

General Distribution

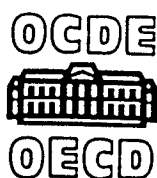
**LABOUR MARKET AND SOCIAL POLICY
OCCASIONAL PAPERS**

N° 3

**WRONGFUL TERMINATION LITIGATION
IN THE UNITED STATES AND ITS EFFECT
ON THE EMPLOYMENT RELATIONSHIP**

by

Susan R. Mendelsohn



Paris 1990

LABOUR MARKET AND SOCIAL POLICY
OCCASIONAL PAPERS

No. 3

**WRONGFUL TERMINATION LITIGATION
IN THE UNITED STATES AND ITS EFFECT
ON THE EMPLOYMENT RELATIONSHIP**

by

Susan R. Mendelsohn

**DIRECTORATE FOR SOCIAL AFFAIRS,
MANPOWER AND EDUCATION**

OCCASIONAL PAPERS

This series is designed to make available to a wider readership selected labour market and social policy studies prepared for use within the OECD. Authorship is usually collective, but principal writers are named. The papers are generally available only in their original language -- English or French -- with a summary in the other.

Comment on the series is welcome, and should be sent to the Directorate for Social Affairs, Manpower and Education, 2, rue André-Pascal, 75775 PARIS CEDEX 16, France. Additional, limited copies are available on request.

The opinions expressed and arguments employed here are the responsibility of the author(s) and do not necessarily represent those of the OECD.

LABOUR MARKET AND SOCIAL POLICY OCCASIONAL PAPERS

(Already available, free of charge)

No. 1 *AN ECONOMIC FRAMEWORK FOR THE EVALUATION OF CHILD CARE POLICY* (1990)
(Donald Verry)

No. 1 *UN CADRE ÉCONOMIQUE POUR L'ÉVALUATION DES POLITIQUES DE GARDE
D'ENFANT* (1990) (Donald Verry)

No. 2 *HEALTH AND PENSION REFORM IN JAPAN* (1990)

.....
***Mailing List for
Labour Market and Social Policy Occasional Papers***

Please include the following name on the mailing list:
(write in capitals)

Name
Organisation
.....
Address
.....
.....
Country

This form should be returned to:

Labour Market and Social Policy Occasional Papers
Directorate for Social Affairs, Manpower and Education
OECD
2, rue André-Pascal
75775 PARIS CEDEX 16
FRANCE

A SELECTION OF OECD PUBLICATIONS ALSO AVAILABLE

"OECD SOCIAL POLICY STUDIES" SERIES

- No. 1 SOCIAL EXPENDITURE 1960-1990: Problems of Growth and Control** (1985)
 Out of print in English. French text available under the title:
No. 1 Dépenses sociales 1960-1990. Problèmes de croissance et de maîtrise.
 (81 85 01 2) ISBN 92-64-22656-7, 100 pp. £7.50 US\$15.00 FF75 DM33
- No. 2 MEASURING HEALTH CARE 1960-1983: Expenditure, Costs and Performance** (1985)
 (81 85 06 1) ISBN 92-64-12736-4, 162 pp.
 Out of print. Available on microfiche edition.
 Price per microfiche: £2.50 US\$4.50 FF20 DM8
- No. 3 LIVING CONDITIONS IN OECD COUNTRIES: A Compendium of Social Indicators** (1986)
 (81 85 04 1) ISBN 92-64-12734-8, 166 pp. £6.50 US\$13.00 FF65 DM29
- No. 4 FINANCING AND DELIVERING HEALTH CARE: A Comparative Analysis of OECD Countries** (1987)
 (81 87 02 1) ISBN 92-64-12973-1, 102 pp. £11.00 US\$19.00 FF90 DM37
- No. 5 REFORMING PUBLIC PENSIONS** (1988)
 (81 88 04 1) ISBN 92-64-13123-X, 250 pp. £15.50 US\$29.00 FF130 DM56
- No. 6 THE FUTURE OF SOCIAL PROTECTION** (1988)
 (81 88 03 1) ISBN 92-64-13152-3, 64 pp. £8.50 US\$15.50 FF70 DM31
- No. 7 HEALTH CARE SYSTEMS IN TRANSITION: The Search for Efficiency** (1990)
 (81 89 05 1) ISBN 92-64-13310-0, 206 pp. £17.00 US\$30.00 FF140 DM55
- No. 8 LONE PARENT FAMILIES: The Economic Challenge** (1990)
 (81 89 04 1) ISBN 92-64-13303-8, 252 pp. £20.00 US\$34.00 FF160 DM66

EMPLOYMENT

- OECD EMPLOYMENT OUTLOOK** July 1990 (published annually)
 (81 90 02 1) ISBN 92-64-13396-8, 212 pp. £23.00 US\$40.00 FF190 DM78
- THE INTEGRATION OF WOMEN INTO THE ECONOMY** (1985)
 (81 85 05 1) ISBN 92-64-12735-6, 184 pp. £10.00 US\$20.00 FF100 DM44
- MEASURES TO ASSIST THE LONG-TERM UNEMPLOYED -- Recent Experience in Some OECD Countries** (1988)
 (81 88 06 1) ISBN 92-64-13134-5, 100 pp. £7.50 US\$13.50 FF60 DM26
- LABOUR MARKET FLEXIBILITY: Trends in Enterprises** (1989)
 (81 89 03 1) ISBN 92-64-13286-4, 74 pp. £10.00 US\$17.00 FF80 DM33

MECHANISMS FOR JOB CREATION: Lessons from the United States (1989)

(81 88 01 1) ISBN 92-64-13186-8, 228 pp. £14.50 US\$25.50 FF120 DM50

NEW TECHNOLOGY IN THE 1990S: A Socio-Economic Strategy (1989)

(81 88 07 1) ISBN 92-64-13180-9, 130 pp. £11.00 US\$19.00 FF90 DM37

LABOUR MARKET POLICIES FOR THE 1990s (1990)

(81 90 01 1) ISBN 92-64-13363-1, 130 pp. £13.00 US\$23.00 FF110 DM43

DEMOGRAPHY

AGEING POPULATIONS: The Social Policy Implications (1988)

(81 88 02 1) ISBN 92-64-13113-2, 90 pp. £12.00 US\$22.00 FF100 DM43

CHILD CARE

CHILDREN AND SOCIETY: Issues for Pre-School Reforms (1981)

(96 81 01 2) ISBN 92-64-22210-3, 249 pp. £7.60 US\$17.00 FF76 DM38
(out of print)

CARING FOR YOUNG CHILDREN (1982)

(96 82 01 2) ISBN 92-64-22315-0, 249 pp. £5.80 US\$14.50 FF58 DM29
(out of print)

"CHILD CARE IN OECD COUNTRIES", in *OECD Employment Outlook*, July 1990, chapter 5.

Prices charged at the OECD Bookshop

THE OECD CATALOGUE OF PUBLICATIONS and supplements will be sent
free of charge on request addressed either to OECD Publications Service,
2, rue André-Pascal, 75775 PARIS CEDEX 16
or to the OECD Distributor in your country

Over the last decade, employment law in the United States has ceased to be governed solely by the right to "at will" termination on either side. As a result of a series of decisions in the civil courts of the various states, employers have become liable for damages - often very heavy - for dismissals which have been held to be unfair. A dismissal may be considered "unfair" because it violates public policy, because it breaches an implied contract or because it breaches an implied covenant of good faith and fair dealing. The resultant restrictions on the right to fire are reminiscent of employment security laws in Europe.

This paper reviews and explains these legal developments. A preface explores whether this represents a convergence between United States and European practices.

* * * * *

Au cours des dix dernières années, la législation en matière d'emploi aux Etats-Unis a cessé d'être fondée sur le droit de mettre fin à l'emploi "au gré" de l'une ou l'autre partie. Par suite d'une série de décisions prises par les tribunaux civils des divers Etats, les employeurs sont désormais astreints à verser des dommages-intérêts - souvent très lourds - en cas de licenciements contraires à une obligation légale de l'employeur. Il s'agit notamment de licenciements qui constituent la violation d'un quasi-contrat ou encore la rupture d'un engagement implicite d'agir de bonne foi et en toute équité. Les restrictions à la liberté de licencier qui en résultent rappellent les lois sur la sécurité de l'emploi en vigueur en Europe.

L'objet du présent document est de passer en revue et d'expliquer l'évolution de la législation dans ce domaine. On cherchera dans la préface à déterminer s'il faut voir dans cette évolution un rapprochement des pratiques suivies aux Etats-Unis et en Europe.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. WRONGFUL TERMINATION LITIGATION	2
A. Historical Background	
B. Modifications in the At-Will Relationship as a Result of Litigation	
1. Violation of Public Policy	
2. Breach of Employment Contract	
3. Breach of the Implied Covenant of Good Faith and Fair Dealing	
C. The <u>Foley</u> Case and its impact on Wrongful Termination Law	
III. SOCIAL AND ECONOMIC IMPACT OF WRONGFUL TERMINATION LITIGATION	12
A. Litigation Costs	
B. Generalised Changes in the Employment Relationship	
C. Effect of Wrongful Termination Litigation on Unions	
D. Legislation	
IV. LITIGATION IN CANADA	17
V. CONCLUSION	18
NOTES	19
ANNEX A Federal Protective Legislation	23
ANNEX B Extracts from Draft Uniform Employment Employment Termination Act	25

PREFACE

1. This paper deals with the issue of the extent to which U.S. institutions make the labour market more responsive to market conditions. Over the past decade of high unemployment, the concern of policymakers in many countries has been directed to the possibility that at least a part of the cause of high unemployment could be wages above those which would have emerged from "market clearing" bargains reflecting labour market trends. For example, in general, wages do not fall in recessions, in spite of what might well appear a surplus of labour willing to accept jobs at prevailing wage rates.

