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EMPLOYEE PROTECTION FROM UNJUST DISCHARGE: A PROPOSAL FOR JUDICIAL REVERSAL OF THE TERMINABLE-AT-WILL DOCTRINE

Edwin Robert Cottone*

I. INTRODUCTION

"You can take this job and shove it! I ain't workin' here no more [sic] . . . ."1 Perhaps this classic song lyric by singer Johnny Paycheck best demonstrates the theoretical principle of mutuality that makes up the heart of the employment at-will doctrine.2 The doctrine allows employers to fire employees "for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."3 In other words, the employment at-will doctrine allows an employer to discharge an employee for almost any reason or for no reason, as long as contrary statutory or contractual provisions do not exist.4 The mutuality justification of the at-will rule has undergone much criticism.5 This criticism is based on the fact that employees often have inferior bargaining power when compared to their employers, rendering so-called mutuality of the at-will doctrine illusory at best.6

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* Comments Editor, Santa Clara Law Review, Volume 42. J.D. candidate, Santa Clara University School of Law; B.S., University of California, Berkeley.

1. Johnny Paycheck, Take this Job and Shove It, on JOHNNY PAYCHECK GREATEST HITS (Country Music Foundation Records 1974).
5. See ROTHSTEIN & LIEBEMAN, supra note 2, at 910.
6. See id.
The employment at-will doctrine, however, does not apply to all employees in the United States. A minority of employees are protected from the "potentially harsh and unjust effects of this doctrine by collective bargaining agreements, civil service legislation and antidiscrimination statutes." Included within this minority group are government employees such as letter carriers, forest rangers and police officers, as well as unionized employees such as laborers and steel workers. Government employees, in sharp contrast to their private sector counterparts, maintain comprehensive legal protection against unjust discharge. Moreover, unionized employees typically retain unjust discharge protection pursuant to a contractual collective bargaining agreement between the union and the employer. Workers covered by antidiscrimination statutes also enjoy at least partial protection from the at-will rule because statutes prohibit those employees from using discriminatory reasons as a basis to terminate employees. The bulk of today's private sector workforce, however, is still susceptible to the at-will doctrine because the majority of private sector employees are not in unions and because "many discharged employees find statutory protections inapplicable to their situations."

In 1992, experts estimated that ninety million persons in the United States were employed in private sector nonagricultural jobs. Roughly sixty million of these jobs were susceptible to the at-will doctrine. Currently, experts "estimate that about two million at-will employees are terminated by their employers each year." Researchers further estimate

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7. See id.
8. See Hitchcock, supra note 4, at 942.
9. See id.
10. See infra Part II.D.
11. See Hitchcock, supra note 4, at 945.
13. Hitchcock, supra note 4, at 942.
that approximately 200,000 or more of the two million discharged each year are wrongfully terminated. A discharge that is "not justified by some nondiscriminatory business reason that would meet the standard of 'just cause'" is considered wrongful termination. For example, a supervisor can lawfully (although wrongfully) discharge an employee in pure retaliation when the employee reports to the employer workplace conditions that are in violation of federal safety regulations. This harsh rule, which allows an employee to be fired for even morally repugnant reasons, is in dire need of judicial review.

The solution to this problem lies in the development of a new common law principle that gives private, non-union employees some of the protections courts and legislatures have given to public employees. For example, pre-termination grievance procedures are mandatory for public employees such as firemen and judges. Private sector employees have no such safeguards unless they belong to a union or have an express contract with their employer stating that the employer will not fire the employee except for just cause.

This comment explores the problems of at-will employment as well as the difficulties involved in extinguishing this anachronistic doctrine. This comment begins with a brief description of the origin of American employment law. Second, it discusses the creation of the at-will doctrine, including its history and adoption by the United States Supreme Court as well as the legislative and judicially created exceptions to the doctrine. Third, contract exceptions to the at-will rule are

17. See Sprang, supra note 14, at 850-51 & n.7 (citing Model Uniform Employment Termination Act prefatory note reprinted in 9A LAB. REL. REP. (BNA) 21, 23 (Aug. 8, 1991)).
18. Id. at 850-51. "Just cause' is the common standard that must be met to support a discharge under the terms of most collective bargaining agreements." Id. at 851 n.8 (citing WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 63 (1993)).
22. See infra Part II.D.
23. See infra Parts II.B.2-3.
24. Seeinfra Part II.A.
25. See infra Parts II.A-B.2.
Fourth, this comment explains a scholarly proposal to enact a federal statute to overturn the common law employment at-will rule. Fifth, this comment introduces a Montana state statute that protects employees from wrongful discharge. Sixth, the astounding difference between the extensive rights given to public employees and the limited rights given to private employees will be investigated.

The analysis section of this comment describes why the legislative option is not a likely or viable alternative. Finally, this comment proposes that the courts themselves create a common law exception to the at-will employment doctrine that grants private employees the same rights that government employees enjoy.

II. BACKGROUND

A. History and Creation of the Employment At-Will Doctrine

American employment law was originally based on the English law of master-servant. English master-servant law operated on the assumption that employment would last for approximately one year. The two systems sharply diverged around the end of the nineteenth century when American legal systems developed the termination at-will rule.

"According to scholars, the termination at-will doctrine first appeared in a legal treatise by Horace C. Wood." To support his bold and novel at-will employment rule, Wood cited four American cases. However, scholars claim that none of the four cases Wood cited actually supported the statement. Nevertheless, Wood's rule gained acceptance in the United States. After Wood's treatise, Master and Ser-
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vant, becoming widely known and accepted, courts began citing to it and the at-will rule became law. The establishment of Wood's at-will doctrine culminated in 1908 when the United States Supreme Court adopted the rule in Adair v. United States. The Adair Court invalidated a federal statute that protected union employees from termination based on their union membership.

