47 Cal. 3d 654, 76 P.2d 373 (1988).

[29] See Koys et al., op. cit. (1986), pp. 260-261.

[30] Kistler *v.* Life Care Centers of America, Inc., 620 F. Supp. 1268 (D. Kan. 1985); Goins *v.* Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Clanton *v.* Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

[31] See Dockery *v.* Lampert Table Co., 36 N.C. App. 293, 244 S.E.2d 272, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978), overruled by statute, North Carolina General Statute, section 97.6.1.

A broader application of the public policy theory involves discharges that do not violate express statutory rights but none the less undercut well-defined public policies.[32] For the public policy exception to the employment-at-will doctrine to apply, the employee's discharge must affect a duty or responsiblity (such as reporting crime) that benefits the public at large, as opposed to a duty or responsibility that benefits the employer or employee alone.[33]

4. Tort theory

While the public policy exception to the employment-at-will doctrine is often treated as a tort cause of action, there are cases that have found an exception to the employment-at-will doctrine based solely on traditional tort concepts.[34] At least one court has drawn an analogy between wrongful discharge and tortious interference with the performance of a contract.[35] Where an employer's conduct in discharging an employee is extreme and outrageous, the employee can recover damages for the employer's intentional infliction of mental distress.[36] But many jurisdictions have rejected the notion that termination of at-will employees gives rise to a cause of action for a prima facie tort (i.e. infliction of intentional harm without excuse or justification).[37]

C. Collective bargaining agreements

Although unions represented fewer than 19 per cent of employees in the United States in 1989,[38] there are approximately 165,000 collective bargaining contracts currently in force covering those employees. Nearly all of them provide for arbitration of grievances[39] and most provide that covered employees may be discharged only for "good cause", "just cause", "sufficient cause" or "cause".[40] (There is no significant difference of

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[32] See, for example, Palmateer *v.* Int'l Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (discharge of employee for providing the police with information about a crime a fellow employee may have committed violated public policy favouring citizen crime fighters); Harless *v.* First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (bank employee wrongfully discharged for reporting bank's violations of consumer credit laws to state officials).

[33] Foley *v.* Interactive Data Corp., 47 Cal. 3d 654, 76 P.2d 373 (1988),

[34] Koys et al., op. cit. (1986), p. 269.

[35] Yaindl *v.* Ingersoll-Rand Co., 281 Pa. Super. 560, 422 A.2d 611 (1980).

[36] See, for example, Rawson *v.* Sears, Roebuck and Co., 495 F. Supp. 776 (D. Colo. 1982); Agis *v.* Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976).

[37] See Koys et al., op. cit. (1986), p. 269.

[38] US Bureau of the Census: *Statistical abstract of the United States: 1991* (Washington, DC, US Government Printing Office, 1991), p. 425.

[39] T. Bornstein: "Introduction to the system of labor and employment arbitration", in T. Bornstein and A. Gosline (eds.): *Labor and employment arbitration* (New York, Matthew Bender, 1991), Vol. 1, section 1.01.

[40] Larson and Borowsky, op. cit., Vol. 1, section 1.01 n. 7.

meaning between these various phrases.[41]) Even without express contract provisions limiting management's right to discharge, many arbitrators have found that such limitations can be implied.[42] These arbitrators reason that an agreement covering seniority rights, wages, hours and other conditions of employment is worthless unless there is an implied protection of employees against arbitrary and discriminatory discharge.[43]

The meaning of just cause is rarely defined in the contract and few collective bargaining agreements specify what types of conduct may result in discharge.[44] The determination of the reasonableness of the rules and the existence of just cause is frequently left to the grievance procedure, culminating in final and binding arbitration.[45]

Cases involving disciplinary action make up the largest category of disputes brought to arbitration, accounting for two-fifths of the total.[46] Because the collective bargaining agreements rarely define "just cause," "good cause" or "sufficient cause" for discharge, arbitrators have themselves developed definitions. One prominent arbitrator explained how to decide what is sufficient cause:

