AN EXAMINATION OF THE STATUS OF EMPLOYMENT-AT-WILL IN THE STATE OF MICHIGAN

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ABSTRACT

The common law doctrine of employment-at-will has been in existence for centuries. Under this doctrine, the employer has been granted the privilege of controlling the employment practices as far as hiring and firing. Certain groups of employees have protection from unfair dismissal. These groups consist mainly of government employees, tenured employees, and those protected from discrimination by law. The largest number of employees in the American workforce are presently without any protection from unfair dismissal. The problem that this creates is one in which approximately 70% of the American workforce has no job security--they can be fired indiscriminately without any recourse to statutory appeal. In the absence of statutory protection, court cases are expensive and lengthy prohibiting an average worker from initiating an appeal.

The author has chosen to examine the current status of employment-at-will in the State of Michigan. The examination has included a review of the literature; an investigation of previously unsuccessful legislation; and interviews with scholars, lawyers, business groups, and government leaders addressing the issues surrounding employment-at-will.

INTRODUCTION

The relationship between an employer and an employee has always been considered to be a "private" matter subject to the internal controls of the employing agency. This relationship has been called employment-at-will which is simply defined as the employer's right to fire at any time without giving a reason.

The employment-at-will doctrine has been in existence for over one hundred years. It was addressed in an 1884 Tennessee court decision: ". . . All may dismiss their employee(s) at will, be they many or few, for good cause, for no cause, or even for the cause morally wrong without being thereby guilty of legal wrong."[1] The concept of mutuality has been used to explain this doctrine. Behind this concept are the following beliefs:

1) Since the employee has the right to quit, the employer should have the right to terminate.
2) In actuality, neither party expects that the employment will be permanent.
3) No one has anything to lose (i.e. the employee can always get another job and the employer can have someone temporarily cover the vacant job while someone new is trained).

This concept of mutuality evolved out of the nineteenth century English Common Law. This was predicated on a agriculturally dominated economy where a business was essentially small scaled and family owned. If a worker disagreed with working conditions, the employer had the power to dismiss him without question.

With the advent of the twentieth century and the change to an industrial economy, workers began to push for shorter work weeks, better wages, and more humane working conditions. As workers became more dissatisfied, voicing opposition to unimproved working conditions, the issue of job security became important. The passage of legislation known as the National Labor Relations Act (Wagner Act) in 1935 offered limited job security by prohibiting firing as a result of participating in union organizing activities or joining a union. It also identified conditions and terms for reinstatement and back pay for employees who were subject to unfair firing due to union activities, and established the National Labor Relations Board to enforce the law.

Recognizing that the Wagner Act gave American workers the right to organize and bargain, a tremendous growth in union membership took place during the next two decades. By 1940 almost nine million workers belonged to unions with a peak of over 17 million workers organized by 1954.[2] Union contracts outline the procedures for hiring and promotion, details of wage and benefit packages, and the penalties imposed for stated work rule violations. For any worker disagreeing with management, a grievance procedure outlines the steps which will

be utilized in a formal complaint process. When it comes to dismissal, most union contracts provide that workers can be discharged only for "just cause" or "for cause." Once a unionized employee has been dismissed, he has the support financially and organizationally of the union, providing that there is some merit to his cause.

Labor contracts today provide protection to approximately twenty percent of the work force in the event of an unfair dismissal. Of the remaining work force, fifteen percent are governmental employees and the remaining sixty-five percent unrepresented.[3] Employees who work for the federal or most state governments benefit by having well designed civil service appeal procedures in effect for protesting an unfair dismissal. Disregarding then the unionized employees and governmental employees, the majority of American workers have no protection for their own job security, unless they can be identified as a member of specifically protected groups (such as those protected from discrimination on the basis of race, sex, age, national origin, etc.).

What follows is an examination of the issues surrounding employment-at-will. A review of the literature discusses the scope of employment-at-will and the issues that are involved. The literature review discusses attempts made by state, federal, and international groups to either support or reject this concept. Proposals offered in the Michigan legislature are discussed for the purpose of analyzing the impact of a statutory remedy. Personal interviews are conducted with representatives of state groups (scholars, lawyers, businessmen,

and government employees) to highlight their current positions on a statutory remedy.

FOOTNOTES

[1]S. Abbasi et al., "Employment at Will: An Eroding Concept in Employment Relationships," Labor Law Journal 38 (January 1987):21.

[2]Thomas A. Kochan et al., The Transformation of American Industrial Relations (New York: Basic Books, Inc., 1986), p. 35.

[3]Mary Bedikian, "Safeguarding the Interests of At-Will Employees: A Model Case for Arbitration," Detroit College of Law Review 1986 (Spring 1986):46.

REVIEW OF RELEVANT LITERATURE

FEDERAL LEGISLATION

The Federal Civil Service Act of 1883 provided most federal employees with the first protection against arbitrary dismissal. It prohibited dismissal for reasons which had nothing to do with the job. Using this as a model, many states proceeded with replicating this legislation for state civil service employees. Procedures were initiated to outline steps in disciplinary and dismissal processes with safeguards inserted so as to provide adequate notice and justifiable reasons to the employee.

The Wagner Act of 1935 offered employees protection from retaliation by an employer for involvement in union organizing and bargaining. Amendments to this act in the form of the Taft Hartley Act of 1947 provided reciprocal management rights to the employer. Revised legislation throughout the years has provided the National Labor Relations Board with the responsibility for monitoring certain disputes between discharged unionized employees and employers. Within the terms of most union contracts, employers are guaranteed the right to discharge an employee without having to prove "just cause" in their probationary period. However, once an employee has completed the probationary period, the contract generally requires that the employer

provide justification. Union contracts specify acts of misbehavior which can lead to disciplinary action or dismissal based on severity. Once these acts are proven, it will usually constitute "just cause" for dismissal. The dismissed employee has recourse through the grievance procedure. In the event that agreement cannot be met in any of the grievance procedure steps, arbitration may be sought. Stieber states that:[1]

> ". . . In about half of all discharge cases appealed to arbitration under the collective bargaining agreements, the arbitrator finds just cause for the discharge . . . in over fifty percent of all discharge cases, the employer did not present sufficient evidence to satisfy an arbitrator that the discharge was justified. In such cases, arbitrators usually reinstate the grievant to his former job with full, partial, or no back pay depending upon the circumstances in each case."

In non-unionized settings voluntary arbitration is being advocated as a workable method to handle disputes in the private sector. Duke University initiated a formal procedure from grievance to arbitration in 1984.[2] Statistics for the first three years demonstrate that with the number of terminations remaining relatively constant, the number of discharge grievances has decreased from 55 in 1984, to 29 in 1985, and to 12 in 1986. Also the number of cases taken to arbitration has been reduced from 15 in 1984, to 6 in 1985, and to 5 in 1986. Management estimates that the cost of each of the arbitration cases has averaged $1,500 and none of them have resulted in the initiation of a court case. Montgomery Ward in its California offices has initiated a formal procedure with the first step review by management, a second step review by an impartial committee comprised

half of management and half of peers, followed by the third step of arbitration. These organizations point out the advantages that these formal procedures offer them:

1) Arbitration is faster than the judicial court system.
2) Arbitration is less costly than the judicial court system.
3) It has a positive effect on employee relations and has deterred unionization.
4) It improves management practices.

In the 1960's several pieces of national legislation were enacted to prohibit discrimination against specific groups. Title VII of the Civil Rights Act of 1964 provided protection against dismissal on the basis of race, color, religion, sex, or national origin. The 1967 Age Discrimination in Employment Act prohibited dismissal on the basis of advancing age. This was amended in 1986 to prohibit discrimination against individuals between the ages of 40 and 70 years of age.

In the 1970's other protections were added:

1) Viet Nam Era Veterans Readjustment Assistance Act of 1974;
2) Veterans Reemployment Rights;
3) Rehabilitation Act of 1973;
4) Whistle Blower protection through the Occupational Safety and Health Act.

For several years following the enactment of each of these statutes, there was very little change. Suddenly in the 1970's and 1980's the picture changed dramatically. Employees were utilizing the legislation to defend their employment situations. Some authors have suggested that an assault occurred on employers by discharged employees. The title of one article in a management journal, Health Care Supervisor, entitled "Employee Clout: Who's Running This Organization, Anyway?" traces the changing status of the relationship between the employee and employer just in terms of the protection offered by these pieces of legislation.

In 1980 during the second session of the 96th Congress, the Corporate Democracy Act (HR 7010) was introduced.[3] It was a proposal to amend the National Labor Relations Act to provide all employees the security of their employment by limiting the right of employers to discharge freely. The proponents of this bill sought to offer protection to the non-unionized sector. The proposal was defeated by strong opposition from business groups opposing additional rights for employee groups. Business groups feared that this would be an outright imposition on their management rights. Despite the fact that this bill failed to gain support, there is still evidence that supporters have not given up on their cause.[4]

STATE LEGISLATION

Several states have proposed legislation to prohibit unjust dismissal. Between 1981 and 1983 Colorado, Michigan, Wisconsin, and

Pennsylvania introduced legislation to prevent employers from dismissing employees without just cause. All efforts were defeated. In 1984 and 1985 California introduced legislation, then joined the list of states in which this issue had been defeated.[5]

Michigan's legislation was introduced by Representatives Emerson and Bullard in HB 5892 on June 17, 1982.[6] The major components of this legislation were:

1) Exemption for organizations with less then ten employees;
2) Exclusion of certain types of employees (those covered by collective bargaining agreements; those with less than six months of employment; those considered to be "confidential" or "managerial" employees; those who had filed an action against their employer in court; those protected by civil service and tenure; and those with written contracts);
3) Employers were required to provide reason(s) for dismissal of employee at time of discharge, followed by justifications in writing by registered mail within 15 days of termination;
4) Employees may select the right to arbitration within 30 days of receipt of letter;

5) Employee and employer were to share equally the expenses of an arbitrator; other expenses would be the responsibility of side initiating them;

6) Informal arbitration proceedings would take place within 60 days of the appointment of the arbitrator; the award to be made within 30 days;

7) Types of awards:

   a) Sustainment of the discharge;

   b) Reinstatement with no back pay;

   c) Reinstatement with partial back pay;

   d) Reinstatement with full back pay; or

   e) Severance payment;

8) Awards are final and binding. Employee has the option to take a decision to circuit court only if:[7]

> ". . . the arbitrator was without or exceeded his jurisdiction; the award is not supported by competent, material, and substantial evidence on the whole record; or the award was procured by fraud, collusion, or other similar and unlawful means."

A hearing was conducted on the Michigan proposed legislation, but the bill did not have enough support for it to receive additional action.