B. Exceptions to the At-Will Doctrine

1. Public Policy

Since Adair, the judiciary has made several exceptions to the pure termination at-will rule. The original termination at-will rule started to erode when the United States Supreme Court overruled Adair in NLRB v. Jones & Laughlin Steel Corp. In Jones & Laughlin, the Court allowed a statutory exception to the at-will rule. This exception prohibited employers from firing employees solely for being members of a labor union. Subject to this single exclusion, the at-will rule remained good law.

Public policy exceptions led to a more significant erosion of the at-will doctrine. In 1853, the early English case of

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38. See id.
39. See id.

Scholars and jurists unanimously agree that Wood's pronouncement in his treatise, Master and Servant, was responsible for the nationwide acceptance of the rule. They also agree that his statement of the rule was not supported by the authority upon which he relied, and that it did not accurately depict the law as it then existed.

Id.

40. Adair v. United States, 208 U.S. 161 (1908) (holding unconstitutional a federal statute that made it a crime for an employer to fire an employee only because he is a member of a union). But see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (overruling Adair and holding a similar statute valid and constitutional; however the at-will rule was still good law subject to this restriction).

41. See Adair, 208 U.S. at 161.
43. Jones & Laughlin, 301 U.S. at 1.
44. See id.
45. See id. (holding as constitutional a federal statute that prohibited firing employees based solely on union membership).
46. See id.
47. See Holmstrom supra note 42 at 160.
Egerton v. Brownlow\textsuperscript{48} articulated public policy in terms of contracts, "[p]ublic policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good."\textsuperscript{49} If the rule in Egerton were taken to its logical extreme, then it would allow judges to void any employment contract that is either "injurious to the public or against public good,"\textsuperscript{50} including at-will employment contracts.\textsuperscript{51}

Despite the seemingly broad power granted to judges by Egerton, in practice judges usually only apply a "narrow range"\textsuperscript{52} of public policy exceptions to the employment at-will rule.\textsuperscript{53} In most states, judges will only recognize a public policy exception to the at-will rule if the exception is grounded in either the state or federal constitution, a statute, or some regulation designed to implement statutes.\textsuperscript{54} These types of exceptions are explored in the following cases.

In 1959, the landmark California case of Petermann v. International Brotherhood of Teamsters\textsuperscript{55} established the first public policy exception to the at-will rule.\textsuperscript{56} In Petermann, the plaintiff employee's employer asked him to perjure himself in testimony before a state legislative committee.\textsuperscript{57} The employee refused, and was fired the very next day.\textsuperscript{58} The court reasoned that making "one's continued employment . . . contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and the employer and to serve to contaminate the honest administration of public affairs."\textsuperscript{59} The Petermann court grounded its public policy exception in the state's penal code, holding that an at-will employee could not be fired for refusing to violate a statute.\textsuperscript{60}

\textsuperscript{48.} Egerton v. Brownlow [1853] 4 H.L.Cas. 1, 196 (Eng.).
\textsuperscript{49.} STANDLER, supra note 20 (quoting Egerton, 4 H.L.Cas. at 196 (Lord Truro, J.)).
\textsuperscript{50.} Id.
\textsuperscript{51.} See id.
\textsuperscript{52.} Id.
\textsuperscript{53.} See id.
\textsuperscript{54.} See id.
\textsuperscript{56.} See STANDLER, supra note 20, at pt. 4.
\textsuperscript{57.} See Petermann, 344 P.2d at 26.
\textsuperscript{58.} See id.
\textsuperscript{59.} Id. at 27.
\textsuperscript{60.} See id.
What if the employee exercised a statutorily granted right? In *Frampton v. Central Indiana Gas Company*, the Indiana Supreme Court created an exception to the at-will doctrine for employees who were fired for exercising a statutorily granted right. In *Frampton*, plaintiff employee lost her job because she filed a workers' compensation claim for an injury sustained while on the job. The *Frampton* court reasoned that while an employee can be discharged without cause under ordinary circumstances, "when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general [at-will] rule must be recognized."

In 1992, the California appellate court in *Gantt v. Sentry Insurance* further defined the public policy exception to the at-will rule. The *Gantt* court quoted its decision in *Foley v. Interactive Data Corporation* to begin its analysis:

[I]n *Foley* we endeavored to provide some guidelines [to determining what public policy is] by noting that the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer; in addition the policy must be "fundamental," "substantial" and "well established" at the time of the discharge.

The *Gantt* court then described four categories in which "courts and commentators alike" have found public policy exceptions. Those four categories include instances where the employee was fired for the following: "(1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." The *Gantt* court expressed concern over judicial policy making, cautioning the courts to use "great care and [to give] due deference to the judgment of the legislative branch." The court held that the

62. See id. at 426.
63. Id. at 428.
66. Gantt, 824 P.2d at 684.
67. Id.
68. Id.
69. Id. at 687.
"wise caveats against judicial policy making" would not be necessary if a public policy exception to at-will employment doctrine had to be based on statutory or constitutional provisions.

In 1999, the California Supreme Court in *Green v. Ralee Engineering* expanded on *Gantt* by grounding certain public policy exceptions in federal regulations intended to protect public safety. In *Green*, the plaintiff based his claim not on statutory or constitutional grounds, but on his employer's violation of the Federal Aviation Act ("FAA"). The plaintiff reported the alleged FAA violations internally to his supervisors and to the company president. Similarly, in *Foley*, the plaintiff made only internal reports of his supervisor's embezzlement of company funds. The *Foley* court, however, did not recognize an exception to the at-will rule, whereas the *Green* court did. In *Green*, the employer was violating FAA regulations while manufacturing aircraft parts, whereas in *Foley*, the employee's supervisor was embezzling company funds. The *Foley* court held that the supervisor's embezzlement of funds was not a public concern that warranted the exception to the at-will doctrine and thus the plaintiff had no cause of action. In *Green*, however, despite the fact that the plaintiff never reported the alleged violations of FAA regulations outside of the company, the court still found that the public policy exception prevented the employer from firing him at-will in retaliation for reporting. The *Green* court reasoned that the alleged violations of FAA regulations not only violated the company's interest but also violated public safety interests. The *Green* court distinguished *Foley* by reasoning that the public interest must be at stake and not merely the