2. As far as the United States is concerned, the idea that wages "should" reflect current market conditions found support in that country's traditional legal concept of the employment contract, under which, unless there was explicit agreement to the contrary, employment was terminable "at will" by either party. The introduction of legally enforceable collective agreements in the 1930's modified this for workers covered by collective agreements, and other legislation -- in particular that protecting civil rights and equal employment opportunity -- has modified it further. But until the last decade, these were seen as exceptions to what was still a basic rule. And this is still the picture of the United States held by many, perhaps most, observers abroad.

3. Interestingly, however, this has to some extent at least ceased to be the case. The civil courts in the United States -- largely operating in the 50 State jurisdictions -- have departed from the "employment at will" doctrine, and have introduced the sorts of constraints on an employer's ability to terminate employment which are familiar in other countries with very different legal traditions and histories. Furthermore, in many instances they have also introduced the United States concept of exemplary damages, whereby employers can be faced with penalties which far exceed compensation for loss of earnings. Thus while the average payment to a discharged employee is still probably much lower than in countries which provide for statutory entitlements (unless the employee brings action in the courts, no payment is due), the risk of having to pay a very large amount in any particular case is much higher than it would be if damages were limited to statutory entitlements. This risk, if widely perceived by employers, would lead them markedly to modify their behaviour, and there are suggestions that this may indeed be the case.

4. The recent economics literature -- particularly that originating in the United States -- has reflected both these currents. Much of it tended to assume that the "natural" state of affairs in employment contracts is employment-at-will. The fact that wages do not follow labour market trends is then explained by seeking "distortions" of the market process (for example, trade union actions). Recent and more sophisticated analyses have recognised that "implicit contracts" to enter into a long-term relationship might well be the result of the free operation of market forces. However, they have not

generally taken the next logical step: to the conclusion that in many employment arrangements it is long-term agreements -- and not "employment-at-will" -- which represent the labour market expression of the contractual arrangements on which any market economy is founded. This paper shows that it is precisely this conclusion which has been reached by the civil courts in many US state jurisdictions.

5. Underlying this process may be a sort of reaction of industrial practice to a legal vacuum. The shrinking scope of collective bargaining in the United States has meant that of the order of 85 percent of employees are not covered by such contracts. In these circumstances, the civil courts seem to have re-interpreted the law to make legally enforceable those understandings of ongoing relationships and trust which industrial relations practitioners have long recognised to be characteristic of long term employment relationships.

6. This development calls into question some views on regulations in other countries. Observing the relatively restricted scope of legislative regulation of employment contracts in the United States, together with the decline of collective bargaining, some observers have argued that other countries constrain employment by over-regulation. However, recent United States trends suggest another interpretation. This is that long term employment relationships are necessarily based on understandings which may need some form of legal backing if they are to operate satisfactorily -- in particular when corporate employers with continually changing owners and managers are parties to the understandings. If that legal backing is provided by the civil courts, the cost of court action will often exclude most plaintiffs.

7. If legal backing for these long-term arrangements is necessary, the statutory redundancy compensation and labour courts typical of European jurisdictions may well be a more efficient process. Plaintiffs benefit from inexpensive access, employers from a clearly defined and limited cost to terminating employment. In such circumstances, legislative regulations or generally applicable collective agreements may be less disruptive than are legal remedies which are relatively arbitrary, and which seek to constrain employers from unreasonable behaviour by threatening them with punitive penalties. The draft Uniform Employment Termination Act which is currently being considered by the National Conference of Commissioners on Uniform State Laws can be said to reflect this line of reasoning. A recent paper has shown that in "the probability that a law is proposed in a state legislature is more than quadrupled if these causes of action have been allowed in a state" (Krueger: 1989, 18).

8. This paper by Ms. Susan Mendelsohn describes these developments in the United States and considers their possible consequences. Ms. Mendelsohn is an attorney with Pillsbury, Madison & Sutro in San Francisco, California. She prepared this paper as a Consultant to OECD in 1988, while on leave from the firm. The views expressed are those of the author and do not commit either the Organisation or the national authorities concerned.

REFERENCE

KRUEGER, Alan B. L. (1989). "The Evolution of the Unjust -- Dismissal Legislation in the United States", NBER Working Paper No. 31.

WRONGFUL TERMINATION LITIGATION
IN THE UNITED STATES AND ITS EFFECT ON THE EMPLOYMENT RELATIONSHIP

I. INTRODUCTION

1. As part of its on-going interest in the factors which effect labour market flexibility, OECD in the past has sponsored studies which deal with redundancy regulations and with collective bargaining relations (1).

2. It is common knowledge that employers in many western European and other developed countries are constrained by statutes specifically designed to prevent unjust dismissal. However, it is widely believed that in the United States, employers can terminate non-union employees at will, without cost. In fact, employers in the United States face two types of legal constraints. Although there is no comprehensive unjust dismissal statute applicable in all 50 states, employers in the United States are constrained by numerous Federal laws applicable in all states which protect specific categories of employees, such as union members, civil servants, minorities and women, from dismissal under certain specified circumstances. In addition, most states have similar protective legislation. Moreover, since 1980, private employers increasingly have been involved in civil litigation filed by employees who claim that they were terminated unfairly ("wrongful termination litigation") (2).

3. In wrongful termination litigation, the plaintiff usually asserts one or more theories of recovery:

- a) the employer terminated him in violation of public policy, such as refusing to commit perjury on behalf of the employer;
- b) there was an oral agreement that the employee would continue to be employed as long as he or she performed satisfactorily;
- c) the employer's personnel policies and course of conduct created an implied contract for continued employment, which could only be terminated for "good cause", and the employer did not have cause to discharge the employee;
- d) the employer breached the covenant of good faith and fair dealing by denying the existence of a contract.

4. Wrongful termination litigation has expanded rapidly in the past seven years in state courts throughout the country. These suits have been filed successfully against large multinational firms as well as small local companies. Typically, the plaintiffs are individual employees who generally are not represented by unions. Workers from all levels of the organisation file

wrongful termination suits. However, these cases frequently involve management-level employees. Usually, the plaintiffs are represented by private attorneys who work on a contingent fee arrangement, i.e., the plaintiff's attorney expects to be paid out of the award if the case is concluded successfully. However, the plaintiff generally is responsible for paying his/her own litigation costs, which can run into several thousand dollars (3).

5. The United States does not have a system of Labour Courts. Therefore, these suits are heard by state and Federal civil courts, typically applying state statutory and common law (The state courts have the ultimate responsibility for deciding issues involving state statutory and common law. If an employee files a wrongful termination suit alleging both state and Federal causes of action, a Federal court may hear the case. However, the Federal court must apply state law to the state causes of action) (4).

6. Most wrongful termination cases are tried before a jury, which generally is more sympathetic to the discharged employee than a judge sitting as the sole decision-maker. As a result, plaintiffs frequently have been very successful in wrongful termination litigation and have received large financial awards. These awards substantially exceed the amounts awarded under European dismissal laws (5).

7. The Courts in almost all of the 50 states have judicially adopted some aspect of wrongful termination law, thereby modifying the at-will relationship. Only one state, Montana, has passed legislation which codifies the judicially created exceptions to employment at will. The Montana Supreme Court recently upheld this statute as constitutional (Meech v Hillhaven West, Inc.,) 129 DLR D-1 (7.7.89)). As a result of wrongful termination litigation, significant changes are occurring for employees in the non-union, non-agricultural sector, which currently comprises 83 per cent of the workforce in the United States.

8. This paper describes the three theories of "wrongful termination" litigation, discusses the extent to which these theories have been adopted, by state courts, explores legal trends and examines the economic and social impact of this litigation. It also briefly discusses the status of wrongful termination litigation in Canada.

II. WRONGFUL TERMINATION LITIGATION

A. Historical Background

9. The nature of wrongful termination litigation can be more easily understood by briefly reviewing the legal basis of the employment relationship. Under the traditional English rule the master was obligated to retain the servant for the term of employment. If no term was specified, the English courts implied a term, based on custom and practice in the industry. Employees hired to work on a daily or weekly basis were essentially employed at-will. However, if a more substantial term of employment was implied, termination was wrongful, unless proper notice was given. One drawback of the English rule was that it required case-by-case analysis to determine the rights of workers employed for an indefinite term.