Meanwhile Montana has been successful as the first state to pass legislation protecting employees against unjust dismissal. The "Wrongful Discharge From Employment Act" became effective July 1, 1987.[8] Provisions include:

1) Definition of wrongful discharge;

a) Retaliation from employer for the employee's refusal to violate public policy;

b) Discharge without just cause after completion of the probationary period.

c) Violation by the employer of his own written personnel policies;

2) Awards specify:

a) Only lost wages and fringe benefits (including interest) for a period not to exceed four years from the date of discharge; interim wages earned by the discharged employee will be subtracted from award;

b) Punitive damages are restricted to those allowed by law;

3) Excludes:

a) Those covered by collective bargaining agreements;

b) Those with written contracts of employment;

c) Those who are contesting a dismissal on grounds of another statute or procedure;

4) Provides for arbitration within 60 days of selection of an arbitrator; award to be made in 30 days;

5) Allows employees who win awards to have the costs of arbitration and attorney fees paid by the employer;

6) Renders the arbitrator's decision as final and binding.

OTHER COUNTRIES

Foreign countries have been successful in obtaining legislation to protect their workers against unfair dismissal. Great Britain passed the British Industrial Relations Act in 1971 which provided for industrial tribunals to hear the appeals of dismissed workers.[9] Since sixty percent of the British work force was unionized, previous protests against unjust dismissals were in the form of wildcat strikes. It is reported by Professor B.A. Hepple, Chairman of Industrial Tribunals from England that this legislation:[10]

1) Has encouraged employers to have voluntary disciplinary procedures;
2) Has been completely accepted by the unions who feel that it has aided their growth;
3) Has rendered decisions in an average of 8-10 weeks; and
4) Has been modified to:
    a) Make the employer pay for the costs if he is responsible; and
    b) Not apply to institutions with less than twenty employees.

French workers can appeal their dismissals to a labor court where they are judged by their peers.[11] In the event that a tie needs to be

broken, a professional judge will be introduced in the decision making. Awards consist of damages only. West German courts may order reinstatement and back pay in cases of unjust dismissal.[12] Sweden utilizes a strong grievance procedure with a Joint Labor Market Council as a final arbitration board.[13] In summary, the United States is an exception to the labor relations practice of industrialized countries around the world which protect against unjust dismissal.

At the 1982 International Labor Organization (a body of the United Nations), representatives of employers from six out of one hundred twenty-six countries voted against an unjust dismissal recommendation.[14] The United States was one of the dissenting countries. Since the Convention of the ILO sets forth basic minimum protections which every nation should abide by, the United States position demonstrated being out of step with world standards.

THE COURTS

In the absence of appropriate statutory law, the employee who has been fired unfairly has generally had recourse through the court system. Protection has been obtained in some cases through three exceptions to the employment-at-will doctrine.

1) PUBLIC POLICY EXCEPTION. The public policy exception argues that the employer can't fire an employee for reasons that would violate public policy. It argues that the law must be upheld for the benefit of the public or society. There are

commonly three areas in which the public policy exception comes into effect;

a) Discharge for whistle blowing;

b) Discharge in retaliation for exercising a statutory right; or

c) Discharge in retaliation for refusing to commit an illegal act.

In Palameteer v. International Harvester,[15] the discharged employee reported information to the policy after another employee engaged in criminal activity. The court ruled in the discharged employee's favor, since had it not done so, it would not have enforced state law. In Hauck v. Sabine Pilots Service the discharged employee was rewarded for refusing to pump wastes illegally into the Gulf of Mexico.[16] In Nees v. Hocks the court awarded the discharged employee her right to serve on a jury despite the employer's protest.[17] In Sventko v. Kroger Michigan courts ruled in favor of the discharged employee who was fired for filing a worker's compensation claim.[18] The Occupational Health and Safety Act along with state statutes (Michigan Whistle Blower statute) give protection to employees for reporting

conditions or acts which are to the detriment of public safety.

2) GOOD FAITH EXCEPTION. The good faith exception is based on contract law. Under contract law one promises the other that you will act fairly and in good faith. In terms of employment, it provides the employee with property rights, in that the job cannot be taken away except through a fair process. There are numerous court cases in which the discharged employee has been able to use this rule in his/her favor. In Monge v. Beebe Rubber, a female employee was demoted and harassed and subsequently fired, because she refused to date her supervisor.[19] The court supported the employee's claim. In a controversial claim (Toussaint v. Blue Cross of Michigan) good faith and fairness extended to employment expectations in the absence of a bonafide written contract (i.e. good performance linked with job assurances).[20] The employee was discharged after five years with Blue Cross without cause. The rationale of the court awarding in Toussaint's favor fell back on promises which were made by the employer to induce the employee to join the company along with assurances that led him to

believe that he would have a job as long as his performance was satisfactory. The court ruled that these verbal assurances were the equivalent of a written contract. In Chamberlain v. Bissel, Inc. the employee worked 29 years without a warning of declining performance.[21] He was awarded $61,100 even though his performance was questionable. The reason provided by the court in support of the discharged employee was that the performance evaluations were not detailed enough and did not provide him an opportunity to improve his performance prior to his dismissal. In Grand Rapids a Federal judge awarded over $60,000 in damages even though the employer had just cause to fire the employee. The court found the company liable for having failed to tell the employee at the performance review, that if he did not improve, he would be fired.[22]

3) <u>IMPLIED CONTRACT EXCEPTION</u>. The courts have interceded when an employer has stated that he will discharge only for good cause and he does not maintain this position. Such evidence may be found in employee handbooks, personnel manuals, application forms, stock-option plans, or simply in oral statements made in interviews. In Fortune

v. National Cash Register a 61 year old salesman with 40 years of service with a company was discharged. The testimony brought out that the company had done so in order to deprive him of benefits and bonuses to which he was entitled.[23] In Pugh v. See's Candies a vice president with an excellent track record of 32 years with the company was fired with no other reason than to "look deep within himself." The jury credited his length of service, promotions and awards, and lack of negative criticism of his work as serving to reinforce an implied contract for doing a good job.[24]

The employee who has been fired when working under a collective bargaining agreement with have the protection of the National Labor Relations Board in unfair labor practices. The courts have generally refused to hear cases under the NLRB jurisdiction, unless there has been an actual complaint of unfairness in the proceedings. It is generally understood that a discharged employee covered by the collective bargaining agreement will exhaust all avenues prior to court action. In cases which have subsequently been brought to court, the court may have to determine the degree of fairness. In Khalifa v. Henry Ford Hospital the discharged employee sued for breach of contract, after having filed unsuccessful grievances.[25] The court ruled that the employee had had a fair hearing and dismissed the case.

Most collective bargaining agreements specify the reasons for discharge, the penalties, and the steps involved in the employee desiring to appeal or grieve. The Michigan Courts have generally recognized the handling of disputes through arbitration, if the resolution has been by an "impartial arbiter."

In summary, the Federal government has taken a strong stand in protecting some selected groups of American workers from unjust dismissal. However, in comparison with other industrialized countries, the United States is the only one where workers do not have statutory protection against unjust dismissal. In addition, most countries have initiated an appeal process whereby the workers are guaranteed that this right will be administered fairly. The dissenting viewpoints of legal experts, legislators, employers, and scholars make it hard to envision a sudden change in this situation. Experts in the State of Michigan have been interviewed to determine whether there is any possibility of translating ideals into protected rights. Support for the concept that employees should be protected is continuing to grow. However, the various groups involved differ on their approaches to how this ought to be accomplished. The interviews are directed towards identifying the concerns of the legal experts, legislators, employers, and scholars within Michigan's employment setting.

FOOTNOTES

[1]Jack Stieber, "Employment-at-Will: An Issue for the 1980s," Industrial Relations Research Association Proceedings 36 (December 1983):2.

[2]Thomas Barnes and Jeffrey Rueble, "Making Wrongful Discharge Right," Michigan Bar Journal 66 (February 1987):129.

[3]Mary Bedikian, "Safeguarding the Interests of At-Will Employees: A Model Case for Arbitration," Detroit College of Law Review 1986 (Spring 1986):46.

[4]Jack Stieber and Michael Murray, "Protection Against Unjust Discharge: The Need for a Federal Statute," University of Michigan Journal of Law Reform 16 (Winter 1983):339.

[5]Sami M. Abbasi, Kenneth W. Hallman, and Joe H. Murrey, Jr., "Employment at Will: An Eroding Concept in Employment Relationships," Labor Law Journal 38 (January 1987):21.

[6]Jack Stieber and John Blackburn, Protecting Unorganized Employees Against Unjust Discharge (E. Lansing: Michigan State University, 1983):169.

[7]Ibid., p. 173.

[8]Bureau of National Affairs, Individual Employment Rights Manual, (Washington, D.C.: BNA, 1987):70.

[9]Stieber, p. 46.

[10]Ibid., p. 135.

[11]Ibid., p. 50.

[12]Ibid., p. 54.

[13]Mary Green Miner and John B. Miner, Policy Issues in Contemporary Personnel and Industrial Relations (New York: Macmillan Publishing Co., 1977):418.

[14]Bedikian, p. 3.

[15]Palameter v. International Harvester, 421 NE2d 876 (1981).

[16]Hauck v. Sabine Pilots Services, 672 SW2d 322 (1984).

[17]Nees v. Hocks, 536 P2d 512 (1975).

[18]Sventko v. Kroger, 69 Mich App 644 (1976).

[19]Monge v. Beebe Rubber, 316 A2d 549 (1974).

[20]Touissant v. Blue Cross, 408 Mich 579 (1980).

[21]Chamberlain v. Bissel, Inc., DC W. Mich (1982).

[22]Detroit News, 3 May 1987.

[23]Fortune v. National Cash Register, 364 NE2d 1251 (1977).

[24]Pugh v. See's Candies, Inc., 116 Cal App 311 (1981).

[25]Khalifa v. Henry Ford Hospital, CA 84582 (12/1/86).

THE CURRENT SITUATION IN MICHIGAN

Reaching across the educational, legal, and political arenas, the issue of employment-at-will or unjust dismissals has come in the limelight in the past five to ten years. This is evidenced by:

1) Professional journals in personnel management, labor relations, and the law have devoted numerous articles to this concept. The overall picture is that the common law concept of employment at will is eroding from the management perspective and that employee rights are gaining in strength. An opinion issued by the Texas Supreme court said, ". . . Absolute employment-at-will is a relic of early industrial times conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law."[1]

2) Despite legislation covering specific portions of the labor force, there is still a large employee group which remains unprotected. It is estimated that 15 percent of the work force are government employees, 20-22 percent are unionized with the remaining 60-65 percent being employment-at-will

based employees. This means that potentially almost 70 percent of the workers in the private sector could be dismissed without cause. It is estimated that approximately one million workers are discharged without a fair hearing, and 100,000 to 200,000 are discharged unfairly each year.[2]

3) The courts are becoming the arbitrators of labor relations conflicts in unjust dismissal cases. This not only becomes costly to both parties, but results in the courts making management decisions about hiring and firing practices which are important to the success of business.