70. *Id.*
71. *See id.*
73. *See id.* at 1057.
74. *See id.* at 1049.
76. *See id.* at 374.
77. *See Green*, 960 P.2d at 1049.
78. *See id.*
79. *See Foley*, 765 P.2d at 375.
80. *See id.* at 401.
82. *See id.*
interests of the employee or employer. Moreover, the Green court further reasoned that employees should not be discouraged from reporting these types of violations and thus a public policy exception was appropriate because interests beyond those of the individual employee or employer were at stake. The Green court expanded on Gantt by creating a public policy exception to the at-will doctrine based on violations of federal administrative regulations, rather than only allowing an exception firmly based on constitutional principles or statutes.

In a small minority of states, courts have recognized judge-made public policy exceptions not rooted in constitutional law or statutes. In Palmateer v. International Harvester Company, the Illinois court declared, "[many of our cases state that the public policy is to be found in the constitution and statutes of this State and, when these are silent, in the decisions of the courts." Similarly in Boyle v. Vista Eyewear, Inc., the Missouri appellate court reasoned that judicial public policy exceptions were legitimate because "[t]he at-will employment doctrine itself is judicially enunciated public policy." The Boyle court stated further that either state or national court decisions are an adequate basis for public policy exceptions.

In summary, there are few public policy exceptions to the at-will doctrine. Thus, for private, non-union employees, the

83. See id. at 1057-58 (citing Foley v. Interactive Data Corp., 765 P.2d 373 (1988)).
84. See id.
85. See id. at 1062 (Baxter, J., dissenting).
86. See STANDLER, supra note 20, pt. 5 (citing Pierce v. Ortho Pharm., 417 A.2d 505, 512 (N.J. 1980); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (Public policy "is to be found in the state's constitution and statutes and, when they are silent, in its judicial decisions."); Parnar v. Am. Hotels, 652 P.2d 625, 631 (Haw. 1982) ("[P]rior judicial decisions may also establish the relevant public policy."); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) ("[Public policy] finds its sources in the state constitution; in the letter and purpose of a constitutional, statutory or regulatory provision or scheme; in the judicial decisions of the state and the national courts . . . .").
88. Id. at 881 (citing People ex rel. Nelson v. Wiersema State Bank, 361 Ill. 75, 86 (1935); Ill. Bankers Life Ass'n v. Collins, 341 Ill. 548 (1930); Zeigler v. Ill. Trust & Sav. Bank, 245 Ill. 180 (1910)).
90. Id. at 871.
91. See id.
at-will doctrine is still good law in most of the United States, including California. Essentially, private sector, non-union employees can still be fired at the whim of their employer. For this reason, most employees in the United States have zero legal job security.

2. Statutory Exceptions to At-Will Termination

The United States is one of the very few industrialized nations that does not provide general statutory protection against wrongful discharge. American employees who are members of unions are typically not susceptible to the rule however, because they are usually protected by a clause in the union collective bargaining agreement that does not allow firing of employees, except for just cause. Additionally, employees protected by particular statutes also enjoy protection from termination based on unlawful justification. For example, union and non-union employees alike enjoy protection from discharge that is based on race, color, religion, sex, national origin, age, or wage garnishment. California aug-

92. See STANDLER, supra note 20.
93. See CAL. LAB. CODE ANN. § 2922 (West 2002) (providing that an at-will employment may be ended by either party at any time without cause, for any or no reason, and subject to no procedure except the statutory requirement of notice).
94. See, e.g., id.; see also supra Part I.
95. See Hitchcock, supra note 4, at 945 (citing Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 509-19 (1976)).
96. See id. at 945 (citing 2 COLLECTIVE BARGAINING, NEGOTIATIONS, & CONTRACTS (BNA) 40:1, 51:1 (1979)). “A survey of the major types of provisions in collective-bargaining agreements conducted by the Bureau of National Affairs found that ninety nine percent of the contracts studied contained grievance procedures and ninety six percent provided for arbitration.” Id. at 945 n.29.
ments the federal scheme of statutes and forbids discharge based on jury service or an employee’s involvement in union or political activity. “Despite such protections, it has been estimated that between sixty and sixty-five percent of the nonagricultural work force is employed under contracts that are terminable at-will.”

Although the aforementioned groups are statutorily protected, there are still more hurdles to jump over if the employer violates one of the antidiscrimination statutes. For example, an at-will employee must meet the criteria of the United States Supreme Court’s opinion in Reeves v. Sanderson Plumbing Products, Inc., in order to sustain a prima facie claim of discrimination. The Reeves Court held that it was insufficient for the jury to simply disbelieve the employer’s proffered reason for the termination; the jury must also believe the plaintiff’s claim of discrimination.

A California case, Guz v. Bechtel, illustrates the difficulties faced by an employee intent on proving a discrimination charge. In Guz, the Bechtel Corporation went through a “reduction in force” whereby plaintiff John Guz’s working group was downsized and relocated to another part of the corporation. Guz, who was 49 years old, was willing to take a grade and pay cut in order to maintain a position at his group’s new location. Guz alleged that he was not even considered for the new jobs and, instead, two much younger workers were assigned to the new location. In her dissenting opinion, Justice Kennard noted that by “[a]dopting the United States Supreme Court’s recent discrimination formula in Reeves the majority found that Guz’s claim of age discrimination was ‘too weak to raise a rational inference that [age]

100. See CAL. LAB. CODE § 230 (2002).
101. See id. § 923 (2002).
102. See id. § 1102 (2002).
103. Hitchcock, supra note 4, at 946 (citing Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 n.9 (1979)).
105. See id. at 146-47.
106. See id. at 147.
108. Id. at 1094.
109. See id.
110. Bechtel filled the positions with workers that were between seven and fifteen years younger than Guz. See id. at 1129.
discrimination occurred." The Guz court reasoned that the reduction in force gave the employer sufficient reason to terminate Guz despite his age.