10. Initially, the United States adopted the English system of a master-servant relationship. However, by the late 1800's the law was in a state of confusion with the courts disagreeing on issues of employment duration and notice requirements for indefinite term employees. A treatise published by Horace Gray Woods in 1877 provided a solution. Woods argued that since no term of employment was specified in the contract, none should be implied by the courts. He analysed the indefinite employment relationship as being "at will", whereby either party could terminate the relationship at any time, for any reason or for no reason. The "American rule" provided a presumption that unless there was evidence to the contrary, employment was at will. This legal presumption made it easier for the courts to summarily dismiss suits by indefinite term employees. In addition, some authors have attributed the acceptance of employment at-will in the United States to laissez faire attitudes and need for greater flexibility in labour relations during a period of rapid industrialisation (6).

11. The American rule was first adopted by the Tennessee court in Payne v Western and Atlantic Railroad (1884) 81 Tenn. 507, 519-520. Eventually, it was adopted by virtually every state in the country.

12. The employment-at-will rule remained firmly in place until the 1930's when a series of state and Federal laws were passed which protected specific categories of employees, such as unionised and low paid workers, from dismissal for engaging in certain legally protected activities. The United States Congress first passed the National Labor Relations Act ("NLRA") (1935), which protects employees from dismissal because of union membership or participation in "protected concerted" activity. The NLRA was followed by the passage of the Fair Labor Standards Act (1938), which protects employees who file minimum wage and overtime claims from dismissal for pursuing such claims. Civil service workers also were protected by state or Federal law from termination without good cause.

13. Beginning in 1964 with the passage of the Civil Rights Act, and in almost every year thereafter, Congress has enacted laws which offer additional protection from termination for specific categories of employees in the private sector. Today there are at least 22 different statutes of this type. For example, employees cannot lawfully be terminated based on race, colour, religion, national origin, age, sex, handicap, Vietnam era veterans or citizenship status. Employees cannot lawfully be discharged for making safety complaints or for reporting violations of law by their employer ("whistleblower statutes"). And, employees cannot be discharged in order to prevent them from attaining vested pension rights. A chronological list of the Federal protective legislation appears in Annex A.

14. Although the state and Federal protective legislation modified the at-will relationship for some employees, under some circumstances, the basic nature of the employment relationship did not change for the vast majority of employees. Workers who did not have express written or oral contracts, could be discharged at any time, for any reason, so long as it was not a reason circumscribed by law.

15. It is difficult to explain precisely why wrongful termination litigation became acceptable in the 1980's, but a number of interrelated social and economic factors have been suggested as contributing to its growth. For

example, during this period there was a general increase in all types of litigation in the United States, especially litigation designed to protect individuals, such as consumer protection litigation, personal injury litigation and landlord tenant suits.

16. The increase in corporate restructuring, including mergers and acquisitions, which resulted in greater uncertainty about long-term employment prospects, has also been suggested as a factor (7). In many cases corporate restructuring resulted in layoffs which effected all levels of the organisation, including management-level employees, who had not been as severely affected in the past. For example, a recent survey by the American Management Association reported that more than 500,000 middle-management jobs were cut by a group of 300 companies between 1984 and 1986 (8).

17. At the same time as corporate mergers were increasing, managers began to question the legislative framework which protected certain categories of employees (minorities, women, unionised workers), but did not protect them from "arbitrary" corporate actions (9). In addition, the popular press sensationalised high wrongful termination jury awards and settlements which may have encouraged other employees to file suit.

18. Other factors which have been mentioned as contributing to the increase in wrongful termination litigation include, the high level of unemployment during the severe economic recession of 1981-1983 in some industrial states like Michigan, which resulted in a backlash from frustrated workers (10); judicial awareness of the large decline of unionisation, with a corresponding effort to protect individual workers (11); and an attempt by the courts to equalise the bargaining power between employers and non-union employees who lack sufficient information about the market (12).

B. Modifications in the At-Will Relationship as a Result of Litigation

19. Plaintiffs rely on three major legal theories in pursuing wrongful termination claims. They may allege that their dismissal was a:

- (a) violation of public policy;
- (b) breach of an implied contract, or;
- (c) breach of the implied covenant of good faith and fair dealing.

Most plaintiffs allege all three of these theories, hoping that they will be successful on at least one cause of action. In addition, plaintiffs usually allege related torts, (13) such as infliction of emotional distress, defamation, interference with contractual relations, fraud and invasion of privacy. These "related torts" can result in the award of punitive damages. The damages that a successful plaintiff can be awarded depend, in part, on which legal theory applies to the facts of the case.

20. If a plaintiff succeeds in a wrongful termination case, the jury must determine the amount of damages due, within the legal parameters established by the judge. There are two types of damages, compensatory and punitive. Compensatory damages are designed to compensate the plaintiff for what he would

have received under the contract "but for" the defendant's breach. Punitive damages are designed to punish and make an example of the defendant for wrongful acts which are considered harmful to society as a whole. Generally, punitive damages only will be awarded in wrongful termination cases for violation of public policy (14).

1. Violation of Public Policy

21. The public policy theory is the oldest and most widely accepted theory of wrongful termination. Under this theory the employee claims that he was discharged for exercising a right or furthering a goal protected by statute, such as refusing to commit perjury (Petermann v International Brotherhood of Teamsters Local 396 (1959) 174 Cal. App. 2d 184). A few states also allow public policy claims where the employee expresses general societal concerns even though there is no statute or clear public policy.

22. As of January 1988, the courts in 34 states had accepted some variant of the public policy exception to at-will employment. The courts in eight states had rejected the public policy exception. The law was unsettled, i.e. there had been no definitive case in eight additional states. Twenty-two states had passed whistleblower statutes which protect employees who report violations of law.

Refusing to violate a statute or regulation

23. Most states recognise that an employee cannot be terminated solely for refusing to violate a statute. For example, the California Supreme Court in Tameny v Atlantic Richfield Co. (1980) 27 Cal.3d 167 held that an employee who refused to participate in an illegal price fixing scheme and was terminated had stated a tort cause of action. The public policy behind Federal and state antitrust laws was enhanced by the employee's refusal to help fix prices, thus justifying a tort claim (15).

24. In Indiana, the appellate courts have allowed public policy claims by an employee who was terminated for refusing to drive a truck that violated state weight restrictions (McClanahan v Remington Freight Lines, Inc. (Ind. 1986) 498 NE 2d 1336) and by an employee who refused to participate in an illegal scheme to turn back vehicle odometers (Sarratore v Longview Van Corp. (N.D. Ind. 1987) 2 IER Cases 922).

25. Public policy claims also have been accepted where an employee was discharged for refusing to testify falsely (Sides v Duke Hospital (N.C. App. 1985) 328 S.E.2d 818) and for refusing to commit an illegal act, such as pumping bilges into the Gulf of Texas (Sabine Pilots Services v Hauck (Tex. 1985) 687 S.W. 2d 733).

Exercising a legally protected right

26. Many states recognise an action for wrongful discharge when an employee exercises a right protected by law, such as filing a workers' compensation claim or serving on a jury. For example, in Clanton v Cain - Sloan Co. (Tenn. 1984) 677 S.W. 2d 441, 445, the Tennessee Supreme Court allowed a claim for retaliatory discharge where the plaintiff had been discharged after settling a workers' compensation claim, even though the workers' compensation statute did

not explicitly create a private cause of action. In Nees v Hocks (Ore. 1975) 536 P. 2d 512 the Oregon Supreme Court held that an employee fired for jury service had stated a public policy claim. However, some states, such as Alabama, have refused to recognise public policy claims in similar instances, such as filing a workers' compensation claim, because the state legislature has not specifically created a private right of action.

Expressing General Societal Concerns

27. This category of public policy cases is the most controversial because it extends protection to employees who refuse to support illegal activities or who protest activities which they believe are contrary to public policy when there is no clearly defined statute or explicit public policy involved. The courts in a number of states have held that a wrongful termination suit cannot be based on a general public policy which appears to be subjective and personal. In Hostettler v Pioneer (S.D. Ind. 1987) 2 I.E.R. Cases 1311 an Indiana appellate court rejected the plaintiff's public policy claim that he was discharged for reporting irregularities concerning supervisors, because there was no exercise of a statutory right.

28. In Foley v Interactive Data Corp. (Ca. 1988) 47 Cal. 3d 654, the California Supreme Court held that the discharge must be against a "substantial public policy" and one which serves the general public interest, rather than the employer's private interests. (Id., at 670-671). Advising the employer concerning a supervisor's alleged embezzlement on a former job only served the employer's private interests and therefore did not reflect a substantial public policy. See also, Suchodolski v Michigan Consol. Gas Co. (Mich. 1982) 316 N.W.2d 710 [the Michigan Supreme Court held that violation of internal company management regulations or a code of ethics was not sufficient to support a public policy claim].

29. Public policy cases provide an important exception to employment at-will and it is likely that plaintiffs will seek to expand the definition of "public policy" in order to recover punitive damages. However, most employees are not discharged for refusing to violate a statute or for taking some other action currently protected by public policy. Therefore, it is more likely employees will seek protection under the other two exceptions to employment at-will, breach of an implied contract and breach of the covenant of good faith and fair dealing.