4) The number of awards made to unjustly dismissed employees has grown. One lawyer has labelled Michigan as the "most anti-employer state in the nation."[3] It is estimated that when an unjust dismissal is tried in court, juries rule in favor of the employee 75 to 80 percent of the time. Damage judgments of $1.5 million, $4.7 million and in one instance $20 million have been awarded to employees discharged without cause. California is perhaps the state that has received notoriety for the large size of awards. However, actual studies have shown that an average award is more likely to be a little more than $500,000 in damages.

5) Professional journals are "prepping" employees on the precautions to take for their own protection in the event that they might be facing an unjust dismissal act.[4]

The problem of unfair dismissal being handled by the courts makes it less likely that the disadvantaged employee with fewer financial and educational resources will be able to seek recourse.

The purpose of this study is to investigate the current situation within Michigan by interviewing experts in the field. Sources to be interviewed were identified primarily as those individuals who had provided testimony to the House hearing in March 1984. Selecting these key sources was felt to be essential in determining whether the proposed movement for protection had been affected in the past several years. Open-ended questions were developed for the interviews. The focus of the interview questions were concentrated on identifying the current atmosphere toward unjust dismissal in Michigan; on determining whether a legislative remedy was possible; on identifying what events had taken place within the past year in the past five years to support or oppose a remedy; and what events were taking place in other states that may impinge upon Michigan. Following these initial questions, the interviewee was provided with the 1987 redraft of the legislation and asked for comments on the changes. The interview concluded with a statement inviting the interviewee to offer any other additional comments "off the record" on the subject.

UNSUCCESSFUL 1982 PROPOSAL IN MICHIGAN

Based on the attention that this subject has received in various types of professional publications over the past several years, and the little that has been published about the details of what specifically occurred in the State of Michigan, it was felt that an historical analysis of proposed legislation would be necessary. A series of interviews were conducted with prominent individuals who had vocalized their interests in legislative hearings.

This investigation into the current status of proposed unjust dismissal legislation is predicated on what took place five years ago. Representatives Robert L. Emerson and Perry Bullard introduced HB 5892 (later referred to in the hearings as HB 5155) on June 17, 1982. The bill was referred to the Judiciary Committee. On March 15, 1984 the House Judiciary Committee conducted a hearing. The following individuals and firms provided testimony:

PROPONENTS

Elaine Frost, Michigan Employment Relations Commission

Robert G. Howlett, Attorney with the firm of Schmidt, Howell, Van't Hof, Snell, and Vana, Grand Rapids

John Johnson, Attorney specializing in unfair dismissal cases

Lawrence Lee, Fired worker who successfully sued employer

Michael Pitts, Attorney specializing in employee-employer disputes on behalf of the Michigan Trial Lawyers Association

Bob Schneider, Representative of the Womens and Childrens Apparel Association

Jack Stieber, Professor and Director of the School of Labor and Industrial Relations at Michigan State University, East Lansing

OPPONENTS

Lynn Briggs, Executive Director of the Michigan Plumbers Council

Joe Golden, Attorney, Southfield (opposed to language, but supported concept)

Diane Pattinson, Staff Attorney with the Michigan Department of Labor, Director of Employment Relations

Sol Sperka, Staff Attorney with the Michigan Department of Labor

Richard Studley, Michigan Chamber of Commerce

David S. Zurvalec, Director of Industrial Relations for the Michigan Manufacturers Association

Robert Howlett's testimony was based on his having served as Member and Chairman of the Michigan Employment Relations Commission from 1963 to 1976.

> ". . . We had many visits, letters, and telephone calls from nonunion employees recounting discharges for reasons which were patently unjust. We had to tell them we had no jurisdiction over their complaints. They could not understand why a government which protected against discrimination because of race, religion, national origin, or sex could not protect them against their termination of employment."[1]

Mr. Howlett's testimony justified arbitration as a solution because ". . . court proceedings are too costly, they take too long, are too

remote from the work-a-day world, and the difficulty of implementing a decision is too great." In concluding he stated, ". . . If we believe the Declaration of Independence, the Constitution of the United States, and the Constitution of the State of Michigan, we will adopt legislation granting justice, fairness, and equity in the employment relationship to all employees in this state."

Jack Stieber, professor of Labor and Industrial Relations at Michigan State University appeared ". . . to testify in support of House Bill 5155 in my individual capacity and not as a representative of Michigan State University."[2] He presented his projections that Michigan would have approximately 235,000 terminations each year for non-economic reasons. Half of these would be for "just cause." Assuming that one out of ten of the balance filed for arbitration under the proposed legislation and half of these won, ". . . some 7,000 workers would be entitled to reinstatement or compensatory damages." He went on to state that the benefit of this legislation would be obvious to Michigan workers. It would also be less expensive for nonunionized employers to share the costs of arbitration than to engage in costly litigation with uncontrollable jury awards.

Elaine Frost, attorney, labor arbitrator, and past Commissioner on the Michigan Employment Relations Commission from 1980 to 1983 testified in favor of the proposed legislation. In her introductory statement, she stated, ". . . I am here because I think protection against unjust discharge should be the right of all Michigan workers. . . ."[3] Her testimony was mainly comprised of the proposed

changes in the language which she would recommend. What needed to be reflected in the law were provisions for:

1) Reducing the size of the firms covered by this act, since even firms with less than 10 employees ought to be covered;

2) Managerial employees;

3) Ensuring that employers communicate properly to the unjustly discharged employee to avoid misinterpretation and possible incrimination by having written published information about their rights under the Act and eliminating concerns about the oral notification of reasons for discharge;

4) Not overburdening the mediation staff at MERC;

5) Setting up an escrow account for payment of arbitration costs, or in the event the employee is unable to pay, holding the employer totally responsible for costs.

David S. Zurvalec, Director of Industrial Relations for the Michigan Manufacturers Association (composed of approximately 2,500 member companies) provided testimony against it for the following reasons:[4]

1) It would interfere with well-established provisions for handling grievances and arbitration in collective bargaining agreements.

2) Despite the bill's provision to exclude dismissals due to economic situations (layoffs), it is always conceivable that unnecessary arbitration and mediation may result as the employer defends his business conditions.

3) There is no well known definition for "just cause."

4) There are some procedural questions which have not been addressed. Are we going to need more mediators? Are there going to be problems resulting in the payment of arbitration costs or the failure to pay when the dismissed employee has lost?

5) The definition for "managerial employee" is extremely vague.

6) What will be the impact on unions? ". . . Why should employees pay union dues for what the Legislature gives for free?"

7) "The results of decisions in administrative proceedings in the Worker's Compensation and Unemployment Compensation areas have gravely injured Michigan's business climate and cost thousands of jobs." Mediators and arbitrators hired through this legislation will only serve to worsen the business climate.

8) There are a number of Federal and State statutes (National Labor Relations Act, Occupational Health and Safety Act, Civil Rights, Age Discrimination and others) which already provide adequate protection.

The final statement sums up the position the Michigan Manufacturers Association has taken:

> ". . . In conclusion, House Bill 5155 certainly has a laudable purpose. There can be no doubt that a truly unjust discharge is both unfair and is harmful to the economy. Nevertheless, common sense and an examination of the role of unions, court decisions and the statutes already in place must lead to the conclusion that this is unnecessary legislation. It may be that passage of the bill would eliminate a few terribly egregious cases of unjust discharge. Other than that, it will result in endless disputes, mediation, arbitration, and litigation. It will be one more reason that the cost of doing business in Michigan is higher than other states. The general good of the community is better served by not passing this bill, because the cost of protecting a very few is so great that it is contrary to the common good. A statement must be made that the State of Michigan cannot solve by legislative fiat every labor and social problem. The cost of solution is beyond the capacity of the taxpayers to bear. The line should be drawn at this bill."[5]

Transcripts of all of the presentations are not available from the hearing. Those that have been retrieved represent the main arguments presented in March 1984 for and against the proposed legislation. The bill has lain dormant over the past few years, since there was a lack of support to carry it any further.

FOOTNOTES

[1]Robert G. Howlett, "Testimony on House Bill 5155 Before the House Judiciary Committee, Lansing, Michigan, 15 March 1984.

[2]Jack Stieber, "Testimony on House Bill 5155 Before the House Judiciary Committee, Lansing, Michigan, 15 March 1984.

[3]Elaine Frost, "Testimony on House Bill 5155 Before the House Judiciary Committee, Lansing, Michigan, 15 March 1984.

[4]David S. Zurvalec, "Testimony on House Bill 5155 Before the House Judiciary Committee, Lansing, Michigan, 15 March 1984.

[5]Ibid., p. 8.

LEGISLATION CURRENTLY PROPOSED

Interviews utilizing open-ended questions were conducted in the fall of 1987. Sources who had voiced their opposition or support for the proposed legislation were contacted. In addition, new sources were identified from the review of the literature and referral from other interviewees.

LEGISLATIVE EXPERTS

John Hanson, Director of the Judiciary Committee Staff in Representative Perry Bullard's office stated that the original "Michigan Unjust Dismissal Act" proposal of 1982 had been redrafted and renamed the "Michigan Fair Employment Practices Act." This draft reads:[1]

> "The People of the State of Michigan Enact:
> Sec. 1. This act shall be known and may be cited as the 'Michigan fair employment practices act.'
> Sec. 2. As used in this act:
> (a) 'Discharge' means an involuntary dismissal from employment. Discharge includes constructive dismissal in the form of a resignation or quit that results from an improper or unreasonable action or inaction of an employer.
> (b) 'Employee' means a person who has worked for an employer for wages or other renumeration under a contract of hire, written or oral, express or implied, for not less than 15 hours per week for at least 90 days. Employee includes a person employed by the state or a political subdivision of the state, except an employee in the state classified civil service.

Employee does not include a person who has a written employment contract of not less than 2 years and whose contract requires not less than 6 months' notice of termination.

(c) 'Employer' means a person who employs 10 or more employees, and includes an agent of an employer.

(d) 'Person' means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

Sec. 3. (1) An employer shall not discharge an employee except for just cause.

(2) An employer who discharges an employee shall notify the employee in writing by registered mail within 15 calendar days after the discharge of all reasons for the discharge and of his or her right to bring a civil action against the employer under this act.

Sec. 4. (1) An employee who alleges a violation of section 3 may bring a civil action within 90 days after the occurrence of the alleged violation.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his or her principal place of business.