3. Contract Exceptions to the At-Will Employment Rule

Typically, a contract based challenge to the at-will doctrine, absent a proper collective bargaining agreement or a separate individual contract, will fail. Further, even if the employee did prevail, damages in a contract claim would be limited to the employee's lost compensation. "The employee cannot recover damages for the pain, anguish, and frustration suffered as a result of the job loss." Despite these daunting realities, the contract based wrongful discharge claim is the most common cause of action asserted by discharged at-will employees. But contract claims that are based on an employer document, whether it be an employee handbook or some other tangible employer policy have only a narrow chance of success. In an unusual circumstance, a claim based on employee manuals was upheld in the early case of Toussaint v. Blue Cross & Blue Shield. In Toussaint, the Michigan Supreme Court held that an employer's personnel manual containing a statement that the company would only fire for good cause was contractually binding on the employer.

In the past, implied contract claims not to fire but for just cause that were based on longevity of service, repeated oral promises of continued employment, and good job performance reviews have also been upheld. But, recently in Guz the

111. Id. at 1129 (Kennard, J., dissenting).
112. See id.
113. See Sprang, supra note 14, at 869 (citing William B. Gould IV, Stemming the Wrongful Discharge Tide: A Case for Arbitration, 13 EMPLOYEE REL. L.J. 404, 413-14 (1987) (stating that because an employee's potential recovery will be based in part on the employee's income, damage recoveries will be limited)).
114. See id.
115. See id.
116. See id.
117. See id. (citing Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980)).
118. See Toussaint, 292 N.W.2d at 885.
119. See id.
California Supreme Court issued a landmark decision making it harder for discharged employees to prove the existence of an implied contract. The Guz court held that no implied contract existed despite compelling conflicting arguments. Plaintiff Guz’s contrary arguments included:

(1) his long service (of nearly 20 years); (2) assurances of continued employment in the form of raises, promotions, and good performance reviews; (3) Bechtel’s written personnel policy suggesting that termination for poor performance would be preceded by progressive discipline . . . ; and (4) testimony by a Bechtel executive that company practice was to terminate employees for good reason, and to reassign, if possible, a laid off employee who was performing satisfactorily . . .

The Guz court expressly held that lengthy employment, by itself, does not demonstrate an implied in fact contract not to terminate at-will. Furthermore, the Guz court unanimously rejected Guz’s claim that his termination violated an implied covenant of good faith and fair dealing. “Guz argue[d], in effect, that the implied covenant can impose substantive terms and conditions beyond those to which the contracting parties actually agreed [and such reasoning] directly contradicts [this court’s] conclusions in Foley.” The covenant merely prevents “one contracting party from unfairly frustrating the other party’s right to receive the benefits of the agreement actually made.” Moreover, the court asserted that a breach of an implied covenant cannot logically be based on a claim that the discharge of an at-will employee was made without cause.

In summary, the Guz court made it “easier for bosses to sack workers.” In doing so, the Guz decision made it harder
for long term employees with good performance records to prove implied employment contracts. Moreover, the Guz decision held that the age of the employee is not likely to be a barrier to termination, further narrowing statutory discrimination protections.

C. Statutes That Prohibit Unjust Discharge

1. A Proposed Federal Statute

Several scholarly papers have proposed that legislatures enact statutes to reverse the common law at-will rule. For example, in a Michigan law review article ("Stieber article") the authors assert: "[t]he appropriate remedy for the problem of unjust discharge is comprehensive federal legislation." In another publication, Professor Kenneth Sprang calls for a federal statute that closely mirrors Title VII of the Civil Rights Act and "prohibits the discharge of any employee without good cause." Since both articles propose federal statutes, this comment will focus on the Stieber article.

In their article, Jack Stieber and Michael Murray begin their proposal for federal legislation by asserting that "piecemeal legislation and narrow judicial decisions are of only limited value." They then outline, in eight steps, the elements that drafters of the statute should consider.

a. Limits on the Statute

The Stieber article first defines and limits the scope of the proposed statute to include only wrongful discharge actions, including constructive discharge, instead of all types of disciplinary actions (i.e., suspensions, demotions, etc.).

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131. See id.
132. See id.
134. See Stieber & Murray, supra note 133, at 319.
135. See Sprang, supra note 14, at 921. ("The right to be protected against wrongful discharge is as important as the right to be protected from invidious employment discrimination."). Id.
136. See Stieber & Murray, supra note 133, at 319.
137. Id. at 336.
138. See id. at 337-41.
139. See id. at 337.
b. Defining "Just Cause"

Second, the article suggests how the proposed federal statute should interpret just cause.\(^{140}\) The article explains that a termination decision in one case may amount to just cause, but the same reason in another case may not.\(^{141}\) Instead of attempting to define this slippery term in the proposed legislation, the article instead suggests that the legislation should "incorporate the body of industrial common law that already exists"\(^{142}\) in order to prevent "unnecessary litigation."\(^{143}\)

c. Which Employers are Covered?

According to the Stieber article, the third criteria drafters should take into consideration is employer coverage.\(^{144}\) Citing the exemption for small employers in Title VII, the authors suggest that employers with less than ten employees should be exempt from the proposed federal statute.\(^{145}\) Moreover, the article also suggests exceptions for employers who are part of a collective bargaining agreement that already provides employees with protection against unjust discharge and for employers that voluntarily take up a system of their own that protects from unjust discharge.\(^{146}\) Of course, the voluntary employer system must meet statutory guidelines.\(^{147}\)

d. Which Employees Would be Eligible for Protection?