2. Breach of Employment Contract

30. Employees may establish that they have a right to continued employment based on an express written contract, an express oral contract or an implied contract for continued employment. If the plaintiff establishes a contract for continued employment, the employer must show that it had "good cause" for the discharge (16). If the employee shows he was "wrongfully terminated", he is limited to contract damages which are designed to give him "the benefit of his bargain," i.e., what he would have received under the contract if he had not been terminated. However, the employee is required to mitigate his damages, i.e. his award will be reduced by income which was or could have been earned.

Express written contracts

31. Traditionally, employees in the United States did not have the right to continued employment unless the employer made an express promise to that effect. The express promise could be written or oral. Although sports figures, movie stars, high-level executives and union members frequently had express written contracts of employment, these categories of employees did not comprise the majority of the workforce.

Express oral contracts

32. Express oral contracts of continued employment are rarer, but occasionally the courts find a worker has been promised such employment. For example, an employer may promise that worker will have "lifetime employment" (17).

33. However, not every offhand remark about continued employment is sufficient to create a contract. For example, in Hillesland v Federal Land Bank Association. (1987) 407 N.W. 2d 206, the North Dakota Supreme Court rejected an oral contract claim based on an "impression" regarding career employment, gathered in a job interview 27 years before. Even the liberal California courts reject claims which are too vague or express a mere hope of expectation, such as a statement that the employer looked forward to a "long, pleasant and mutually satisfactory relationship" (Hillsman v Sutter Community Hospital (1984) 153 Cal. App. 3d 743).

34. Although breach of an express written or oral contract can result in substantial compensatory damages for a highly-paid employee, a plaintiff's success in litigation will not necessarily change the employer's future behaviour. Other employees will not be protected from wrongful discharge unless each worker, individually, can prove that he was promised continued employment. However, if the plaintiff prevails in an implied contract case based on the employer's personnel policies, employee handbook or based on the employer's course of conduct, it can affect the employment relationship with every employee in the workforce subject to those policies.

Implied contract

35. As a result of wrongful termination litigation, most states now allow plaintiffs to establish an "implied contract" for continued employment. Under this contract, the parties, by implication, agree that the employee will remain employed as long as his performance is satisfactory and the employee will not be discharged without good cause. Courts look at the "totality of the circumstances" in order to determine if there is an implied contract, including:

- a) the personnel policies or practices of the employer;
- b) the employee's longevity of service;
- c) actions or communications by the employer reflecting assurances of continued employment, and
- d) the practices of the industry in which the employee is engaged. Foley v Interactive Data Corp., supra, 47. Cal. 3d 654, citing Pugh v See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 327.

36. The implied contract theory was set forth by the Michigan Supreme Court in Toussaint v Blue Cross and Blue Shield, 292 N.W. 2d 880 (1980) and has been expanded upon by the Supreme Courts in a number of other states. In Toussaint, the employee was not only given oral assurances of job security, but he also received the Company's personnel manual which listed disciplinary procedures and stated that it was the Company's policy to discharge employees "for just cause only." The Court held that it was not necessary for the employee to specifically know about the policies or rely on them to his detriment, such as foregoing another job. It held that the policies created a reasonable expectation of continued employment which could not be avoided once the company chose to issue the policies.

37. Similarly, in Wooley v Hoffman-La Roche, Inc. (NJ 1985) 491 A1. 2d 1257, the New Jersey Supreme Court took the approach that the personnel manual formed a valid, enforceable employment contract. The Court suggested that if employers do not want their manuals construed as contracts, they should draft the manuals to state that the employer promises nothing and remains free to change wages and other working conditions at will.

38. Although almost every state recognizes that employer writings can create a contract for continued employment, each state interprets the implied contract theory somewhat differently. A few courts take the position that even if the handbook is issued years after the employee is hired, the disciplinary procedures in it can create an implied contract not to discharge unless those procedures are followed (Pine River State Bank v Mettelle (Minn. 1983) 333 N.W. 2d 622). A number of courts require that the personnel policies be distributed in such a manner that the employee is aware of the contents and reasonably believes there has been an offer of continued employment.

39. Other courts require detrimental reliance by the employee for a contract to be formed. For example, in Weiner v McGraw-Hill Inc. (1982) 457 N.Y. 2d 193, the high court of New York held that the plaintiff had established an implied contract when he left his former employment in reliance on a just-cause promise by McGraw-Hill, was told several times while at McGraw-Hill that there was a just-cause standard and rejected other job offers in reliance on the Company's promises. In general, the New York courts have refused to embrace implied contract theories unless there is strong evidence of reliance.

40. Some courts will not find an implied contract if the personnel policies state that they are merely "guidelines", if the policies are reserved for supervisors or if the disciplinary procedures are stated in permissive language, such as "may", rather than mandatory terms, such as "shall" or "will."

Totality of circumstances

41. Rather than looking at any one factor, some courts consider the totality of the circumstances to determine if there is an implied contract. For example, in Pugh v See's Candies, Inc. (Ca. 1981) 116 Cal. App. 3d 311, Mr. Pugh started his employment as a candy pot washer. At the same time he was hired he was told "if you are loyal to (See's) and do a good job, your future is secure." Over the next 32 years Pugh received raises, commendations and promotions. Eventually he became Vice President of the firm. Shortly after returning from a business trip to Europe, Pugh was asked to resign. When he

refused, the company fired him. The California Court of Appeals held that the statement about loyalty in exchange for job security, in combination with other factors in the case, such as Pugh's promotions, commendations and length of service, was sufficient to create an implied contract for continued employment. This multi-factor approach was followed by the California Supreme Court in Foley v Interactive Data Corp., supra, 47 Cal. 3d 654, the Court's first comprehensive decision on wrongful termination.

42. Implied contract cases often raise difficult questions for employers. Many companies have personnel policies adopted in the late 1960's, in response to Civil Rights legislation, which promise fairness, equal treatment and "permanent" employment after successful completion of a probationary period. In light of wrongful termination litigation, employers are questioning whether they should maintain these policies or revise them and possibly create labor relations difficulties with employees who believe they were promised continued employment. However, the problems raised by implied contract cases seem manageable when compared with the uncertainty caused by cases alleging breach of the implied covenant of good faith and fair dealing.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

43. The breach of the covenant of good faith and fair dealing, said to be implied in every contract of employment, is the least developed theory of wrongful termination litigation and the one with the least acceptance. It is also the most radical departure from prior law. Only ten states recognise this theory, which generally requires that neither party act to defeat the rights of the other party to enjoy the benefits of the contract.

44. Nevada recognises that breach of the covenant can be a tort and allows the plaintiff to recover compensatory and punitive damages. In Connecticut and New Hampshire breach of the covenant must occur in a public policy case before punitive damages are allowed. In Alabama, Alaska, Arizona, California, Iowa and Massachusetts, the courts limit the employee to contract damages for a breach of the covenant. In the remaining forty states, about half reject the concept of a covenant of good faith and fair dealing in the employment context and half have no definitive case law on the issue.

45. The concept of a covenant of good faith and fair dealing initially developed in the insurance context. In 1958, the California Supreme Court, for example, recognised that since insurance companies held themselves out as fiduciaries and were in a superior bargaining position to the insured, they had a special obligation of "good faith and fair dealing" toward the insured (Communale v Traders & General Ins. Co. (1958) 50 Cal. 2d 654).

46. The New Hampshire Supreme Court first applied the covenant to an employment case in Monge v Beebe (1974) 316 Atl. 2d 549, in which a female employee was discharged after refusing her boss' sexual advances. The Court found this was a dismissal motivated by bad faith or malice and thus created a tort exception to the at-will employment rule. Subsequently, New Hampshire limited the covenant to public policy cases.

47. The Massachusetts Supreme Court followed New Hampshire with its decision in Fortune v National Cash Register Co. (1977) 364 N.E. 2d 1251). The Court found that an at-will employment contract contained an implied term that the employer would act in good faith. Therefore, it was wrongful to discharge a salesman in order to deprive him of earned commissions. However, the plaintiff was limited to contract damages.

48. The California courts expanded this cause of action further when they held that violation of the covenant could result in tort damages (Cleary v American Airlines (1980) 111 Cal. App. 3d 443). In Cleary the court found that there was a covenant of good faith and fair dealing implied in every contract, including contracts of employment. The covenant was violated when an employee was terminated without good cause under the following circumstances: (1) The employee had 18 years of satisfactory service with the Company, and (2) the Company failed to follow its own express policy on disciplinary action.

49. However, the California Supreme Court recently narrowed the substantive meaning of the covenant so that Cleary is no longer good law. In addition, the Court limited the plaintiff's recovery for a breach of the covenant of good faith and fair dealing to contract damages (Foley v Interactive Data Corp., supra, 47 Cal. 3d 654).

C. The Foley Case and its Impact on Wrongful Termination Law

50. For the past 10 years, California has been at the forefront of wrongful termination litigation with cases such as Tameny v Atlantic Richfield Co. (1980) 27 Cal. 3d 167 (which established tort damages for a breach of public policy), Pugh v See's Candies, Inc. (1981) 116 Cal. App. 3d 311 (which established the parameters for an implied contract cause of action) and Cleary v American Airlines, Inc. (1980) 111 Cal. App. 3d 443 (which treated a breach of the covenant of good faith and fair dealing as a tort). However, prior to Foley v Interactive Data Corp. supra, 47 Cal. 3d 654, the California Supreme Court had not taken a comprehensive look at wrongful termination litigation. The Foley decision was expected to affect the development of wrongful termination litigation not only in California, but throughout the United States.