Sec. 5. A court, in rendering a judgment in an action brought pursuant to section 4, shall order, as the court considers appropriate, reinstatement of the employee, the payment of full or partial back wages, future wages of not more than 6 months, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies. A court shall also award a complainant who prevails in his or her action all of the costs of litigation, including reasonable attorney fees and witness fees.

Sec. 6. An employer shall post a copy of this act or a summary of this act in a prominent place in the work area. Directly above the copy or summary of the act an employer shall post a sign in capital letters not less than 2 inches high stating the following: STATE LAW PROTECTS EMPLOYEES FROM UNJUST DISCHARGE.

Sec. 7. (1) An employer who violates this act shall be liable for a civil fine of not more than $2,000.00.

(2) A civil fine that is ordered pursuant to this act shall be submitted to the state treasurer for deposit in the general fund of the state.

Sec. 8. This act shall not diminish or impair the rights of an employee under a collective bargaining agreement. However, an employee who has the propriety of his or her discharge arbitrated pursuant to a collective bargaining agreement is barred from seeking relief for that discharge under this act."

The proposed legislation has been reviewed by attorneys, and Representatives H. Lynn Jondahl and Virgil Smith, Jr. have agreed to co-sponsor it. At this point the proposed bill has not been presented to the Speaker of the House for a first reading. Sharon Miles, Judiciary Committee Aide assigned to this bill, has ". . . no idea of when it will happen." Neither source was able to identify the rationale that went into drastically changing the remedy sought for unjust dismissals. To go from a recommendation of arbitration in 1982 to civil court action in 1987 is a significant change.

Richard A. Bandstra of the Michigan House of Representatives (also a member of the Judiciary Committee) has supported Bullard's proposal. He states, ". . . The perception since the Toussaint ruling is that this area is a mess! Both employees and employers can't tell what their rights are. The employers assume they have 'just cause' when severing a person only to find out later that they are involved in a costly litigation to defend their decision."[2] He believes that the picture is changing very slowly in three ways:

1) Employees are more knowledgeable about their rights in the workplace.

2) Employers are more concerned about Toussaint about management practices, such as what a supervisor says about performance or the long term obligation of the employer towards the employee.

3) ". . . I have heard a rumor that the union position is changing, but I don't have anything concrete to vouch for it. . ."

Whether or not there is future support for Bullard's proposal, Bandstra relates that he's been considering another alternative, but isn't ready to push it yet. That alternative would be comprised of 3 solutions:

1) Set up a statutory system by which employees and employers would know whether they have "just cause" for dismissal.

2) An employer would follow certain methods of communication to indicate that he was an employment-at-will employer.

3) If choosing to be an employment-at-will employer, the employer would be required to visibly post such notices in the work place and annually review this policy with employees. Providing the employer did so, state statute would thereby provide immunity to the employer from prosecution

in the event of a dismissal in which the employee disagreed with the employer.

Within the legislative arena, there is no doubt that some form of legislation would be desirable. It does seem, however, that the agreement as to the best remedy is far from being determined.

LABOR RELATIONS EXPERTS

Jack Stieber has received national attention in his advocacy of arbitration as a remedy to unjust dismissal for nonunionized employees. Much of the working in the original design of the 1982 "Michigan Unjust Dismissal Act" was written by Jack Stieber, Director of Labor Relations at Michigan State University and T. St. Antoine, Law Professor at the University of Michigan-Ann Arbor.[3] His view that arbitration is the appropriate remedy for unjust dismissal is based on two primary reasons:

1) The courts are not as competent as arbitrators in establishing reasons for "just cause." Arbitrators have dealt with grievances on dismissals over and over to the point where their experience is very consistent.
2) The courts are too expensive. The common every day worker cannot afford legal fees when he has no income coming in.

These reasons are the ones that strengthen his conviction holding him to the same position as declared in the 1984 hearing.

He relates, ". . . It isn't difficult for an employer to prevent unjust dismissal litigation . . . He just does not have to break the law or make any promises that he can't keep." Stieber feels that employers have initiated two practices over the past five years basically due to the threat of being sued. ". . . They have obtained signed consent statements from prospective applicants on application forms, or upon hiring having the employee acknowledge that the employer is an 'employment-at-will' employer . . . And they have chosen to be a 'just cause' employer with careful training of supervisors, frequent performance appraisal, and other good personnel management practices. . ."

Jack Stieber upon hearing of the redrafted "Michigan Fair Employment Practice Act," stated that he could not endorse it. He is opposed to the courts handling these cases. He states, ". . . The people winning big awards are upper level employees in management--they know their rights; they can easily go to a lawyer; they can afford to start a suit; and the lawyers recognize that there will be sizeable recoveries . . . By my supporting arbitration, even the lowest paid worker would have protection. . . ."

Jack Stieber has also become more of a proponent of Federal rather rather than State legislation as being the best alternative. This would model the protection under a Federal statute under an existing agency such as the National Labor Relations Act.

During the past several years in addition to the changes initiated by employers and the awards made by the courts, Mr. Stieber feels that we are yet to see the total impact of two other significant actions. The first is union support for unjust dismissal. At this point the UAW, American Civil Liberties Union, and the AFL-CIO have supported it. At the February 20, 1987 Executive Committee of the AFL-CIO in Bal Harbour, Florida, the following resolution was passed:[4]

> "The general acceptance in the United States of the concept that employers are entitled to dismiss employees at any time, without notice, for any reason whatsoever puts some 60 million non-union workers at risk. It is estimated that of these, roughly 150,000 workers are unjustly discharged each year. And, the 'employment-at-will' doctrine adversely affects all who are potentially subject to their employer's unbridled caprice by denying these workers their natural right to be treated fairly and with respect . . . Over the past several years, the courts in a number of states have made limited inroads on the employment-at-will doctrine. These belated judicial developments, while of course welcome, do not correct the essential conflicts between the employment-at-will doctrine and the legitimate concern of workers . . . The judicial exceptions to the at-will-doctrine suffer as well from serious practical limitations . . . our policy is to support measures that safeguard workers against discharges without cause . . . What is worthy of our support and of enactment is legislation . . . an unjust discharge law must contain at least the following elements:
>
> -a prohibition on discharges without cause. . .
> -financing to assure that discharged employees will be able to enforce their statutory rights. . .
> -prompt review of discharge decisions by an independent tribunal. . .
> -mandatory reinstatement for any employee who is found to have been discharged wrongfully. . .
> -full compensation for losses sustained as the result of a wrongful discharge. . .
>
> The AFL-CIO calls upon the Congress and the state legislatures to enact laws containing these essential

> protections. We comment our active support to this important goal at the national level and urge the state central bodies to press for the enactment of such laws at the state level."

The second action which will no doubt have a greater impact is that of Montana's "Wrongful Discharge From Employment Act" which became effective July 1, 1987 (Appendix IV). Mr. Stieber feels that ". . . once one state has taken the initiative, others will jump on the bandwagon . . . which is still why I prefer a Federal statute . . . A Federal statute won't ruin the Michigan image as not favoring business, which is what the Chamber of Commerce and others have believed."

Mr. Stieber feels that Michigan has been singled out and linked with California as states which have given exceedingly high awards. He states, "This really isn't as strong as we expect . . . California awards do tend to run in the millions, but the largest award in Michigan was initially $750,000, but even that was scaled down to $500,000 without punitive damages." Trying to obtain a realistic picture of the number of cases and awards is extremely difficult. Mr. Stieber has just completed a study of the published dismissal cases in Michigan (only Appeals Court and Supreme Court cases are published, lower court decisions are not). In examining the 6 year period from 1980 to 1986, 40 unjust dismissal cases were brought to the Appeals Court.[5] Of these the majority utilized the implied contract exception with 60% of the cases awarded to the defendant and 40% to the plaintiff. Of the 9 utilizing the public policy exception, awards were made evenly. These 40 cases represent only a small fraction of

the total number of Michigan cases. The majority would have been handled through mediation or arbitration under collective bargaining agreements. "Researching the end award of civil court cases is difficult as the judge may negate the jury decision; the judge may decrease the award; the case may be appealed, overturned, or scaled-down; or the parties may settle anywhere inbetween. . .," says Stieber.

Stieber feels somewhat pessimistic about future state legislation being enacted. "It hasn't been considered a high priority; so I believe that it will take considerably more time and effort to see it accomplished."

Mary Sutton from the American Arbitration Association (Detroit office) states that the American Arbitration Association still endorses a voluntary rather than a statutory solution for unjust dismissal.[6] She states, "In the last five years, we have seen an increase in the number of employers wanting to get a handle on this problem . . . When employers come to us, we recommend rules and procedures which they can incorporate into their company handbooks. This will provide the nonunionized employer with something comparable to a grievance procedure . . . We had not been involved in taking a stand on the proposed state or federal legislation of the 1980's. . ."

She references Mary A. Bedikian's (the Michigan Region Vice President of the American Arbitration Association) article published in the Spring 1986 issue of the Detroit College of Law Review which reflects the author's own views.

EMPLOYER GROUPS

Richard Zurvalec as Director of Industrial Relations for the Michigan Manufacturers Association represents some of the largest companies in Michigan (General Motors, Ford, Chrysler, Dow Chemical, Detroit Edison, Consumers Power, and others). When asked whether his organization's position on unjust dismissal had changed since his testimony in 1984, he replied, "Our position is still the same . . . But we have seen a boom in litigation. Jack Stieber made two predictions several years ago. One, that court cases were going to increase against employers; and secondly, that as a result the employer-community would then embrace a legislative solution . . . He was right on the first, but not on the second. Litigation has gotten astronomical. Our association estimates that there may be 10,000 prospective cases statewide--many of which if disputed, would go to arbitration.[7]

"The problem that you run into when you deal with legislation granting a benefit or taking one away, is that there must be a strong supporter. If there isn't a champion in the labor area, it will die a quick death . . . This piece hasn't been viewed by labor as being 'friendly' . . . Labor sees the state providing job security as a threat," states Zurvalec.

When asked to explain the Association's recommendations to its members, he stated, "Employment contracts are recommended, plus tightening of the loopholes created by Toussaint (i.e. even though you

have written handbooks, not making statements in reference to your future with the company, providing satisfactory performance, etc.)."

LEGAL EXPERTS

Attorney Samuel McKnight, Labor Relations Section Chairperson of the State Bar of Michigan stated that there had been no official position taken by the State Bar on either the State or Federal legislation.[8] He recollected that "it generated a lot of debate," including publications in the Michigan Bar Journal by various lawyers. He does not feel that it is highly likely that the State Bar of Michigan would ever take a position on this due to the diversity of lawyers specializing on opposing sides of the issue.