The fourth step in the plan involves employee eligibility for protection against unjust discharge under the proposed statute.\(^{148}\) Employees who already enjoy this protection such as union members, tenured teachers, certain government employees, or those employees with an individual contract of employment should be exempt from the federal statute.\(^{149}\)

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140. See id.
141. See id. (citing F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 610-66 (3d ed. 1973)).
142. Stieber & Murray, supra note 133, at 337.
143. Id.
144. See id. at 338.
145. See id.
146. See id.
147. See id.
148. See Stieber & Murray, supra note 133, at 338.
149. See id.
The article then proposes that employees with both unjust discharge and employment discrimination claims should be barred from also suing under the proposed unjust discharge statute. The proposed statute would also have a minimum service requirement before an employee would become entitled to protection from unjust discharge "[i]n order to allow employers to retain the necessary flexibility in determining employee suitability for continued employment." A recommended minimum amount of service time is six months.

e. Informal Remedies

The fifth criteria in the proposed statute calls for an informal conciliation procedure that must occur before the unjust discharge claim will be certified for a formal hearing. "Conciliation [or mediation] not only can speed the resolution of complaints but can reduce administration costs by limiting the number of cases going to formal hearing and arbitration." 

f. Formal Remedies

Reinstatement with back-pay is the recommended formal remedy for unjust discharge in large companies where the employee can be placed under a different supervisor. The recommended remedy, however, is different for the employee of a small company. Because reinstatement may be "unworkable" in a small company, the statute should be flexible to allow a compensation award in these circumstances.

g. Funding the Administration of the Statute

The seventh criteria involves cost. The Stieber article suggests that the government should bear the costs of administering the statute. In order to prevent frivolous lawsuits, however, the article suggests having each side pay a filing
fee. The fee would be returned to the prevailing party. The article proposes that the amount of the filing fee could be a flat rate or it could be a percentage of the employee's weekly earnings.

h. The Forum for Enforcement of the Statute

Finally, the Stieber article suggests that cases brought under the statute should be decided by a single arbitrator rather than a court. The article suggests that the statute should allow joint selection of an arbitrator from a qualified select group. The article also suggests that hearings should be informal and that the "judicial system's rules of evidence should not apply."

2. A Montana State Statute that Protects Employees From Wrongful Discharge

As of 1994, Montana was the only state in the nation to adopt a statute that protects employees from wrongful discharge. The Montana Code provides:

(1) A discharge is wrongful only if:

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

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

(c) the employer violated the express provisions of its own written personnel policy.

Subsection (a) of the Montana statute codifies the common law in California as described above. Subsection (c) embodies existing common law where a contract is found in

160. See Stieber & Murray, supra note 133, at 340.
161. See id.
162. See id.
163. See id.
164. See id.
165. Stieber & Murray, supra note 133, at 340.
166. See Sprang, supra note 14, at 855.
168. See supra Part II.B.1.
the handbook or other written policy of the employer. The basis for subsection (b) cannot be found in California common law, or any other state law for that matter. The statute protects employees who have completed an initial probationary period from discharge without "good cause." The probationary period is defined by the employer at the onset of the employment relationship, and if the employer discharges without good cause, the employer has the burden of showing that the employee was still providing services in the probationary period. In 1994, Montana law defined "good cause" for purposes of discharge as "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." The Montana statute also requires that employees exhaust all internal procedures an employer may have put in place for the appeal of the discharge before beginning the litigation process.

D. Employment At-Will Versus Public Agency Employment

In California, the differences in protection against unjust discharge between government and private employees are astounding. The California Supreme Court in Skelley v. State Personnel Board noted that "the California scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the continuation of his employment which is protected by due process." According to Skelley, permanent public sector employees also enjoy several pre-removal rights and "safeguards." The Skelley court outlined these rights and safeguards: public sector employees, before they are disciplined or terminated must be given "notice of the proposed

176. Id. at 215.
[disciplinary] action, the reasons therefor [sic], a copy of the charges and materials upon which the action is based, and a right to respond, either orally or in writing, to the authority initially imposing discipline.\textsuperscript{177} In other words, before a public agency may take disciplinary action, \textit{Skelley} compels the public agency to first engage in an investigation or fact finding process in order to determine whether the permanent employee did actually commit some type of wrongdoing.\textsuperscript{178} Next, \textit{Skelley} requires the public employer to provide the permanent employee with notice of the proposed discipline, reasons for the discipline, and a copy of the charges and materials on which the disciplinary action is based.\textsuperscript{179} \textit{Skelley} does not entitle the employee to a full evidentiary hearing prior to being disciplined, but the case does grant the employee an opportunity to respond to the charges and to address the decision maker before disciplinary action is taken.\textsuperscript{180} According to \textit{Skelley}, after the employee is given an opportunity to respond, the public employer may terminate the employment.\textsuperscript{181} After termination, \textit{Skelley} entitles the employee to make an appeal of the decision to a neutral board within the agency.\textsuperscript{182} \textit{Skelley} permits the appeal to be made within the structure of the public agency.\textsuperscript{183} Subsequent to this appeal, \textit{Skelley} allows writ of administrative mandamus\textsuperscript{184} so that the employee can seek judicial review of the decision under an abuse of discretion standard of review.\textsuperscript{185}