51. The plaintiff in the Foley case was employed for seven years and received a number of promotions and commendations. When a new supervisor was hired, Foley heard that the supervisor had been involved in an embezzlement scheme at his prior place of employment and Foley reported this information to upper management. Less than two months later Foley was dismissed.

52. The Foley case gave the California Supreme Court an opportunity to discuss each of the theories of wrongful termination. In summary, the Court decided (1) public policy claims must be based on a substantial public policy and one which serves the general interests of the public, rather than the employer's private interests; (2) employers and employees may enter into at-will contracts and those contracts will be enforced so long as they are not violative of other laws. However, a contract to dismiss only for good cause may be implied based on the employer's statements, policies or conduct; (3) although there is a covenant of good faith and fair dealing in every contract, its breach only gives rise to contract damages.

53. In the wake of the Foley decision, there are a number of important issues which will have to be resolved by the courts or by state legislatures.

- 1) What are the parameters of a public policy cause of action?
 - Employees are expected to focus on public policy litigation since, now, it is the only wrongful termination cause of action which can result in punitive damages. (18) One of the first post-Foley cases in California to explore this issue was American Computer Corporation v Miletic (Aug. 29, 1989) ____ Cal. App. 3d ____, 89 C.D.O.S. 6720. In this case the Court of Appeal decided that an employee who reported his suspicion of ongoing embezzlement to Company officials was not protecting a general public interest. Therefore, the termination did not violate public policy.

- 2) What types of statements or actions by the employer will create an implied contract of employment which can only be terminated for "good cause"?
 - Since at-will contracts can be terminated without cause, employees will try to establish that they are protected from arbitrary termination as a result of an implied contract of employment. Two recent California Court of Appeal cases explored what is needed to create an implied contract. In Miller v Pepsi-Cola Bottling Co. (May 31, 1989) ____ Cal. App. 3d ____, 259 Cal.Rptr. 56 the court held that an employee's regular salary increases and promotions over eleven years were "natural occurrences of an employee who remains with an employer for a substantial length of time" and did not change the at-will nature of his employment. In Wilkerson v Wells Fargo Bank (1989) ____ Cal. App. 3d, 89 C.D.O.S. 6061 the court held that even though the bank's employee handbook and operations manual contained at-will statements, there was no integrated writing signed by the employer. Therefore, the court held that the jury should consider these documents as well as other evidence to determine whether there was an implied contract for continued employment.

- 3) What is "good cause" for termination?
 - This issue is expected to result in a great deal of litigation as the courts struggle to craft a workable definition of "good cause". This process has already begun. For example, in Giorgi v Verdugo Hills Hospital (May 9, 1989) ____ Cal. 3d ____, 89 C.D.O.S. 3457, the Court of Appeal found that the employee's insubordination toward her supervisor and difficulties in managing her supervisees constituted good cause for termination. In McLain v Great American Insurance Co. (Mar. 28, 1989) 208 Cal. App. 3d 1476, the California Court of Appeal found that the employer breached its implied contract when it terminated the employee for complaining about his supervisor's inappropriate and racist behaviour.

- 4) Should the standard for termination be "good cause" or some other less stringent standard?
 - A "good cause" or "just cause" standard frequently is used in union contracts for judging terminations. Some employer representatives object to adopting this standard for wrongful termination cases because it puts a substantial burden on the employer. In addition, the "good cause" standard may not be equally workable for all types of positions in all types of industries.

-- A number of other standards have been suggested for use in the wrongful termination context. For example, one option is to allow terminations so long as the employer has a "reasonable good faith" belief that its actions are proper. Another option is to let the termination stand so long as the employer's actions are not "arbitrary and capricious." A third option is to allow terminations to stand so long as the employer does not act in "bad faith".

5) What is the proper measure of damages?

-- In California, the Supreme Court's decision in Foley precluded courts from awarding tort remedies for breach of the covenant of good faith and fair dealing. However, the Court did not define the proper contract remedies for wrongful termination. It is likely that the courts, as well as the state Legislature, will continue to struggle with this issue.

III. SOCIAL AND ECONOMIC IMPACT OF WRONGFUL TERMINATION LITIGATION

54. Wrongful termination litigation has resulted in substantial costs for the employers directly involved in these lawsuits. It also has resulted in more generalised changes in the employment relationship. Although these changes primarily affect non-union employees, it appears that the ability of unions to organise employees also may be effected. In addition, state legislatures are reacting to the costs and uncertainty caused by wrongful termination litigation by attempting to pass legislation to further regulate the employment relationship.

A. Litigation Costs

55. Wrongful termination litigation involves both monetary and non-monetary costs. One of the primary monetary costs is damages, which can result in awards of hundreds of thousands of dollars to the plaintiff. A second monetary cost is attorneys fees, which can require a substantial expenditure by the company. Generally, in the United States each side must pay its own attorney. Therefore, a company involved in wrongful termination litigation faces attorneys fees whether it wins, loses or settles the case. If the case is resolved early in the proceedings, the fees can be minimal, in the \$5,000 to \$10,000 range. However, a fully litigated wrongful termination case can result in attorneys fees well in excess of \$100,000 (19). As noted above, the plaintiff usually has little or no liability for attorneys fees, since wrongful termination cases generally are taken on a contingent fee basis.

56. As a rule of thumb, 90 per cent of all civil litigation in the United States is disposed of prior to trial. Some cases are resolved through pretrial motions, others are settled. In a newly developing area of the law like wrongful termination litigation, settlements are frequently made because of the great uncertainty surrounding future legal developments.

57. Settlement figures for wrongful termination cases are difficult to obtain since the parties frequently agree to keep the settlement amount confidential. However, in California, one indication of the range of settlement discussions can be obtained from Jury Verdicts Weekly, which polls

the parties after trial to determine their pretrial bargaining positions. It also reports on the amount of compensatory and punitive damage awarded. Subsequent history of the case is not provided, so that it is difficult to determine if the award was reduced on appeal or if the case was settled for less than the full award.

58. Jury Verdicts Weekly reported that during the period October 1981 to November 1987, 183 wrongful termination cases were tried before California juries. The plaintiff prevailed in 66 per cent of these cases. The plaintiff's settlement demands ranged from \$5,875,000 to zero; employer's settlement offers ranged from \$760,000 to zero; the verdicts ranged from \$8,000,000 to zero. The mean total award (compensatory and punitive damages combined) was \$498,563. The mean compensatory and punitive damage awards were \$274,672 and \$363,201 respectively. The median award was \$60,000 (20).

59. The Rand Study findings regarding awards in wrongful termination cases were not substantially different. In regard to settlements, Rand Study found plaintiffs' demands averaged \$207,710; defendants' offers averaged \$40,570 in the cases in which an offer was made. If all cases were considered, plaintiffs were awarded an average of \$208,212. However, after post-trial reductions and legal expenses, the average net payment to plaintiffs in all cases was \$127,590. The median net payment in all cases was \$30,000, which is approximately the amount of one-half year's salary for the typical plaintiff (21).

60. The non-monetary costs of wrongful termination litigation are harder to measure, but are just as real. Any litigation is disruptive to an organisation, but wrongful termination is especially so, since it usually involves many layers of the company, including top managers, officers and directors. Employees from various departments must review documents and prepare testimony, which may take them away from more productive activities. In addition, since civil litigation dockets are extremely crowded, a wrongful termination suit can take three to five years to be resolved, leaving the parties uncertain about the status of the employment relationship.

61. Wrongful termination litigation also can be disruptive to the plaintiff, who frequently must spend time away from his job search or subsequent employment to pursue his suit. This type of litigation can be stressful because the employee places his personal pride and credibility in issue. Moreover, in order to prove non-contract damages the employee may have to divulge sensitive information about his personal life.

B. Generalised Changes in the Employment Relationship

62. Wrongful termination litigation not only affects the employers directly involved in these lawsuits, but it also affects those firms which seek to avoid costly, time-consuming litigation. Many employers are trying to strengthen the at-will nature of employment by revising their personnel policies to state explicitly that employment is "at-will and can be terminated by either party, at any time, for any reason." While this strategy may discourage implied contract claims, it probably will not protect the employer from public policy claims or from claims arising under the covenant of good faith and fair dealing. In addition, labour relations repercussions may occur if a company suddenly adopts an "at-will" standard on the heels of a period of time during which it traditionally had an implied contract to terminate only for good cause.

63. In addition to taking steps to strengthen the at-will nature of the employment relationship, many employers are also making changes in the way they hire, train and discharge employees in order to avoid wrongful termination litigation. As a result of these changes, employers are voluntarily reducing the flexibility they enjoy to hire, promote, train and terminate employees.