Robert Howlett's position remains unchanged.[9] He is still a staunch supporter for legislation to promote arbitration. Having reflected on the last 12 years since he made his first public statement on unjust dismissal, he remains ". . . somewhat pessimistic . . . The problem is nonunionized employees don't have a constituency . . . The union is lukewarm . . . and legislatures act under pressure. There isn't an organized group to make this their 'cause' or 'crusade' . . . I'm pleased that Montana has passed legislation . . . Maybe other states will pick it up." When asked what his opinion was of the redrafted legislation, he responded, "I would very much oppose court action--it's too expensive and slow . . . Toussaint helped those who could afford a lawyer (middle management), but not the poor guy working for a fast food franchise. We need to

enable anyone who is fired to file a grievance, if they are dismissed with unjust cause, taking it to mediation or arbitration making the decision binding on the employee and the employer . . . I arbitrate cases in collective bargaining, feel that for the nonunionized employee a modest fee could be charged for negotiations, the State mediation service could be utilized, and a fast and relatively inexpensive remedy could be provided to the rank and file . . . ."

T. St. Antoine, Professor of Law at the University of Michigan-Ann Arbor has continued to advocate his position of a statutory remedy of arbitration.[10] He feels that within the past couple of years, the interest "has not diminished at all . . . There are signs that interest is increasing--especially on the national picture. Last year's 3 day meeting of the American Bar Association Labor and Employment Section in San Francisco dealt with unjust dismissal, blood testing, and employee privacy . . . The 38th Annual Advocacy Institute met for 2 days in May of 1987 in Ann Arbor focusing solely on wrongful discharge . . . There are more and more lawsuits . . . Attorneys are saying that this is becoming a growing area, what with the number of cases increasing. Actually it has been hard to determine the number of cases, but the figures that I have heard tossed about by the Bar Association indicate 5 to 10 thousand cases nationally. No one really knows, since the majority of the cases aren't reported. The ones that are filed are a very small minority.

"In addition this past year, the Commissioners on Uniform State Laws (a group of judges, practitioners, and scholars organized to

determine which laws have impact across state lines) have decided to draft one on Unjust Discharge. This, the February 1987 action of the AFL-CIO Executive Council, and the July 1987 success of Montana passing a state statute on wrongful discharge will impact slowly upon other states . . . It will be some time before this spreads, but I am hopeful that we will see some movement in this area."

When asked about the revision of Bullard's Michigan Fair Employment Practice Act, Professor St. Antoine stated, "I still favor arbitration . . . eliminating jury verdicts and the emotionalism associated with punitive damages. Employees ought to be entitled to reinstatement and back pay."

These primary leaders of our governmental, legal, educational, and business communities highlight the problems encountered in trying to enact legislation which will be seen as a benefit to the majority of the citizens. What is likely to happen within the State of Michigan?

FOOTNOTES

[1]Perry Bullard, "Michigan Unjust Dismissal Act," 6 July 1987.

[2]Richard A. Bandstra, telephone interview, 6 November 1987.

[3]Jack Stieber, interview, Michigan State University, East Lansing, Michigan, 11 November 1987.

[4]AFL-CIO Executive Committee, "Resolution on Unjust Dismissal," Bal Harbour, Florida, 20 February 1987.

[5]Jack Stieber, unpublished article for The University of Nebraska Law Review (to be published in 1988).

[6] Mary Sutton, telephone interview, American Arbitration Association, Detroit, Michigan, 16 November 1987.

[7] Richard Survalec, telephone interview, Michigan Manufacturers Association, Detroit, Michigan, 16 November 1987.

[8] Samuel McKnight, telephone interview, State Bar of Michigan, Lansing, Michigan, 17 November 1987.

[9] Robert G. Howlett, telephone interview, Grand Rapids, Michigan, 17 November 1987.

[10] Theodore St. Antoine, telephone interview, University of Michigan, Ann Arbor, Michigan, 18 November 1987.

COMPARISONS

The 1982 proposed Michigan legislation and the 1987 redrafted versions are quite different. Some of the changes are as follows:

1) The 1982 proposal provided mediation and arbitration as the remedy, whereas the 1987 proposal endorses civil court action.

2) Deleted from the 1987 proposal consequently are all references to the role of the Michigan Employment Relations Commission as the enforcer of the law and the exact steps and procedures involved in mediation and arbitration.

3) Definition of the words "discharge", "employee", and "employer" have basically remained unchanged. In the 1987 version the word "constructive" was included in the phrase ". . . Discharge includes <u>constructive</u> dismissal in the form of a resignation or quit. . . ." In the definition of "employee", the exclusion of "confidential employee" and one ". . . who is not protected . . . by tenure" has been made.

4) The notification requirement has remained the same, in that an employee would receive notification by registered mail within 15 days of the discharge and the entitlement to seek civil action.

5) Venue is identified for court action in the 1987 version.

6) In the 1987 version fringe benefits and seniority have been included along with full or partial back wages. A limitation capping ". . . future wages of not more than 6 months. . ." has been substituted for severence payment.

7) The 1982 proposal specified the employer and employee sharing the costs of arbitration equally. The 1987 proposal maintains, ". . . A court shall also award a complainant who prevails in his or her action all of the costs of litigation, including reasonable attorney fees and witness fees. . ."

8) In the 1987 version, visibility of the newly enacted law would be further increased by a sign posted in 2 inch high capital letters, ". . . STATE LAW PROTECTS EMPLOYEES FROM UNJUST DISCHARGE. . ."

9) Violations by an employer under the 1982 proposal were imposed only if the employer was held in contempt of court when there was a dispute over the award of the arbitrator. In that case the court could set a fine not to exceed $250 per day. Under the 1987 provision, ". . . An employer who violates this act shall be liable for a civil fine of not more than $2,000. . ."

The original 1982 draft was a strong pro-employee proposal. The 1987 redraft appears to be one which is serving the employers' interest group more so than the employees. The 1987 redraft will require the employee to be willing to take the risk of being liable for attorney's fees in the event that the employee loses his case. This is going to have a substantial impact on the person earning a minimum wage or slightly more than that who is unjustly dismissed. He basically will not exhibit a willingness to fight an unjust discharge. He will be more concerned with the everyday aspects of survival, since he will not have any savings to support him between jobs or to pay for a lawyer. Rather than risk the lengthy and costly ordeal of litigation, the unjustly dismissed employee will only be concerned about obtaining another job which will provide him with a comparable income and benefits. Upper level or management employees unjustly dismissed may be more willing to take the risk. In many cases, replacement of a job offering comparable status, income, and benefits will be harder to obtain.

The "capping" of awards imposed by the 1987 redraft is favorable to business. This will prevent the awards from reaching excessively high amounts. Despite the length of time it will take for a court action to be completed, awards for back wages, fringes, and legal fees will be more "practical" in the eyes of the business community. Eliminating punitive damages as a possible recovery will make this proposal much less objectionable to employers.

The 1987 redraft also appears to have been strongly influenced by the legal community. Many lawyers within the state have opposed arbitration as the best remedy. Even in the 1984 hearing, Joe Golden, an attorney specializing in unfair dismissal cases from Southfield, Michigan testified in opposition to the language, but in favor of the concept. His main objection was that legislation should not prohibit anyone from going to court.

The likelihood of the 1987 "Michigan Fair Employment Practices Act" picking up momentum and being enacted into law at this time still seems quite slim. Due to the controversy that this proposed legislation generates from so many disciplines, it will be hard to develop a proposal within the State of Michigan that will meet everyones' needs.

CURRENT MANAGEMENT POLICIES

As far as the implications for both employees and employers who are not covered by collective bargaining agreements, civil service, tenure, or individual contracts, measures can be taken to reduce one's risk. The success of court cases in the employee's favor is leading to a very proactive approach in the area of personnel management for the purpose of reducing the number of law suits. The literature discusses various management strategies:

1) Remove words and phrases as "permanent," "career," "tenure," "bright future with the company," "dismissal for just and sufficient cause," and references to permanence ". . . after the end of your probationary period. . ." from your personnel documents.
2) Top management should carefully scrutinize all terminations and give the final authorization.
3) Employers should give fair and consistent job evaluations.
4) Employers should formulate written guidelines for discipline and grievance procedures.

5) Employers should keep extremely close-mouthed about dismissals to avoid defamation and libel claims.

6) Publish on your application blank that you are an at-will employer, if that if your position, or have your employees sign statements. In 3 separate cases, the courts have ruled against the plaintiff when he/she had signed statements to the effect that they "could be released for any reason."

7) If choosing to use disclaimers, obtain legal consultation on the authenticity of the disclaimer in a court of law.

8) Employers should be continually updated on the most recent developments taking place on this subject. The November/December 1987 issue of the Michigan State Chamber of Commerce publication, Michigan Forward, has an article entitled "Wrongful Discharge: The Battle Brews in the Courts" written by a Flint attorney specializing in employment law. The author highlights the variety of decisions that have been awarded in the Michigan Trial Courts, Courts of Appeals, and the Michigan Supreme Court pertaining to unjust dismissals.

9) If you are an employer facing litigation in an unjust dismissal case, the many ramifications of a mock trial are discussed for lawyers in a publication such as the 38th Annual Advocacy Institute Proceedings. The case reviewed was that of a 57 year old car salesman employed for 17 years, encountering some personal problems over which time his performance declined. As his problems resolved and his performance improved dramatically, he was discharged. The proceedings discuss every possible aspect of the trial with clearcut explanations from both the plaintiff's and defendant's attorneys.

These are some of the proactive approaches that managers in the 80's can take toward reducing their risk. Realistically it will be many years before the opposition to imposing just cause requirements on employers disappears. In the meantime, managers must be sympathetic to the interests of their workers and become "experts" on current employment practices in this area.

CONCLUSION

This examination into employment-at-will demonstrates the complexities involved in reaching a solution to guaranteeing employment rights to all American workers. Even though there were strong proponents for the 1982 proposal in the Michigan legislature, they were not strong enough to counteract the testimony provided by the business community. The business community would prefer not to guarantee employees the right to challenge employers. The legal community is divided. There are those who would prefer to let the courts handle all conflicts knowing full well that this opportunity is one which is not available to most employees due to prohibitive costs. There are other legal experts prefering a solution which is more similar to arbitration and mediation which would ensure availability to all. Scholars prefer to see a state or federal solution to this problem similar to mediation or arbitration. Legislative sources with a strong commitment to provide a statutory appeal process, have put aside in their earlier proposals the concepts of arbitration and mediation and substituted civil action instead.

Enactment of both state and federal legislation on unfair dismissal in the current political atmosphere is highly unlikely. As we follow the impact that the Montana legislation has on that state, the business community may be more amenable towards protection, if it

can be shown that compliance with the legislation would not unjustly harm business.