\section*{III. IDENTIFICATION OF THE LEGAL PROBLEM}

A discharged employee in California and most other states will likely find that they have no recourse against their

\begin{itemize}
\item \textsuperscript{177} Id.
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See id.
\item \textsuperscript{180} See id.
\item \textsuperscript{181} See Skelley, 15 Cal. 3d at 215.
\item \textsuperscript{182} See id. at 203-04.
\item \textsuperscript{183} Id. at 204. After the decision to implement the discipline has been made and the employee appeals to a neutral board within the agency, the burden is on the employer to show why they implemented the discipline. See id.
\item \textsuperscript{184} See CAL. CODE CIV. PROC. ANN. § 1094.5 (West 2002).
\item \textsuperscript{185} See Skelley, 15 Cal. 3d at 216. When the employee seeks a writ of administrative mandamus for judicial review of the outcome of the appeal, the burden is placed on the employee to prove that the decision was an abuse of the agency's discretion. See id.
\end{itemize}
employer for terminating them without cause.\textsuperscript{186} Firing a non-union private employee, even for morally repugnant reasons, is not illegal in California and most other states.\textsuperscript{187}

While unionized employees are protected from the at-will doctrine by collective bargaining agreements,\textsuperscript{188} and government employees in California are protected under \textit{Skelley},\textsuperscript{189} almost all other employees remain unprotected and susceptible to the at-will rule.\textsuperscript{190} Private sector job security is subject to employers' "unfettered right to fire at will."\textsuperscript{191} Employees' livelihoods are left unprotected and vulnerable to the whims of their employers.\textsuperscript{192} From hourly workers to executives, the at-will doctrine cuts across the American workforce, allowing purely arbitrary and capricious employment decisions to go unchecked.\textsuperscript{193} The following statement is one example of the at-will doctrine's effects:

[A] fifty-two year old executive was given seventy-two hours to clean out his desk and vacate the premises, allegedly because his job was being eliminated after a corporate reorganization. He subsequently learned that the job was reestablished after he left. Fourteen months later he was still looking for suitable employment and wondering why he had been let go.\textsuperscript{194}

Plainly, there is a need for legal protection from random, unfounded terminations, sometimes based on morally repugnant reasons. This comment raises the question of whether it rests upon the judiciary or the legislature to provide a solution to unjust discharge and the destruction of the at-will employment doctrine.

\textsuperscript{186} See Stieber & Murray, supra note 133, at 321; see also CAL. LAB. CODE ANN. § 2922 (West 2002) (allowing at-will employment to be ended at any time without cause, for any or no reason).

\textsuperscript{187} See CAL. LAB. CODE ANN. § 2922 (West 2002).

\textsuperscript{188} See Stieber & Murray, supra note 133, at 320.


\textsuperscript{190} See supra Part I.

\textsuperscript{191} Stieber & Murray, supra note 133, at 321.

\textsuperscript{192} See id. at 323.

\textsuperscript{193} See id. at 320-22.

\textsuperscript{194} See id. at 321-22 (citing WALL ST. J., Jan. 8, 1980, at 1, col. 5). “One of the authors of this Article received more than a hundred letters and phone calls, most of them from middle management persons who had been discharged, allegedly without cause, after he wrote an article that appeared on the Op-Ed page of the New York Times.” Stieber, \textit{Speak Up, Get Fired}, N.Y. TIMES, June 10, 1979, at E-19, col. 2. See also The Growing Cost of Firing Nonunion Workers, BUS. WK, Apr. 6, 1981, at 95; Stieber & Murray, supra note 133, at n.16.
IV. Analysis

Protection from arbitrary discharge is a concept that is slowly starting to gain momentum. For some years there has been pressure on Congress and state legislatures to enact statutes that limit and abolish the at-will doctrine. Despite the pressure on legislators and courts to change this common law doctrine, the at-will rule is still thriving in California.

Although there has been pressure on legislatures, some scholars have criticized taking a legislative approach to ending at-will employment altogether. Scholars exhibit pessimism regarding this approach because of the fact that at-will employees are a diverse group and it is unlikely that they will be able to organize themselves. One difficulty in organizing a pertinent federal lobby is the fact that employees who need the protection of a statute range from low paid hourly workers to managers and executives. But organization is essential if the requisite lobbying pressure is to be placed on the legislators’ shoulders. Furthermore, “the unlikelihood that such legislation will be enacted in the foreseeable future is enhanced by the strong interest groups to be counted on to oppose it.”

Even if at-will employees were able to get a statute through to Congress, the very legislative process that requires a myriad of compromise would probably drain any potency of the proposed statute. This compromise is necessary due to the big dollars and strong campaigns from those on the opposing side: big business and profitable labor unions.

Instead of legislation, some scholars propose that the courts themselves modify the rule. In particular, these

195. See generally STANDLER, supra note 20. See also Stieber & Murray, supra note 133, at 323.
196. See STANDLER, supra note 20, at pt.3. See generally, Stieber & Murray, supra note 133, at 323-37.
198. See STANDLER, supra note 20, at pt.3.
199. See id.
200. See id.
201. See id.
202. Id. (quoting Peck, The Role of the Courts and the Legislature in the Reform of Tort Law, 48 MINN. L. REV. 265 (1963)).
203. See Sprang, supra note 14, at 891.
204. See STANDLER, supra note 20, at pt.6.
205. See Note, Protecting At-Will Employees Against Wrongful Discharge: The
scholars argue that because courts have "considerable experience with similar employment relations problems, they possess sufficient expertise to resolve wrongful discharge disputes." Individuals supporting this proposition believe that courts need not await legislative initiative. Courts in California, however, seem to resist making any exception to the at-will doctrine unless it is based on legislative or other outside initiative. In fact, the California Supreme Court in Gantt v. Sentry Insurance warned against judicial policymaking unless it is based on statutory or constitutional provisions. The California Supreme Court's reluctance to create pure judicial exceptions is evidenced in the Green v. Ralee Engineering decision. In that case, the court based the exception on a federal regulation instead of simply modifying the common law rule on its own. The Gantt court's reasoning for refusing to create a public policy exception comes from "the impression that only statutes or constitutional provisions provide employers with adequate knowledge of what is forbidden by public policy." The dissenters in Gantt assert that this reasoning is wrong and insist that "judicial decisions . . . provide no less 'notice' than do statutes or constitutional provisions." Therefore, it seems that in California, the courts will not initiate a change to the common law rule without some sort of outside initiative. The current court may be persuaded that judicial action is appropriate based on the fact that courts in other states are recognizing that judicial decisions provide adequate notice to employers.