Hiring

64. Since all employees, including short-term probationary workers may be protected from wrongful termination under public policy and covenant of good faith and fair dealing theories, employers are taking more time to carefully orchestrate and formalise hiring procedures to reduce the risk of contract formation. Increased care during the hiring stage includes, conducting detailed reference and background checks, engaging in more extensive interviews, educating prospective employees about the nature of the job and administering more pre-employment tests. Testing not only includes skill and aptitude tests, but also psychological tests, honesty tests, computer-aided profiles, handwriting analysis and polygraph tests. The increased use of polygraphs in the workplace was one of the reasons cited in support of the legislation restricting the use of polygraphs which Congress recently passed. More careful screening of applicants may make it more difficult for new workers to be hired, thereby resulting in greater job security for existing employees.

Training

65. In many companies, managers are receiving specific training about wrongful termination litigation. Frequently this training is conducted by company attorneys. The three wrongful termination causes of action are discussed, company personnel policies are reviewed and managers are advised on how to avoid lawsuits, with an emphasis on the need to treat employees in a fair, consistent manner. In many companies, this type of training had not been conducted since the early 1970's, when U.S. firms first became aware of their equal employment opportunity obligations.

Termination

66. One of the biggest changes to result from wrongful termination litigation is delay in the termination decision. Many firms are adopting supervisory guidelines to assure that at least the company provides a procedurally fair termination process. In addition, in some companies one person is responsible for reviewing all termination decisions and assuring that they are proper. Frequently, the company's attorney is consulted before a final discharge decision is made. Employers also are taking care to document poor performance, advise the worker about problems which could affect future employment and, in some instances, putting the employee on probation or demoting him, before making a final termination decision. In the past, progressive discipline was not unusual for non-management and unionised employees, but rarely occurred when companies discharged managers. Today, documentation and due process procedures are being followed for employees at all levels in the organisation, including top level managers.

Other strategies

67. There are a number of other strategies which have been adopted by some firms, but are less universally accepted than those discussed above. Written contracts of employment are being used more widely than in the past. Some firms are entering into such contracts with all levels of non-union

employees, rather than limiting their use to high-level executives. The terms of these contracts differ widely from firm to firm. Some companies agree to employment for a specified term; others adopt a strict at-will standard of employment; still others state that employment is at-will, but agree to follow certain procedures before terminating employees who have been employed a specified period of time, such as five years.

68. Prior to the advent of wrongful termination litigation, it was not uncommon for firms to have severance pay plans for economic layoffs or to include such provisions in the written employment contract of high-level executives. Recently, some firms have adopted broad based severance pay plans covering all workers. These plans frequently provide that the worker will receive severance pay, unless he is terminated for cause.

69. Rather than adopting a formal severance pay plan, other companies negotiate settlement agreements with individual employees on an ad hoc basis. These agreements usually include a severance provision and an agreement that there will be no litigation. Some firms do not favour this type of pre-litigation settlement because they believe it will encourage other employees to make demands.

70. A growing number of companies are making significant changes in the employment relationship by adopting a grievance and arbitration procedure for non-union employees. The procedure is usually very similar to grievance/arbitration procedures in the union setting, i.e., the terminated employee files a grievance with the company; if the grievance is denied by the company, the matter can be heard by a neutral arbitrator; the decision of the arbitrator is final, precluding further litigation. Depending on the firm's policy, the arbitrator may be paid by the company, the cost may be split 50-50 or the losing party may be required to pay the arbitrator.

71. In the United States arbitration is already used extensively in the unionised sector to resolve disputes over interpretation of a collective bargaining agreement. Thus, for unionised employees, the arbitration process handles many of the disputes which are assigned to the Labour Courts in several European countries. Many attorneys favour arbitration of wrongful termination claims as a rapid, low cost alternative to litigation. However, arbitration differs from litigation in that punitive damages usually are not awarded.

C. Effect of Wrongful Termination Litigation on Unions

72. The growth of wrongful termination litigation raises two difficult questions regarding unions: (a) Can unionised employees file wrongful termination cases? (b) Will wrongful termination litigation have an adverse effect on organising?

Right to File Wrongful Termination Suits

73. The courts are still struggling with whether unionised workers should be permitted to file wrongful termination suits. The United States has a long-standing public policy in favour of collective bargaining that the courts are reluctant to disturb. Federal law governs collective bargaining agreements, so state law claims are pre-empted by Federal law if the suit is

"integrally intertwined with interpretation of the contract." Accordingly, courts generally find that state law is pre-empted when wrongful termination claims are based on implied contract and covenant of good faith theories, since determination of these issues requires interpretation of the collective bargaining agreement.

74. However, wrongful termination suits based on the public policy theory have gained some acceptance. Some courts allow unionised workers to make such claims based on equity, i.e., it would be unfair for non-union workers to receive state law protection and potentially large punitive damage awards while union workers are limited to contractual protection and compensatory damages. Other courts allow such suits when an important public policy, such as the right to file a workers' compensation claim, is involved.

75. The U.S. Supreme Court recently decided a case in which a unionised employee asserted that state law applied where she was discharged in retaliation for notifying her employer about a work-related injury. The Supreme Court unanimously held that the plaintiff had parallel remedies under federal law for breach of the collective bargaining agreement and under state law for retaliatory discharge. State law was not pre-empted since interpretation of the collective bargaining agreement was unnecessary to resolve her state law claim (Lingle v Norge Division of Magic Chef 1988) 108 S.Ct. 1877. This case is significant since it is likely to encourage other unionised workers to file wrongful termination suits based on the public policy cause of action.

Effect of Wrongful Termination Litigation on Organising

76. If unionised employees are not protected by any of the wrongful termination theories, the ability of unions to organise probably will be adversely affected, since workers will question why they are limited to reinstatement and back pay remedies (22), while other workers are not limited in a similar fashion. Even with the Supreme Court's decision in Linge, supra, it appears that wrongful termination litigation may make it more difficult for unions to attract new members. As a result of this litigation non-union workers are gaining many of the advantages that in past were only provided under a collective bargaining agreement, such as, a good cause standard for discharge, severance pay and, in some cases, a grievance/arbitration procedure.

77. The AFL-CIO recently acknowledged that wrongful termination litigation was beginning to affect union organising. For the first time, the AFL-CIO Executive Council called for legislation which would establish protection against discharges without cause for all workers (23).

D. Legislation

78. As a result of the uncertainties and costs created by wrongful termination litigation, a number of states are considering legislation in an attempt to establish a new balance between employers and employees. In addition, the National Conference of Commissioners on Uniform State Laws ("National Conference") currently has a draft Employment Termination Act under consideration (24). See Annex B for the text of key sections of this draft. This proposal adopts many of the provisions which are found in European dismissal statutes.

79. The Uniform proposal is highly controversial. Many defense lawyers in the United States object to the proposal because it establishes a universal definition of "good cause," which would apply regardless of the industry or type of position involved. Plaintiffs' lawyers object to the proposal because it excludes "high-level policy-making executives." In addition, the proposal precludes jury trials by making arbitration the primary adjudicatory forum. It precludes arbitrators from awarding punitive damages in most cases.

80. Thus far, Montana is the only state to adopt wrongful termination legislation (1987 Session Laws, Chap. 641). This legislation was adopted before the National Conference issued its proposal. The Montana statute is more generous to employees than the proposed uniform Employment Termination Act.

81. The Montana statute defines "good cause" as "a 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 reasons." Compensatory damages and punitive damages may be awarded for a wrongful discharge. A discharge is "wrongful" 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 his own written personnel policy."

82. The Montana law pre-empts all common law remedies, but it does not apply to claims covered by a Federal statute or to employees covered by a collective bargaining agreement or other written contract of employment. The employer and employee may agree to binding arbitration in lieu of court action. If a party makes an offer to arbitrate which is rejected and the offering party prevails in a subsequent lawsuit, the party who rejected arbitration is liable for attorneys' fees. If the employee offers to arbitrate and prevails at arbitration, the employer must pay the arbitrator's fee and all costs of arbitration.

IV. LITIGATION IN CANADA

83. Canada's labour relations system is similar to that of the United States, and like the United States, it has experienced a recent increase in wrongful termination litigation. The Canadian courts have struggled with many of the same types of issues as in the United States, such as what type of pre-termination procedures should be followed, what is "just cause" for termination and what types of damages are appropriate. The Canadian courts also have concentrated on what amount of notice should be given prior to termination.

84. Canada has experienced a recent, dramatic increase in wrongful termination litigation. During the period 1955-1973, 51 wrongful termination cases were decided by the Canadian courts (25). This litigation was primarily filed by civil service and union employees (id.). From 1974-1982, 105 cases were decided; managers and professionals with written contracts and at-will employees became the dominant plaintiffs (id.). The number of wrongful termination cases continued to grow during the 1983-1985 period, during which approximately 200 cases were decided (26).

85. Canadian wrongful termination litigation during the 1980s has concerned a number of issues which are similar to those in the United States, including the proper amount of notice required (27), the appropriate circumstances for awarding punitive damages, the type of due process required before termination and what constitutes "just cause" for dismissal (28). It also appears that the Canadian courts have accepted implied contract and public policy theories, which have been used to enlarge express notice periods set forth in written contracts and employer policies.