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APPENDIX I

NEWS FROM STATE REPRESENTATIVE PERRY BULLARD

NEWS from State Representative Perry Bullard

FOR RELEASE: NOVEMBER 29, 1983 **FOR FURTHER INFORMATION CONTACT:**

ROGER KERSON, 517-373-3736

LANSING, MI, November 29, 1983-- Rep. PERRY BULLARD, D. Ann Arbor, announced today the introduction of legislation designed to protect Michigan workers from unjust discharge. The bill would provide that workers could be discharged only for "just cause". The bill establishes a system of mediation and arbitration, administered by the Michigan Employment Relations Commission (MERC), for workers who believe they have been dismissed unfairly.

The law would not apply to layoffs due to slack production plant closures, or any dismissal for economic reasons. The costs of arbitration would be shared equally by employees and employers.

"This bill will offer long overdue protection for the nearly 130,000 Michigan workers dismissed each year who are not covered by collective bargaining or by the civil service system,"said Representative BULLARD. "The bill is a necessary step forward towards fairness and equity for all Michigan citizens."

As examples of "unjust" discharges, Rep. BULLARD cited two hypothetical examples: a worker being fired for one justified absence after years of excellent attendance and performance, and a worker being fired for belonging to the "wrong" political party.

Several distinguished experts from the field of industrial relations joined Rep. BULLARD in calling for enactment of the legislation. PROF. THEODORE J. ST. ANTOINE Dean Emeritus of the University of Michigan Law School, and currently Special Counselor to Governor Blanchard on Workers' Compensation, commented that the issue of unjust discharge is presently "the hottest topic in the field of labor law."

"Employers ought to be receptive to this legislation," he said. "It is not a bonanza for employees nor a burden for employers. The law provides for the orderly resolution of disputes and avoids costly and disruptive litigation."

Prof. JACK STIEBER of the School of Labor and Industrial Relations at Michigan State University, and author of the study, "Discharged Workers and the Labor Market", noted that some 60 million American workers have no protection against un-

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just discharge. Nationwide, some 2 million private sector workers are fired each year without recourse to collective bargaining protections, said Professor STIEBER About 130,000 such cases occur in Michigan.

While declining to predict a precise figure for the number of discharged workers who might decide to seek remedies under the proposed legislation, Prof. STEIBER stated that if the law is passed, "several thousand people who have been discharged without just cause would be likely to win their jobs back."

Robert HOWLETT, who was appointed Chairman of the Michigan Employment Relations Commission by Gov. George Romney, argued strongly for the unjust discharge law as a basic matter of democratic rights and principles. Noting that Japan, Canada, and all Common Market countries already have such legislation, Mr. HOWLETT said that his interest in the issue began during his term of service on MERC from 1963 to 1976. Mr. HOWLETT recalled "many visits, letters, and telephone calls" from individuals who stated that they had been discharged for "reasons which were patently unjust".

"We had to tell them we had no jurisdiction over their complaints", said HOWLETT. "They could not understand why a government which protected against discrimination because of race, religion, national origin, or sex could not protect them against their termination of employment."

"If we believe in the Declaration of Independence, the Constitution of the United States, and the Constitution of the State of Michigan," he said, "we will adopt legislation granting justice, fairness, and equity in the employment relationship to all employees in this state."

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APPENDIX II

HOUSE BILL NO. 5892

APPENDIX E

House Bill No. 5892*

June 17, 1982, introduced by Representatives Bullard and Emerson and referred to the Committee on Judiciary.

A bill to prohibit the unjust discharge of certain employees; to provide for mediation and final and binding arbitration of these disputes; to provide for the selection and payment of arbitrators and for their authority; to prescribe the procedure for certain hearings; and to provide for the enforcement and review of awards of arbitrators.

The People of the State of Michigan Enact:

Sec. 1. For the purposes of this act, the words and phrases defined in sections 2 and 3 have the meanings ascribed to them in those sections.

Sec. 2. (1) "Commission" means the employment relations commission created by Act No. 176 of the Public Acts of 1939, as amended, being sections 423.1 to 423.30 of the Michigan Compiled Laws.

(2) "Confidential employee" means an employee who assists and acts in a confidential capacity to a person who exercises managerial functions in the field of labor relations.

(3) "Discharge" means an involuntary dismissal from employment. Discharge includes a resignation or quit that results from an improper or unreasonable action or inaction of the employer.

Sec. 3. (1) "Employee" means a person who has worked for an employer for not less than 15 hours per week for 6 months and who is not protected by a collective bargaining agreement for a unit that has been certified by the national labor relations board or the commission or recognized by an employer, or who is not protected by civil service or tenure against unjust discharge. Employee does not include a confidential employee, managerial employee, or a person who has a written employment contract of not less than 2 years and whose contract requires not less than 6 months' notice of termination.

(2) "Employer" means a person or an organization that employs not less than 10 persons.

(3) "Managerial employee" means an employee who formulates and effectuates management policies by expressing and making operative the decisions of his or her employer, and who has discretion in the performance of his or her job independent of his or her employer's established policy.

Sec. 4. (1) An employer shall not discharge an employee except for just cause.

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*No action on this bill was taken by the House.

(2) An employer who discharges an employee shall notify the employee orally at the time of discharge, and in writing by registered mail within 15 calendar days after the discharge, of all reasons for the discharge and of his or her right to request arbitration under this act.

Sec. 5. (1) An employee who believes that he or she has been discharged in violation of section 4(1) may file by registered mail a written complaint with the commission not later than 30 calendar days after receipt of the employer's written notification of discharge and right to arbitration as provided in section 4(2). The complaint shall contain the names, addresses, and telephone numbers of the employer and of the employee, the date of the discharge of the employee, and a short statement of the reason for the filing of the complaint.

(2) Except as provided in subsection (3), if an employer fails to provide the discharged employee with a written notification of his or her discharge and the reason for it, the discharged employee may file by registered mail a written complaint, as described in subsection (1), with the commission not later than 45 calendar days after his or her discharge.

(3) If an employer fails to notify, in writing, a discharged employee of his or her right to arbitration under this act, and if a copy of this act or a summary of this act has not been posted pursuant to section 17 in a prominent place in the work area for at least 6 months before the date of the employee's discharge, the discharged employee may file by registered mail a written complaint, as described in subsection (1), with the commission not later than 1 year after his or her discharge.

Sec. 6. (1) Upon receipt of a complaint from a discharged employee, the commission immediately shall appoint a mediator to assist the employer and the discharged employee in attempting to resolve their dispute.

(2) If the dispute in not resolved within 30 calendar days after the commencement of mediation, the mediator shall explain to the employer and the discharged employee the purpose and process of final and binding arbitration, including each party's right to be represented by counsel at the arbitration hearing and to submit a posthearing brief, as well as the method of selecting and compensating the arbitrator, as described in sections 7 and 8.

(3) After the option of arbitration is made available to the discharged employee pursuant to subsection (2), the employee may request a continuance of mediation if he or she believes that a mutual resolution of the dispute is possible. If a mutual resolution is not likely, the discharged employee may file by registered mail a written request with the commission for arbitration of the dispute.

Sec. 7. Upon the request of a discharged employee, the commission immediately shall select from a list that it maintains of impartial, competent, and reputable arbitrators who are citizens of the United States and residents of this state, 3 persons as nominees for arbitrator. Within 5 days after receipt of the names of the nominees, the employer and the employee peremptorily may strike the name of 1 of the nominees. If the employer or employee does not return the list within the 5-day time period, then each person whose name appears on the list shall be considered to be

acceptable to that party. Within 7 days after this 5-day time period, the commission shall designate 1 of the remaining nominees as the arbitrator. If each nominee who is considered to be acceptable by the employer and the employee declines or for any reason is not able to serve as arbitrator, then the director of the commission shall appoint an arbitrator from the general list of arbitrators that the commission maintains without the submission of any additional lists to the employer and the discharged employee.

Sec. 8. (1) The employer and the employee shall bear equally the fee and normal and necessary expenses of an arbitrator selected pursuant to section 7. Payment shall be made in compliance with rules promulgated by the commission pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws. An arbitrator selected pursuant to section 7, in addition to the normal and necessary expenses involved, may not assess a fee for more than twice the number of days in hearing.

(2) A party who produces a witness at the arbitration hearing shall bear the expenses, if any, of that witness. Other expenses similarly shall be borne by the party incurring them.

Sec. 9. (1) Within 60 calendar days after his or her appointment, or within further additional periods to which the parties may agree, the arbitrator selected pursuant to section 7 shall call a hearing and shall give reasonable notice of the time and place of the hearing to the employer and the employee.

(2) The arbitrator may proceed in the absence of an employer or employee who, after due notice, fails to be present at the hearing and who fails to obtain an adjournment of the hearing, as provided in subsection (3). An arbitrator shall not grant or deny a grievance solely on the default of a party. Rather, the arbitrator shall require the opposing party to submit evidence, as necessary, for the rendering of an award.

(3) The arbitrator, for good cause shown, may adjourn the hearing upon the request of a party or upon his or her own initiative, and shall adjourn the hearing when both parties agree to the adjournment.

Sec. 10. (1) The proceedings shall be informal. The arbitrator may conduct the hearing in whatever manner that he or she believes will permit the full and most expeditious presentation of the evidence and arguments of the employer and the employee. Technical rules of evidence shall not apply, and the competency of the evidence shall not be considered to be impaired by the informality of the proceedings. The employer and the employee, though, may not submit a new or different claim to the arbitrator after his or her appointment without the consent of the arbitrator and all other parties. The arbitrator may receive into evidence any oral or documentary evidence or other data that he or she considers to be relevant to the issues under consideration at the hearing, and the arbitrator shall request the submission of any evidence that he or she considers to be necessary for a proper understanding and determination of the issues in dispute.

(2) The arbitrator may administer oaths and require the attendance of witnesses and the production of books, papers, contracts, agreements, and documents that he or she considers to be material to a just determination of the issues in dispute. For this purpose, the arbitrator may issue subpoenas. If a person refuses to obey a subpoena, or to be sworn or to testify, or if a witness, party, or attorney is guilty of contempt while in attendance at a hearing, the arbitrator may, or the attorney general if requested shall, invoke the aid of the circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. The court may punish a failure to obey the order as contempt.

(3) Attendance at the hearing is limited. Authorized representatives of the employer and the employee may be present at the hearing. In addition, a person who has a direct interest in the arbitration award may attend the hearing. The arbitrator shall determine the propriety of the attendance of other persons at the hearing. The arbitrator also shall have the power to require the retirement of a witness during the testimony of another witness.

(4) The employer, the employee, or both may request of the arbitrator, before the scheduled hearing date, that he or she arrange for a verbatim record of the proceedings to be made. If a transcript is made, that transcript shall be the official record of the proceeding. The transcript shall be made available to the arbitrator, and the arbitrator shall make the transcript available for inspection, at a designated time and place, by the employer and the employee. The party that requests that a verbatim record of the proceedings be made shall bear the total cost of the record. If the employer and the employee request that a verbatim record of the proceedings be made, then the employer and the employee shall bear equally the cost of the record.