Although the most viable option for changing the at-will rule in California lies in the hands of the court, this comment looks at various statutes in order to frame a workable template for an unjust discharge rule in California. This com-
The proposed federal statute and the Montana statute are definitely a step in the right direction, and if some shortcomings of the statutes were corrected, it would benefit at-will employees and relieve the burden placed on courts enforcing these statutes. To illustrate the pitfalls of both statutes, consider the following hypothetical, which also serves to demonstrate the procedural safeguards that public employees enjoy in California under Skelley.

Paul Public and Adam AtWill are two residents of a small town in California. Paul Public works for the state and makes a living inspecting the electric wiring jobs of private electric companies. From time to time, Paul inspects the work of Adam AtWill, a non-union, private sector electrician. Adam AtWill's job entails going house to house to work on his company's overhead wiring. Adam AtWill's company employs eleven workers total. Both Paul and Adam have been at their jobs for over ten years, and both are over the age of forty. Both men have also received several promotions and pay increases. As it happens, Paul Public and Adam AtWill are cousins and their normal workday has placed them both at their elderly uncle's home, working on and inspecting company wiring. While Adam AtWill is working in the course and scope of his job, his coworker Ned Nosey drives by the house and sees Adam's company truck parked outside. Ned Nosey, thinking that Adam AtWill is not really working, but rather helping his elderly uncle, tells Adam's boss at AtWill Electric. Adam AtWill returns to the office at the end of the day and receives a termination notice from an irate supervisor.

Fortuitously, one of Paul Public's coworkers also drives by the house and sees Paul Public's truck parked outside. Paul Public's coworker shares Ned Nosey's thoughts and proceeds to tell Paul's boss, Sheila Supervisor, the whole story. Sheila Supervisor immediately jumps to conclusions and assumes that Paul Public was not working and that he deserves to be fired immediately. Sheila Supervisor, however, is cogni-

214. See infra Part IV.A-B.
216. See supra Part II.D.
zant of the required Skelley procedures for terminating public employees. Thus, she promptly initiates a fact finding investigation in order to determine what Paul Public was actually doing at his uncle's house during working hours.

Under current California law, Adam AtWill would immediately be out of a job. Adam would legally be terminated despite the fact that he was over forty, a loyal employee for longer than 10 years, and the recipient of assurances of continued employment in the form of raises and promotions. On the other hand, Paul Public, whose truck was parked right next to Adam's and whose boss reacted the same way as Adam's, would enjoy the procedural safeguards of Skelley.

A. The Proposed Federal Statute

Adam AtWill's situation under the Stieber proposed federal statute would be slightly different. First, in order to analyze Adam AtWill's situation under the statute one must assume a highly unlikely proposition: that the statute passed both houses of Congress without modification and the President did not exercise his constitutional veto power.

Adam AtWill would likely have a cause of action under the statute's first and second criterion, which limits protection to wrongful discharge actions. Wrongful discharge is defined as termination without just cause. The proposed statute defers to the common law definition of just cause rather than defining it outright. A termination based on properly performing one's job would likely lack the necessary just cause required by the statute and thus would probably be labeled as wrongful discharge. Stieber and Murray suggest next that employers with less than ten employees should be

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217. See supra Part II.D.
218. See supra note 93 and accompanying text.
219. See, e.g., Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1104 (2000) (holding that the "employee's mere passage of time in the employer's service, even where marked with tangible indicia that the employer approves of the employee's work, cannot alone form an implied-in-fact contract that the employee is no longer at-will").
220. See supra Part II.D.
222. See Stieber & Murray, supra note 133, at 337-38.
223. See supra Part II.C.1.b.
224. See supra Part II.C.1.b.
225. See supra Part II.C.1.b.
exempt from the statute. Adam AtWill would be able to bring a claim for unjust discharge against his employer based on the proposed statute. Adam AtWill is currently unprotected from unjust discharge because he is a non-union private sector employee, without an express employment contract, thus, he is eligible for protection under the proposed statute. Adam will probably not bring an employment discrimination claim against AtWill Electric because he was fired for allegedly not working, therefore, he can still bring suit under the proposed statute. Adam AtWill would likely also meet any minimum service requirements because he has been with AtWill Electric for over ten years.

The proposed statute is susceptible to criticism because Adam AtWill must be fired before he has a chance to rebut the accusations against him. In other words, the statute does not allow for a pretermination employee grievance process. Thus, Adam AtWill must be terminated without wages before he can challenge the employer's decision. This predicament may affect his financial ability to seek the assistance of an attorney. Requiring termination before the grievance process can begin not only affects Adam, but also has an economic impact on society. Although the proposed federal statute would compel Adam and AtWill Electric to participate in an informal conciliation procedure before going to a formal hearing, this procedural safeguard does not take effect until after Adam AtWill is terminated.

The next consideration under the proposed federal statute involves remedies. The statute wisely declares that reinstatement may be "unworkable" in a small company like AtWill Electric with its eleven employees. Thus, because the statute offers no protection until after the unjust termination occurs, Adam may be out of a job for quite some time. Though he may receive compensation under the proposed statute, if he cannot find a comparable job in the small town that he lives in then the statute has not provided a complete

226. See Stieber & Murray, supra note 133, at 338.
227. See id. at 338 n.129.
228. See id. at 338 n.130.
229. See id. at 338 nn.131, 132.
230. See supra Part II.C.1.e.
231. See supra Part II.C.1.f.
232. See supra Part II.C.1.f.
233. See supra Part II.C.1.f.
answer to the problem.