V. CONCLUSION

86. Since 1980, wrongful termination litigation has had a significant impact on U.S. labour relations. In the absence of legislation, the courts have moved to fill a void created by the widespread practice of terminating employees without "good cause" or without following reasonable procedures. Employers are taking these judicially created limitations seriously. Many are delaying personnel decisions and are acting with greater care when they do discharge employees, in order to avoid wrongful termination litigation.

87. It is difficult to predict whether this litigation will have a lasting effect on the employment relationship. However, it does not appear that the wide-spread acceptance of public policy and implied contract claims will be reversed. And, the U.S. Supreme Court's decision in Linge v Norge Division of Magic Chef, supra, makes it likely that public policy claims will increase, especially in the unionised sector. Development of the remedies for a breach of an implied contract, the parameters of a public policy claim and the definition of "good cause" for termination will require further litigation or legislative action.

NOTES

1. These studies were prepared for the OECD Working Party on Industrial Relations.
2. In 1988, Alan F. Westin, a Columbia University political scientist, estimated that there were 25,000 wrongful termination suits pending in state courts, compared with approximately 200 cases in the late 1970s (Business Week, March 28, 1988, p. 68). The growth of wrongful termination litigation also can be measured by the number of cases decided and the number of legal periodical articles written regarding wrongful termination during the past several years.

Year-by-year data on wrongful termination decisions is not available for each state. However, data is available for California, which has been at the forefront of this litigation.

California Wrongful Termination Verdicts, October 1981 through November 1987*

<u>Year</u>	<u>Number of Verdicts</u>
1981	2
1982	18
1983	14
1984	32
1985	45
1986	43
1987	29
Total	183

*Source: Jury Verdicts Weekly

The following year-by-year data is available regarding articles published on wrongful termination litigation.

Legal Periodical Articles Published
re Wrongful Termination Litigation,
January 1980 thorough December 1987*

Year	Number of Articles Published
1980	8
1981	6
1982	7
1983	23
1984	21
1985	37
1986	31
1987	22
Total	155

* Source: Lexis Legal Resource Index

3. "Litigation costs" can include filing fees, cost of deposition transcripts, and expert witness fees.
4. Defamation is an example of a state cause of action; violation of Title VII of the Civil Rights Act of 1964 is an example of a Federal cause of action.
5. Flanagan, R.J., "Labor Market Behavior and European Economic Growth," Barriers to European Growth, A Transatlantic View, Ed. R. Z. Lawrence, C. L. Schultze, The Brookings Institution, 1987, p. 175, 194-197.
6. Heshizer, Brian, "The New Common Law of Employment: Changes in the Concept of Employment at Will", Labor Law Journal, Feb. 1985, p. 95 -96; Forbes, Frank S., Jones, Ida M., "A Comparative, Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause," Labor Law Journal, March 1986, p. 157 - 158.
7. Gould, William, "Stemming the Wrongful Discharge Tide: A Case for Arbitration", Employee Relations Law Journal, Vol. 13, Winter 1987/88, p. 404, 409-410.

8. "Downsizing Survey" conducted by the American Management Association's Management Review, as reported in BNA's Employee Relations Weekly, Vol. 6, No. 4, January 25, 1988, p. 99.
9. See footnote 7, supra.
10. Raphael, Steve, "Lawsuits by Fired Workers on the Rise", Detroit Business News, June 23, 1986, quoting Federal District Court Judge Avern Cohn.
11. Hoerr, John, "Beyond Unions", Business Week, July 8, 1985, p. 72, 75.
12. Kornblau, David L., "Comment: Common Law Remedies for Wrongfully Discharged Employees", Industrial Relations Law Journal, Vol. 9, 1987, p. 660, 664.
13. A "tort" is a civil breach of duties imposed on the parties by law, without regard to their consent to assume such duties. A detailed discussion of employment-related torts is beyond the scope of this paper.
14. Punitive damages also can be awarded as a result of successful tort claims.
15. By classifying a termination in violation of public policy as a tort, some courts have allowed plaintiffs to recover "punitive damages". Punitive damages are predicated on a number of factors, including the egregious nature of the termination, the wealth of the employer and the amount the jury believes is necessary to deter the employer from future wrongful acts. It has been reported that in public policy cases both punitive and compensatory damages are awarded over 50 per cent of the time. (Kornblau, David L. "Comment: Common Law Remedies for Wrongfully Discharged Employees", Industrial Relations Law Journal, Vol.9, 1987, p. 674, fnt. 10).
16. Some courts suggest that the experience gained over the years in the unionised setting should be used to determine if there was sufficient "good cause" for discharging an employee in a wrongful termination case. However, these same courts acknowledge that a more flexible standard may be appropriate if a high-level executive is involved. Generally, the courts are sympathetic when companies face adverse economic conditions and they allow companies substantial leeway in decisions. However, the firm may have to justify why a particular employee was singled out for layoff.
17. In the past, in order to enforce a contract which could not be performed within one year, the plaintiff had to show that there was a written instrument ("statute of frauds" rule). However, the trend is to allow enforcement of oral employment agreements if the employee could have performed the contract within one year, Foley v Interactive Data Corp.
18. Plaintiffs may still recover punitive damages as a result of the employer's tortious actions, such as assault, fraud or invasion of privacy.

19. According to a recent study by the Rand Corporation, the legal fees charged by defence attorneys averaged \$80,073. The defence fees ranged from \$2,500 to \$650,000, with median fees being \$65,000. Dertorizos, J.N., Holland, E. and Ebener, P., "The Legal and Economic Consequences of Wrongful Termination", The Rand Corporation's Institute for Civil Justice, 1988, p.26. ("Rand Study"), p. 37-38. Table 15.
20. The ten largest wrongful termination awards to plaintiffs during this period ranged between \$1,100,000 and \$8,000,000.
21. Rand Study, p. 39-40, Table 16.
22. The standard arbitral remedy under a collective bargaining agreement for a discharge not based on just cause is reinstatement plus back pay for lost wages and benefits. Where the employee's conduct warrants discipline short of discharge, labor arbitrators often reduce the back pay award accordingly.
23. AFL-CIO Executive Council, "Statement on Employment At Will Doctrine" Bal Harbor, Florida, Feb. 20, 1987.
24. The National Conference is comprised of 315 practicing attorneys and legal scholars who are appointed by the Governors of the 50 states. Its goal is to draft proposals for uniform legislation on issues which have impact throughout the country, where uniformity would be advantageous, such as commercial transactions, probate and family law matters. The individual states are encouraged to enact the proposal as drafted, but modifications are permitted.
25. Sooklal, L. "Identification and Analysis of the Wrongful Dismissal Lawsuit Problem in Canada", Labor Law Journal, September 1987, p. 596, 598-600.
26. Adams, R.J., Donnelly, M.E., "Wrongful Dismissal: Employee Challenge and Corporate Response", December 1986, Unpublished, p. 4.
27. If a Canadian executive was discharged in 1960 the maximum award he could expect was six months salary in lieu of notice. In 1986, a terminated executive was awarded 30 months salary, the largest award to date (Adams, R.J., et al., "Wrongful Dismissal: Employee Challenge and Corporate Response", supra, p. 5).
28. See footnote 6, p. 7-11.

ANNEX A

FEDERAL PROTECTIVE LEGISLATION

1. The National Labor Relations Act (1935) (29 U.S.C. Sec. 141-197) prohibits dismissal of employees because of union membership or participation in "protected concerted" activities;
2. The Fair Labor Standards Act (1938) (as amended 29 U.S.C. Sec. 201-219) prevents discharge of an employee who has filed a complaint or otherwise participates in a proceeding for non-compliance with minimum wage and overtime standards;
3. Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e - 2000e-17) prohibits an employer from discharging an individual because of race, color, religion, sex or national origin;
4. The Age Discrimination in Employment Act of 1967 (29 U.S.C. Sec. 621-634 (as amended, 1986) makes it unlawful for an employer to discharge an employee on the basis of age;
5. The Consumer Protection Act (15 U.S.C. Sec. 1674 (1968)) prevents an employer from discharging an employee because of wage garnishment;
6. The Occupational Safety and Health Act (29 U.S.C. Sec. 651-678 (1970)) provides that an employer shall not discharge an employee because that employee has filed a complaint or otherwise participated in a proceeding for violation of occupational safety and health standards;
7. The Employment and Training of Disabled and Vietnam Era Veterans Assistance Act (38 U.S.C. Sec. 2011-2026) (1972) guarantees a person inducted into the military the right to reemployment on satisfactory completion of military service, so long as the person is still qualified to perform his or her job, and protects the reemployed person from discharge without cause for one year after reemployment;
8. The Federal Water Pollution Control Act (33 U.S.C. p 1367 (1972) prohibits discharge of employees who institute or testify at a proceeding against the employer for violation of the Act.
9. The Rehabilitation Act of 1973, as amended (29 U.S.C. Sec. 793, 794), requires employers affirmatively to employ and advance otherwise qualified handicapped individuals, where the employers receive federal funding or government contracts;
10. The Energy Organization Act of 1974 (42 U.S.C. Sec. 5851 (1978)) prohibits the discharge of employees who assist, participate or testify in any proceedings to carry out purposes of the Act or the Atomic Energy Act of 1954;