(5) If an official transcript of the hearing, as described in subsection (4), is not made, the arbitrator shall tape-record the hearing, and that tape recording shall be the official record of the proceeding.

(6) The employer, the employee, or both may submit a post-hearing brief before a specified date agreed upon at the close of the hearing by the arbitrator, the employer, and the employee.

Sec. 11. (1) Within 30 calendar days after the close of the hearing, or within further additional periods to which the parties may agree, the arbitrator, based upon the issues and evidence presented to him or her, shall render a signed opinion and award. The arbitrator shall deliver by registered mail a copy of the opinion and award to the employer, the employee, and the commission.

(2) Some of the remedies from which the arbitrator may select are the following:

(a) The sustainment of the discharge.
(b) Reinstatement of the discharged employee with no back pay.

(c) Reinstatement of the discharged employee with partial back pay.
(d) Reinstatement of the discharged employee with full back pay.
(e) A severance payment.

(3) If the employer and the employee settle their dispute during the course of the arbitration proceeding, the arbitrator, upon their request, may set forth the terms of the settlement in the award.

Sec. 12. An award of the arbitrator shall be final and binding upon the employer and the employee and may be enforced, at the instance of either the employer or the employee, in the circuit court for the county in which the dispute arose or in which the employee resides.

Sec. 13. The circuit court for the county in which the dispute arose or in which the employee resides may review an award of the arbitrator, but only for the reason that the arbitrator was without or exceeded his or her jurisdiction; the award is not supported by competent, material, and substantial evidence on the whole record; or the award was procured by fraud, collusion, or other similar and unlawful means. The pendency of a proceeding for review shall not stay automatically the award of the arbitrator.

Sec. 14. If an employer or an employee willfully disobeys or offers resistance to a lawful order of enforcement issued by the circuit court, then the employer or the employee, whichever is appropriate, may be held in contempt. The punishment for each day that the contempt persists may be a fine, fixed at the discretion of the court, in an amount not to exceed $250.00 per day.

Sec. 15. This act shall not supersede an employer's grievance procedure that provides for impartial and final and binding arbitration of discharge grievances. Upon the request of an employer or employee, the commission shall determine whether or not an employer's grievance procedure meets this standard.

Sec. 16. If a discharged employee files or has filed an action against his or her former employer in a court of this state or of the United States, that employee is barred from seeking relief for that same issue under this act.

Sec. 17. An employer shall post a copy of this act or a summary of this act in a prominent place in the work area.

APPENDIX III

AFL-CIO POSITION STATEMENT

South Africa and the Frontline States

February 19, 1987
Bal Harbour, FL

The AFL-CIO is proud that, among the free trade unions of the world, it took the lead in the fight against the apartheid system of South Africa. More than 30 years ago, we condemned this system of racism and economic exploitation, just as we had earlier been in the forefront of the post-war struggles against colonialism.

In more recent years, the AFL-CIO has focused on the emerging black democratic trade union movement within South Africa as the principal and most promising force for the peaceful dismantling of apartheid and its replacement by a multi-racial democracy.

Toward this end, the AFL-CIO, through the South Africa Program of the African-American Labor Center, has mobilized the support of American labor for the black South African trade union movement.

As a result of the AALC's programs, carried out at the request of South African trade unions, those unions are benefitting from leadership training programs, conducted both inside and outside of South Africa, and particularly from support activities organized on a union-to-union level. American unions are providing expertise in industrial relations and collective bargaining procedures to help our South African brothers and sisters defend the interests of their union members.

These efforts have been joined with those of other national labor centers in cooperation with the International Confederation of Free Trade Unions. Not surprisingly, the very success of these efforts has provoked attacks both on the AFL-CIO and on the ICFTU. The AFL-CIO will not be deterred by those who seek to divide the free trade union movement and to undermine the coordination of support for the democratic South African labor movement.

In addition to its direct assistance to South African unions, the AFL-CIO successfully lobbied in the Congress, against the Administration, for strong, mandatory economic sanctions against the racist Pretoria regime. We recognize that, if such sanctions are to be effective, they must be coordinated internationally and involve joint action by the ICFTU and the Southern African Trade Union Coordination Council. In response to the sanctions, Pretoria is retaliating against the "Frontline" states, seeking to damage their economies by cutting vital transportation links, choking trade routes, and through other attempts at destabilization. The United States has an obligation to thwart this cruel policy by providing necessary economic assistance to the victimized "Frontline" states, such as highway construction, preparation of deep-water ports, and completion of railroad lines that avoid South Africa territory. Support should also be provided for creation of a cooperative food distribution system that will enable food-surplus Frontline states to assist other states where people face starvation because of South African retaliation.

The AFL-CIO will support appropriate legislation to provide such assistance, giving priority consideration to those states that respect internationally recognized trade union and human rights standards.

The Employment-At-Will Doctrine

February 20, 1987
Bal Harbour, FL

The general acceptance in the United States of the concept that employers are entitled to dismiss employees at any time, without notice, for any reason whatsoever puts some 60 million non-union workers at risk. It is estimated that of these, roughly 150,000 workers are unjustly discharged each year. And, the "employment-at-will" doctrine adversely affects all who are potentially subject to their employer's unbridled caprice by denying these workers their natural right to be treated fairly and with respect. No other industrial society continues to grant employers this feudal power that is totally inconsistent with our concepts or individual dignity and worth

Over the past several years, the courts in a numbe of states have made limited inroads on the employment-at-will doctrine. Many courts have held that where an employee is discharged for engaging in conduct the law seeks to protect or foster, the discharge violates public policy and constitutes a tort. A handled of courts also have concluded that where an employer, in personnel manuals or like documents, sets forth a policy governing discharges, the employer is bound to adhere to his self-proclaimed policy as part of his contract with his employees.

These belated judicial developments, while of course welcome, do not correct the essential conflicts between the employment-at-will doctrine and the legitimate concerns of workers.

The "public policy" exception to the at-will rule, by its terms, is of very limited scope and hence, even in theory, of benefit only to a small number of discharged employees. The "contract" exception is one that employers easily circumvent by redrafting their personnel manuals so as not to make any binding commitments.

The judicial exceptions to the at-will-doctrine suffer as well from serious practical limitations. Proving a violation in any event is a difficult task, especially under the public policy exception which requires the plaintiff to show that the employer was motivated by an improper purpose. Most workers who have lost their jobs do not have the resources to retain counsel; consequently, only those with a strong likelihood of recovering substantial moneys — most often formerly high-paid executives — have been able to secure the resources to fight a case through the judicial system. Lastly, the sole remedy the courts have provided an unjustly discharged employee is money damages, and not reinstatement to the job from which the worker has been wrongfully removed.

Experience demonstrates that the surest way for workers to protect their jobs is through self-organization and collective bargaining. One of the great accomplishments of the American labor movement has been the negotiation of contract provisions that prohibit discharges without just cause and that provide grievance-arbitration procedures through which that job security is made real. Under these agreements, the union provides the discharged employee with representation in challenging the discharge and, if the individual prevails on his challenge he or she will be reinstated to his or her job in a workplace where the union stands ready to assure that on reinstatement the individual is fairly treated. Studies show that in this context, reinstated employees are normally able to pick up where they left off and are not likely to be picked out for retaliation for exercising their rights.

In contract, in an unorganized workplace, even if the employees do enjoy certain legal rights, they ordinarily do not have the wherewithal to enforce their rights. Moreover, if an individual worker seeks to do so he or she will have no protection from employer reprisal. It is not surprising, therefore, that studies have found that employees who obtain reinstatement to a non-union plant through order of the National Labor Relations Board either elect not to return to their jobs or, if they do, leave their jobs within a year.

It is in good measure for these reasons that assisting unorganized employees to organize and to secure contractual protections from unjust discharges remains the labor movement's first priority. At the same time, the AFL-CIO remains committed to its long-term program o providing a base of support for the collective bargaining

process through legislation that seeks to assure every working American the basic labor standards that are hallmark of a decent society. There can be no doubt that protection against arbitrary employer action qualifies as a basic labor standard. Thus, as state legislatures and the United States Congress begin to consider proposals to modify the employment-at-will doctrine, our policy is to support measures that safeguard workers against discharges without cause.

Most of the legislative proposals that have been put forward reflect a lowest common denominator approach which disserves the interest of workers. These proposals seem to proceed on the basis that the precondition to modifying the employment-at-will doctrine is the approval of the employer community as a whole. To secure that approval, it is suggested that a set of limited employee rights and even more limited remedies enforceable through an arbitration-type procedure that a discharged employee may invoke at this own cost should be substituted for the current court law (which at least in some cases produces large damages awards). These proposals are not worthy of organized labor's support.

What is worthy of our support and of enactment is legislation that attempts to provide workers a real safeguard from discharges without cause. To provide that safeguard, an unjust discharge law must contain at least the following elements:

- *A prohibition on discharges without cause.* It is not enough to codify the exceptions to the employment-at-will doctrine that have been judicially developed. What is required, rather, is adoption of the rule that workers may be discharged only *for cause* and not otherwise.
- *Financing to assure that discharged employees will be able to enforce their statutory rights.* Legal rules are of no consequence if they cannot be enforced, and individuals who have lost their jobs cannot be expected to divert their scarce resources from sustaining themselves and their families to retaining attorneys to litigate their discharge cases. An unjust discharge law must therefore provide either for a government administrative enforcement system or for an alternative means of compensation of private representatives.
- *Prompt review of discharge decisions by an independent tribunal.* Most workers cannot afford to be without their livelihood for a sustained period of time. Consequently, if a worker can be fired and required to engage in protracted litigation to secure review of the discharge, workers will, in practice, continue to serve at their employer's pleasure. An unjust discharge law therefore must establish adjudicative procedures that result in decisions within a short time after a challenge to a discharge is filed.
- *Mandatory reinstatement for any employee who is found to have been discharged wrongfully.* Most workers value their job not merely for the income it produces but also for the opportunities for advancement and for the job security — and the other personal and social benefits — derived only from steady employment. To make a wrongfully discharged employee whole, therefore, requires that the employee be reinstated to the job from which he was wrongfully fired. Although it is questionable whether reinstatement can work in practice in an unorganized setting, nonetheless, a law that does not offer reinstatement to wrongfully discharged workers cannot even begin to free workers from the capricious power of their employers.
- *Full compensation for losses sustained as the result of a wrongful discharge.* In many instances, a worker who is fired suffers not only the loss of wages but also a host of consequential injuries flowing from the loss of his/her livelihood. An innocent employee who has been wrongfully discharged should not be left to bear those losses; rather, the wrongdoing employer should be held responsible for these injuries.