> To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[47]

The most widely known attempt to reduce just cause to precise criteria is a checklist devised by Arbitrator Carroll Daugherty.[48] The tests are presented as seven questions, a negative answer to any one of which is normally supposed to show that just cause does not exist. The tests are as follows:

1. *Notice.* Did the employer give the employee forewarning of the possible or probable disciplinary consequences of his/her conduct?
2. *Reasonable rule or order.* Was the employer's rule or order reasonably related to the orderly, efficient and safe operation of the employer's

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[41] F. Elkouri and E. Elkouri: *How arbitration works* (Washington, DC, Bureau of National Affairs, 4th ed., 1985), pp. 652-653.

[42] Ibid.

[43] J. McKelvey: "Discipline and discharge", in A. Zack (ed.): *Arbitration in practice* (Ithaca, New York, ILR Press, 1984), pp. 88, 89.

[44] J. Dunsford: "Arbitral discretion: The tests of just cause", in *Proceedings of the Forty-Second Annual Meeting of the National Academy of Arbitrators* (Washington, DC, Bureau of National Affairs, 1990), pp. 23, 24.

[45] McKelvey, op. cit., p. 89.

[46] R. Abrams and D. Nolan: "Toward a theory of 'just cause' in employee discipline cases", in *Duke Law Journal* (Durham, North Carolina), 1985, pp. 594, 595.

[47] Riley Stoker Corp., 7 Lab. Arb. (BNA) 764 (1947) (Platt, Arb.).

[48] Whirlpool Corp., 58 Lab. Arb. (BNA) 421 (1972) (Daugherty, Arb.).

business and to the performance that the employer might properly expect of the employee?

3. *Investigation.* Before administering the discipline, did the employer make an effort to discover whether the employee had in fact violated or disobeyed a rule or order?
4. *Fair investigation.* Was the employer's investigation conducted fairly and objectively?
5. *Proof.* At the investigation, did the "judge" obtain substantial evidence of the employee's guilt?
6. *Equal treatment.* Has the employer applied the rules, orders and penalties even-handedly and without discrimination to all employees?
7. *Penalty.* Was the degree of discipline administered by the employer reasonably related to the seriousness of the employee's proven offence and record of service?

Although these tests are widely accepted, they have also been criticized for making the process too mechanical.[49]

A cardinal principle in just cause determination under collective bargaining agreements is the concept of progressive or corrective discipline. While some collective bargaining agreements expressly mandate that discipline must be progressive, not punitive in nature, many (if not most) are silent on this matter. None the less, arbitrators frequently imply an obligation by the employer to follow principles of corrective discipline before resorting to the ultimate sanction of discharge.[50]

The degree of penalty should be related to the seriousness of the offence.[51] Extremely serious offences, such as stealing or persistent insubordination, usually justify summary discharge without the necessity of prior attempts at corrective discipline. Less serious offences, such as careless workmanship or tardiness, call for a penalty inferior to discharge for the first offence.[52]

Although the employee's past record may not be used to prove present guilt, it may be considered when evaluating the propriety of the penalty. An offence may be mitigated by a good past record or long service with the employer and, conversely, it may be aggravated by a poor work record. Penalties may be reduced where the employer has previously condoned the violation of the rule in the past, leading employees reasonably to believe that the conduct in question is sanctioned by management.[53]

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[49] Dunsford, op. cit., pp. 37-38.

[50] McKelvey, op. cit., p. 91.

[51] Elkouri and Elkouri, op. cit., p. 670.

[52] Huntington Chair Corp., 24 Lab. Arb. (BNA) 490, 491 (1955) (McCoy, Arb.).

[53] Elkouri and Elkouri, op. cit., pp. 679, 682, 684-85.

D. Individual contracts of employment

Historically courts have held that, when a formal written employment contract has been entered into, discharge of the employee before the end of the contract gives rise to liability under ordinary breach of contract principles.[54] However, most employees are not covered by individual contracts of employment.