11. The Employee Retirement Income Security Act of 1974 (29 U.S.C. Sec. 1140, 1141) prohibits discharge of employees in order to prevent them from attaining vested pension rights.
12. The Clean Air Act (42 U.S.C. Sec. 7622 (1977)) prohibits discharge of employees who commence or testify at proceedings against an employer for violation of the Act;
13. The Civil Service Reform Act of 1978 (5 U.S.C. Sec. 7513(a) (1978)) permits removal of federal civil service employees "only for such cause as will promote the efficiency of the service";
14. The Pregnancy Discrimination Act of 1978 (42 U.S.C. Sec. 2000e(k)) expands the meaning of the terms "because of sex" and "on the basis of sex" in Title VII to include "because of or on the basis of pregnancy, childbirth or related medical conditions";
15. The Railway Safety Act (45 U.S.C. Sec. 441 (1980)) prohibits railroad companies from discharging employees because they have filed complaints or otherwise participated in proceedings related to enforcement of federal railroad safety laws, or who refuse to work under conditions they reasonably believe to be dangerous;
16. The Asbestos School Hazard Detection and Control Act (20 U.S.C. Sec. 3608 (1982)) prohibits state and local educational agencies receiving assistance under the Act from retaliating against an employee who has made public a potential asbestos problem;
17. The Surface Transportation Assistance Act of 1982 (49 U.S.C. Sec. 2305) prohibits interstate trucking firms from firing employees who refuse to operate an unsafe truck or who report their employer for safety violations;
18. The Judiciary and Judicial Procedure Act (28 U.S.C. Sec. 1875 (as amended, 1983)) prohibits dismissal of employees serving on a jury in federal court;
19. The False Claims Act (31 U.S.C. Sec. 3730(h) (1986)) protects federal contractors' employees from retaliation for exposing fraud against the government;
20. The Immigration Reform and Control Act of 1986 (8 U.S.C. Sec. 1324a) protects employees from discrimination based on citizenship status.
21. Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001) (1988) prohibits discharge of employees who refuse to take polygraph examinations.
22. Worker Adjustment Retraining and Notification Act (29 U.S.C. 2101) (1988) requires certain employers to give 60 days' notice to employees of "mass layoff" or "plant closure."

ANNEX B

EXTRACTS FROM DRAFT UNIFORM EMPLOYMENT TERMINATION ACT

Section 1. DEFINITIONS. In this [Act]:

- (a) "Constructive termination" means a voluntary quitting of employment by an employee induced by an act or omission of the employer which an objective, reasonable person would find so intolerable that quitting was [an] [the only] appropriate response.
- (b) "Employee" means an individual who works for the same person for hire for an average of at least 20 hours a week during the six months preceding the individual's termination, including an individual employed in a supervisory, managerial, or confidential position. The term does not include an individual engaged as an independent contractor [or a high-level policy-making executive or an executive having responsibility for the direction of an enterprise or a significant part of an enterprise].
- (c) "Employer" means a person who employs 10 or more individuals for the same enterprise [, but does not include this State, a political subdivision, municipal corporation, or other governmental agency].
- (d) "Fringe benefits" means any vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, or pension benefit plan in force on the date of the termination, if the leave or plan is paid for by the employer.
- (e) "Good cause" means a reasonable basis for the employment action taken, in light of the employee's duties and responsibilities, the employee's conduct and performance record, or the legitimate economic needs of the employer, as determined by the employer's exercise of good faith management judgment in organising or reorganising operations, evaluating employee performance, or making decisions about the size and composition of the workforce.
- (f) "Individual" includes a corporation or partnership functioning as an individual in performing services for hire for others.
- (g) "Person" means one or more individuals, corporations, organisations, or other legal entities.
- (h) "Termination" means (i) a dismissal of an individual by an employer or other employing person, (ii) a layoff or suspension of an individual by an employer or other employing person for more than six months, or (iii) a failure to recall to employment or to rehire an individual, or a retirement, and includes the elimination of a position, plant closing, or any cut-back in the number of individuals employed. The term includes a constructive termination.

COMMENT

Subsection (c): Uniformity is less important with regard to public employees and, thus, their coverage is left to local option.

Subsection (d): Examples of "good cause" for a termination include theft, fighting on the job, destruction of property, intoxication, drug abuse, insubordination, excessive absenteeism or tardiness, incompetence, and nonperformance or neglect of duty. In addition to good cause based on employee conduct, a separate and distinct basis for termination may be found in economic conditions or an employer's honest business judgment. Although an employer's cut-back in the number of employees may be economically justified, an individual may still contest his or her selection for layoff on the grounds it was discriminatory or otherwise without good cause. If the employee is in a higher level position or a position that is critical to the success of the enterprise, the employer has greater discretion in terminating the employee while meeting the good cause standard.

.....

Section 3. EMPLOYMENT AT WILL; PROHIBITED TERMINATIONS

(a) If the employment of an individual is for an unspecified duration, either the individual or the employing person may terminate the employment of the individual at any time for any reason, except as provided by this [Act] or by other applicable state or federal law.

(b) A person may not terminate the employment of any individual, whether or not the parties are employer and employee under this [Act], if:

- (1) the termination is in retaliation for the individual's compliance with, or refusal to violate, public policy derived from constitutional or statutory law existing at the time and conferring rights or imposing duties on persons in this State; or
- (2) the termination is based upon the individual's good faith reporting of facts to the appropriate representatives of the employer or other employing person or to appropriate civil authorities, if the individual is under a legal duty to report those facts and the facts, if proven, would constitute a felony under applicable state or federal law, or if failure to report the facts would adversely affect the safety or health of any fellow worker or of the general public.

(c) An employer may not terminate the employment of an employee, other than an employee who is under a contract of employment having a specified duration, without good cause, if the employee's first date of employment with the employer was at least one year before the date of the termination. However, such an employee shall always be afforded the substantive and procedural guarantees contained in the express provisions of an employer's written personnel policy.

An employer may contract individually with managerial [supervisory, executive, professional, or confidential] employees concerning [reasonable] standards of performance establishing good cause for termination. For purposes of this subsection, an employee's first date of employment is the employee's most recent date of hire, if more than one year elapsed between that latter date and any immediately prior period of employment with the same employer.

COMMENT

Subsection (b)(2): This provision establishes minimum standards regarding an individual's right to report facts without being subject to retaliation. It does not pre-empt or otherwise affect state "whistleblower" statutes which may provide employees greater protections.

Subsection (c): Upon the expiration of a fixed term employment contract, or the completion of the given task for which an individual was employed, there is no continuing right of employment. But the specified duration must be bona fide, as determined by the customs of the particular industry, etc. Thus, an employer could not circumvent the requirements of the statute by entering into a series of one-week contracts.

Unionised employees and employees covered by collective bargaining agreements subject to federal law are entitled to exercise rights under this statute to the extent permitted by the developing law of federal pre-emption. See, e.g. Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877 (1988).

Generally, the [Act] provides a one-year probationary period before "good cause" protections apply. Temporary breaks in service (less than one year) do not necessarily destroy the status of a nonprobationary employee, and thus seasonal workers may be covered. But in all cases an average of 20 hours or more per week must be worked during the six months preceding termination for good cause protections to apply (see Section 1(b)).

.....

Section 6. AWARD AND REMEDIES

(a) Within 30 days after the close of the hearing or after the submission of any post-hearing briefs, or within any further time the parties may agree upon, the arbitrator shall issue an award sustaining or dismissing the complaint in whole or in part. The award will ordinarily include an opinion, unless both parties request otherwise. An opinion will contain the critical facts as found by the arbitrator and the principal reasons for the arbitrator's decision but it need not be lengthy.

(b) The arbitrator may provide any of the following remedies for a violation of this [Act]:

- (1) reinstate the employee or employed individual.
- (2) award full or partial backpay (including the value of any fringe benefits) to the employee or employed individual, with interest,

but with a deduction of interim earnings or amounts earnable with reasonable diligence.

- (3) in the discretion of the arbitrator, award additional liquidated damages in an amount not greater than the backpay awarded, if the arbitrator finds that the termination of employment was a wilful violation of this [Act] and lacking in good faith.
- (4) if reinstatement is not granted, award a severance payment equal to a continuation of the pretermination pay (including the value of any fringe benefits) at the rate paid immediately preceding the termination of employment or constructive discharge for a period not to exceed two years beyond the date of the award.
- (5) award reasonable attorney's or representative's fees and costs to a prevailing employee or employed individual.
- (6) award reasonable attorney's or representative's fees and costs to a prevailing employer or employing person, if the arbitrator finds the complaint was frivolous, unreasonable, and without foundation[;]
- [(7) award the full amount of the arbitrator's fees and expenses, if the arbitrator finds that the resort to arbitration or the defense in arbitration was vexatious and lacking in good faith;]
- [(8) in the discretion of the arbitrator, award punitive damages, if the arbitrator finds the termination of employment was a malicious violation of Section 3(b) (prohibiting terminations contrary to public policy)].

(c) The award of an arbitrator is final and binding.

(d) There is no right to damages for termination of employment under this [Act] for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law, and no right to compensatory damages, punitive damages, or any other form of damages, except as provided in subsection (b).

.....