The AFL-CIO calls upon the Congress and the state legislatures to enact laws containing these essential protections. We comment our active support to this important goal at the national level and urge the state central bodies to press for the enactment of such laws at the state level.

— End of Text —

— End of Section E —

APPENDIX IV

MONTANA "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT

(d) provide a nonsmoking area in all waiting rooms;

(e) prohibit employees from smoking in patient rooms; and

(f) require visitors to obtain express approval from all patients in the patient room, or from the patients' physicians, prior to smoking.

(2) Nothing in this section shall prohibit a health care facility from banning smoking on all or a part of its premises.

(3) All areas of a health care facility not specifically referred to in this section may be considered smoking areas unless posted otherwise.

Sec. 50-40-107. Exemptions. — The following shall be exempt from this part:

(1) restrooms;

(2) taverns or bars where meals are not served;

(3) vehicles or rooms seating six or fewer members of the public.

Sec. 50-40-108. Enforcement. — The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department.

Sec. 50-40-109. Penalties. — A person who fails to designate or reserve a smoking or nonsmoking area in his establishment as provided for in [Sec.] 50-40-104 is guilty of a misdemeanor and is subject to a fine of not more than $25. (Secs. 50-40-101 to 50-40-109, Montana Clean Indoor Air Act)

Sec. 50–40–201. Reservation of smoking and nonsmoking areas in work areas in state and local government buildings. In offices and work areas in buildings maintained by the state or a political subdivision thereof in which seven or more employees of the state or political subdivision thereof in which seven or more employees of the state or political subdivision are employed, the manager or person in charge of the work area shall arrange nonsmoking and smoking areas in a convenient area.

Employment At Will

An employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter, 28-10-301 through 28-10-303, 28-10-502, 30-11-601 through 30-11-605, and 39-2-302. (Sec. 39-2-503)

A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master. (Sec. 39-2-601)

(1) A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for 1 year; a hiring at a daily rate, for 1 day; a hiring by piecework, for no specified term.

(2) In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed. (Sec. 39—2—602)

Wrongful Discharge

Sec. 1. Short title. [Sections 1 through 9] may be cited as the "Wrongful Discharge From Employment Act". (Sec. 1 as enacted by HB 241, L.1987, effective July 1, 1987)

Sec. 2. Purpose. [Sections 1 through 9] set forth certain rights and remedies with respect to wrongful discharge. Except as limited in [sections 1 through 9], employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any

reason considered sufficient by the terminating party. Except as provided in [section 7], [sections 1 through 9] provide the exclusive remedy for a wrongful discharge from employment. (Sec. 2, as enacted by HB 241, L.1987, effective July 1, 1987)

Sec. 3. Definitions. In [sections 1 through 9], the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule. (Sec. 3 (1) to (7) as enacted by HB 241, L.1987, effective July 1, 1987)

Sec. 4. Elements of wrongful discharge. A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; or

(2) The discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) The employer violated the express provisions of its own written personnel policy. (Sec. 4 (1) to (3) as enacted by HB 241, L.1987, effective July 1, 1987)

Sec. 5. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of [section 4(1)].

(3) There is no right under any legal theory to damages for wrongful discharge under [sections 1 through 9] for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages,

except as provided for in subsections (1) and (2). (Sec. 5 (1) to (3), as enacted by HB 241, L.1987, effective July 1, 1987)

Sec. 6. Limitation of actions. (1) An action under [sections 1 through 9] must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in [Section 7], under which an employee may appeal a discharge within the organization structure of the employer, the employee shall first exhaust those procedures prior to filing an action under [sections 1 through 9]. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under [Sections 1 through 9]. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under [Sections 1 through 9] and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2). (Sec. 6(1) to (3), as enacted by HB 241, L. 1987, effective July 1, 1987)

Sec. 7. Exemptions. [Sections 1 through 9] do not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, handicap, creed, religion, political belief, color marital status, and other similar grounds.

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term. (Sec. 7 (1) and (2), as enacted by HB 241, L. 1987, effective July 1, 1987).

Sec. 8. Preemption of common-law remedies. Except as provided in [Sections 1 through 9], no claim for discharge may arise from tort or express or implied contract. (Sec. 8, as enacted by HB 241, L. 1987, effective July 1, 1987).

Sec. 9. Arbitration. (1) Under a written agreement of the parties, a dispute that otherwise could be adjudicated under [Sections 1 through 9] may be resolved by final and binding arbitration as provided in this section.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) A neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(B) The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and [sections 1 through 9], [Sections 1 through 9] apply.

(C) The arbitrator is bound by [Sections 1 through 9].

(3) If a complaint is filed under [Sections 1 through 9], the offer to arbitrate must be made within 60 days after service of the complaint and

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must be accepted in writing within 30 days after the date the offer is made.

(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under [Sections 1 through 9] is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

(5) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(6) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [Sections 1 through 8]. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act. (Sec. 9 (1) to (6), as enacted by HB 241, L. 1987, effective July 1, 1987).

PROFESSIONAL PROFILE

NANCY L. DEXTROM

SW 73

HOME TELEPHONE

BUSINESS TELEPHONE (517) 79 , FTS 374-2230

EDUCATION:	Master, Public Administration, University of Michigan, Flint, Michigan, 1987
	Bachelor Science in Nursing, University of Wisconsin, Madison, Wisconsin, 1966
CERTIFICATION/LICENSURE:	Certification in Nursing Administration, American Nurses Association, 1986
	Registered Nurses Licensure: State of Michigan, Number 111205, Expires March 31, 1988
	BLS Instructor Certification. American Heart Association, January 1987 to January 1989
SOCIAL SECURITY:	

PROFESSIONAL WORK EXPERIENCE:

March 1984 to present	Acting Associate Chief of Nursing Service for Education, Veterans Administration Medical Center, Saginaw, Michigan. Responsible for coordinating the educational activities of nursing staff, patients and affiliated nursing students in a 155 bed facility
September 1985 to present	Preceptor Coordinator, for senior nursing students. Saginaw Valley State University, University Center, Michigan
April 1983 to March 1984	Nursing Instructor, Veterans Administration Medical Center, Saginaw, Michigan
October 1979 to September 1982	Patient Education Coordinator, Munson Medical Center, Traverse City, Michigan. Developed new position at 300 bed facility to promote patient education in all nursing areas
September 1975 to September 1979	Assistant Director of Nursing, Alpena General Hospital, Alpena, Michigan. Managed operations of a nursing department of over 200 employees in a 175 bed facility.

September 1970 to September 1975	Inservice Director, Memorial Hospital, (now renamed M. Werth Medical Center), Menomonie, Wisconsin
March 1969 to June 1970	Staff Nurse, Veterans Administration Medical Center, Augusta, Georgia
December 1967 to February 1969	Public Health Nurse, Visiting Nurse Service, Madison, Wisconsin
December 1966 to December 1967	Staff Nurse, Veterans Administration Medical Center, Madison, Wisconsin
RELATED PROFESSIONAL EXPERIENCES:	Member. American Association of Diabetes Educators; American Diabetes Association; Michigan Organization of Diabetes Educators; Sigma Theta Tau, Theta Chi Chapter; Saginaw Valley State University Continuing Education for RN's Advisory Committee; Delta College's Nursing Continuing Education Advisory Committee; Saginaw Valley Nursing Health Education Council Officer. 1985-1986 Vice President, Saginaw Valley Nursing Health Education Council; 1987-1988 President, Saginaw Valley Nursing Health Education Council

PROFESSIONAL DEVELOPMENT:

09/16-18/87	Performance Based Interviewing
09/09-13/87	Fourteenth American Association of Diabetes Educators Annual Meeting and Educational Program, Orlando, FL
05/15/87	Nursing Diagnosis - Application to Clinical Practice
01/08/87	Required Request Organ Donation Training
09/08-12/86	Interpersonal Skills Training of Trainers
08/07/86	Legal and Ethical Issues in Nursing
02/13/86	Developing the Manager - Employee Relationship
10/31/85	Managing Nursing in the 80's
10/16/85	Women in Business
09/24/85	Diabetes Update
03/20-22/85	Nursing Research and Practice
09/18/84	Diabetes Mellitus
05/17-18/84	Legal Aspects of Nursing
04/13/84	Teaching as a Performing Art
10/28/83	Stress Management in Diabetes Education
10/14/83	Managing the Aggressive Patient

06/14-16/83	Improving Patient Teaching Skills
06/03/83	Safety Supervisory Training
05/18/83	Teaching and Evaluating Clinical Decision Making

EDUCATIONAL PROGRAM PLANNER:

11/05/87	Humor and Plan in the Health Care Setting
09/16/87	Ethical Decision Making Process in the Care of the Terminally Ill
09/09/87	Preceptorship in Nursing Service and Education
04/10/87	Nursing Research: The Beginning
03/12/87	Nursing Research: A Collaborative Effort
10/09/86	An Encounter with Cancer
09/86	Nursing Leadership Series
05/27/86	Nursing Research
03/17/86	Health Assessment of the Alcoholic Patient
01/14/86	Seniors Are Special
05/29/85	Change Theory
05/03/85	Participative Management
03/08/85	Nursing Research
09/84	Charge Nurse Workshop
05/84	Charge Nurse Workshop

EDUCATIONAL PRESENTER
(Outside Facility)

11/19/87	"Automation of Nursing Functions," Sigma Theta Tau, Theta Chi Chapter, 5th Annual Nursing Research Forum
09/22/87 05/20/87 02/17/87 11/05/86 09/23/86	Nursing Leadership Series - "Personnel Issues"
01/24/85	"The Impact of Introducing a Patient Care Management System on Independent Nursing Care Functions and Nursing Process", Saginaw Valley Honor Society of Nursing, 2nd Annual Nursing Research Forum

PUBLICATIONS (Audiovisuals)

07/87	Heart Transplanatation (Videotape)
01/86	Orientation to VAMC, Saginaw (Slide/Tape)
01/86	Safe Handling of Chemotherapy (Slide/-Tape)
03/85	Blood Product Administration (Videotape)

1980-1982	Diabetes; Diabetic Diet; Code Blue; Outpatient Surgery (Adult version); Outpatient Surgery (Pediatric version); Tour of Obstetrics; Patient Teaching for the MI Patient; Orientation to the Rehab Unit

PUBLICATIONS:

Shannon, M.; Dextrom, N.; Fuhrhop, M. "The Impact of a Patient Care Management System on Independent Nursing Care Functions and Nursing Process." Health Care Supervisor (April 1987): 61-68.

AWARDS:

07/01/87	Recognition of High Level Performance
03/20/87	Special Achievement Award
02/16/86	Special Advancement for Achievement