II. Procedures

The decision to discharge an employee is normally made by supervisory or management personnel. Frequently the decision must be approved or reviewed by a high-level manager, such as the personnel director or plant manager. If the employee is represented by a union, many collective bargaining agreements require that both the employee and the union be given notice of the discharge. Except as specified in a collective bargaining agreement, no particular form of notification or recording of the disciplinary action is required.

A. Discharge of non-union employees

Most complaints involving employees not represented by a union are resolved by management.[55] In recent years employers have devised various systems for providing hearings before impartial arbitrators of grievances submitted by employees who do not have union representation.[56] In some systems the employer alone selects either a permanent arbitrator or a neutral hearing officer. Other systems allow the grievant to choose the arbitrator from a list. More frequently, however, an employee's claim to have been wrongfully discharged is heard in a state or federal court.

B. Discharge of unionized employees

1. Grievance procedures

Collective bargaining agreements generally contain a grievance procedure, providing a method for the union and the employer to resolve

[54] Perritt, op. cit., section 4.1.

[55] W. Rentfro: "Employer-promulgated arbitration", in *Proceedings of the Forty-Third Annual Meeting of the National Academy of Arbitrators* (Washington, DC, Bureau of National Affairs, 1991), p. 195.

[56] A. Walt: "Employer-promulgated arbitration", ibid., p. 189.

The preferred method of enforcement under the model Uniform Employment Termination Act is arbitration by professional arbitrators appointed by an appropriate state administrative agency. The arbitrator's award would be subject to limited judicial review. The Act also provides, as an alternative, for adjudication by an administrative agency or by a court.

claims that discharge was not for just cause. If the grievance cannot be resolved by the parties, most agreements provide that the grievance can be appealed to arbitration.

2. Arbitration by neutrals

Most labour arbitrations are conducted on an ad hoc basis with an arbitrator selected by the parties to the collective agreement to decide a single case. Parties with many arbitration cases often prefer the same arbitrator (sometimes called an "umpire") to hear all their cases. Some parties use a permanent panel of arbitrators, selecting several to hear all their cases in rotation.[57] An arbitrator may be contacted directly or may be found with the assistance of a referral agency. Referral agencies maintain lists of arbitrators who have been screened and judged to be qualified by experience, training and character.

There are nearly 3,500 labour arbitrators in the United States, of whom approximately 16 per cent are full-time; most of the rest are university teachers. More than half have law degrees.[58]

The burden of proving that the discharge was for just cause is on the employer. Where the employer alleges misconduct of a criminal nature or involving moral turpitude, some arbitrators require proof beyond reasonable doubt. For lesser offences, the standard may be either preponderance of the evidence or clear and convincing proof.

While arbitration is a private forum that on the face of it operates independently of the courts, it has a well-defined legal status and is subject to judicial review.[59] The United States Supreme Court has recognized a congressional policy favouring the settlement of labour disputes through arbitration, and has mandated that judicial self-restraint be exercised in reviewing arbitration awards, where the parties have agreed to use this method for resolving grievances.[60]

Although either party may seek judicial review of an arbitrator's award, a mistake on the arbitrator's part will probably not be grounds for annulling the award. A court may annul it for the following reasons:

1. The award was procured by corruption, fraud or other undue means.
2. There was evident partiality by the arbitrator.
3. The arbitrator exceeded his or her powers or the award did not draw its essence from the contract.
4. The arbitrator refused to postpone the hearing upon sufficient cause.

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[57] Bornstein, op. cit., section I.03.

[58] Ibid., section I.106[1].

[59] Ibid., section I.04.

[60] See J. Grenig and R. Estes: *Labor arbitration advocacy* (Salem, New Hampshire, Butterworths, 1989), p. 7.

5. The arbitrator refused to hear relevant evidence.
6. There was no agreement to arbitrate.[61]

3. Arbitration without neutrals: Joint committees and boards

In a number of industries, grievances are heard and resolved without calling in an outside arbitrator. In the building trades industry, for example, they are handled by joint union and employer boards.

A number of contracts between employers and the Teamsters Union provide for resolution of grievances by joint committees.[62] Some of the Teamster contracts provide "open-ended" procedures, meaning that the parties are permitted economic recourse (e.g. strike action) if the joint committee reaches a deadlock at the final stage of the grievance procedure; others provide for arbitration by a neutral party in some or all cases if the joint committee cannot reach a majority decision. All or almost all joint committees provide for hearings before, as well as final and binding decisions by a majority vote of, a committee that consists of an equal number of employer and union appointees. Officials of the local union and representatives of the company involved do not sit on any of their own cases. In most cases, representatives of the parties (i.e. the union and the employer) present the facts orally. Signed statements from witnesses are normally accepted. Attorneys for the parties and the grievant may be present, but do not present their cases. The grievant is notified of the hearing and given the right to be heard in his or her own behalf.[63]

III. Remedies for improperly discharged employees

A. Wrongful discharge

Under traditional contract theories, make-whole remedies (measures restoring the economic status quo that would have obtained but for the employer's action) are based upon the expectations of the parties and consist of back pay and lost benefits. Contract damages do not normally include compensation for emotional suffering or damages intended to punish the offending party. Courts have generally been reluctant to order employees to be reinstated, but may award damages for the loss of future earnings, if those losses are reasonably foreseeable consequences of the discharge. A discharged employee has a duty to mitigate such losses by making a reasonable effort to find and accept similar employment.

[61] Ibid., p. 6.

[62] See D. Feller: "Arbitration without neutrals", in *Proceedings of the Thirty-Seventh Annual Meeting of the National Academy of Arbitrators* (Washington, DC, Bureau of National Affairs, 1984), p. 106.

[63] G. Miller: "Teamster joint committees: The legal equivalent of arbitration", ibid., p. 118.

Under the tort theory, actual damages are available, as well as punitive or exemplary damages. Damages include compensation, not only for lost wages and benefits, but also for emotional suffering. Where the relief is based on the public policy exception to the employment-at-will doctrine, some courts award damages based on the contract theory,[64] while others award damages based on the tort theory.[65]

Remedies under the model Uniform Employment Termination Act are limited to reinstatement, with or without back pay, and severance pay when reinstatement is not feasible. Compensatory and punitive damages are eliminated, but attorneys' fees are allowed to a prevailing plaintiff.

B. Breach of the "just cause" standard in a collective bargaining agreement

An arbitrator who finds that there was not just cause for the discharge may order that the discharge be reduced (e.g. to a three-day suspension) or expunged. An arbitrator may order reinstatement with back pay and restoration of lost benefits and seniority, or may make reinstatement conditional upon the employee's showing proof of physical or mental capacity to perform the job. Infrequently, an arbitrator orders reinstatement without back pay.

IV. Conclusion

The small percentage of private sector employees in the United States represented by labour unions enjoy the protection of "just cause" provisions and binding grievance arbitration. For those not so represented, the employment-at-will doctrine gives employers extensive power to discharge. The rapidly developing judicial exceptions to the employment-at-will doctrine have imposed some limitations on the discretion of employers to discharge employees, but generally the decisions have opened only narrow breaches in the doctrine and have not been consistent from state to state. Furthermore, wrongful discharge actions require judicial intervention with resulting costs and delays.

The model Uniform Employment Termination Act addresses the problems of the costs and delays of judicial intervention and seeks to provide a uniform standard. However, it remains to be seen how many states, if any, will adopt the Act. Federal legislation limiting the power of management to discharge employees appears to be unlikely.

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[64] See, for example, Brockmeyer *v.* Dun and Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

[65] See Larson and Borowsky, op. cit., Vol. 1, section 9A.01.

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