The proposed statute further suggests that cases should be heard by a single arbitrator rather than a court.\footnote{234}{See Stieber & Murray, supra note 134, at 340.} But the statute suggests that before going to an arbitration hearing, both parties should be required to pay a filing fee.\footnote{235}{See id.} Now, in addition to being out of work and having to pay for competent representation, Adam AtWill must also pay a filing fee. The article also suggests that the arbitrator should be chosen by both parties from a select group.\footnote{236}{See id.} This practice tends to favor sophisticated management over the unsophisticated electrician. Moreover, the longer any disagreement goes on regarding the selection of the arbitrator, the longer that Adam will be without work, increasing the chances that he will be replaced by another worker.

\textbf{B. The Montana Statute}

Although the Montana statute is progressive and does protect employees from wrongful discharge, it is still far from perfect. First, the statute does not require the employer to engage in a fact-finding process to ensure that the employee actually did what they were accused of doing.\footnote{237}{See supra Part II.C.2.} Second, the statute does not require the employer to provide notice of the proposed termination to the employee and the reasons therefore.\footnote{238}{See supra Part II.C.2.} Requiring this type of notice would enable the employee to present proof of his or her innocence. Third, the statute does not require an intermediate informal meeting before going to court unless the employer voluntarily has in place an internal procedure by which the employee can appeal the decision.\footnote{239}{Wrongful Discharge from Employment Act, Mont. Code Ann. §§ 39-2-911(2) (2002).} In California, pre-discharge procedures are not in place and this would likely flood the already overburdened courts with these types of cases. Because these procedural safeguards are lacking, the employee only has a cause of action after he is fired. Thus, it is likely that the employee can only seek redress through the judiciary. Therefore, the protection of the Montana statute may in fact be il-
lusory for employees without the financial capability to hire counsel. Consequently, it is likely that a large portion of the workforce is still unprotected in Montana.

What would happen to Adam AtWill under the Montana statute? The Montana statute requires the employee to have completed a probationary period before being eligible for protection against unjust discharge. Adam AtWill is most probably past any probationary period because he was employed at AtWill Electric for over ten years. The Montana statute also requires that the employee exhaust all internal procedures for redress. It is likely that internal procedures to redress unjust discharge would be cost prohibitive at a small company like AtWill Electric. Therefore, Adam AtWill is in a similar predicament under both the Stieber proposed statute and the Montana statute; he is out of work and must scramble to find funds to hire an attorney for a long, drawn out battle. Moreover, the Montana statute is flawed in that litigation is apt to be the battleground for the dispute, rather than informal conciliation and arbitration as proposed by Stieber and Murray. Although the statute allows "either party to make a written offer to arbitrate," it does nothing to compel arbitration. Furthermore, unlike Skelley, the Montana statute does not require pre-discharge notice to the employee of the proposed disciplinary measure, nor does it grant the employees a chance to respond. The lack of informal pre-termination procedures will likely create more work for the courts because resolution will not occur until the parties are in court.

C. Skelley Procedural Safeguards

If Adam AtWill had been in Paul Public's shoes he almost

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240. See supra Part II.C.2.
242. See supra Part II.C.2.
243. See supra Part II.C.2.
244. See supra Part II.C.2-D.
245. With pre-pretation procedures in place, it is more probable that disputes will be settled prior to litigation, thus eliminating the need to go to court. An example of this logic is shown in Jack Stieber & James R. Murray, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U. Mich. J.L. Reform 319, 339 (1983). "[Informal] [c]onciliation not only can speed the resolution of complaints but can reduce administration costs by limiting the number of cases going to formal hearing..." Id. at 339.
certainly would not have been terminated. Paul Public enjoys several procedural safeguards under Skelley. Before Sheila Supervisor may discipline Paul, she must conduct a fact-finding process to determine if Paul Public actually engaged in wrongful conduct. Sheila would likely talk to the meddling coworker, Paul’s uncle and Adam AtWill. Also, she would almost certainly look at Paul’s daily records of the inspections he completed, and would probably determine correctly that he was performing his state job at his uncle’s home.

Following the investigation, Sheila Supervisor is required to present Paul Public with pre-discipline notice of the proposed termination and allow Paul Public an opportunity to respond. Only then could Sheila Supervisor fire Paul Public. If Sheila Supervisor pushed the issue this far and actually did terminate Paul for doing his job, then under Skelley, Paul is entitled to appeal her decision within the agency itself. During this internal appeal process, Sheila would have the burden of showing that she legitimately fired Paul Public. If the appeal also proves fruitless, then Paul can file for a writ of administrative mandamus where a court will review Sheila Supervisor’s decision.

Requiring an employer to determine what actually happened before handing down a discharge notice is fair for both parties involved. Also, by putting several pretermination safeguards in place, none of which involve the judiciary, Skelley increases the chance that disputes will be settled before they get to court. Moreover, Skelley further minimizes the court’s role in supervising unjust discharge by granting the employee an opportunity to appeal the decision prior to litigation.

D. The Judicial Answer

“For the foreseeable future, unorganized employees, like
consumers in the products liability area, must look primarily to the courts for protection against arbitrary or malicious discharge in those areas where Congress or the state legislatures have not acted.\textsuperscript{255} For a court to eliminate the at-will rule, it is not necessary for the California legislature to "repeal statutory enactments such as the California Labor Code that establishes or confirms the terminable-at-will norm."\textsuperscript{256} "After all, a California Code section that clearly established contributory negligence as the law of the state did not preclude the common law adoption of comparative negligence.\textsuperscript{257}

While the two statutes analyzed above are a step in the right direction, more needs to be done for private sector employees.\textsuperscript{258} It is unfair and irrational to provide public employees with comprehensive safeguards\textsuperscript{259} while their private sector counterparts labor under the fear that they may be terminated at their employers' whim.\textsuperscript{260} It is then illogical that courts should grant private sector employees some or all of the Skelley protections enjoyed by public employees. While it is tempting to turn to the legislature for a solution to the problem, the reality is that unorganized employees are unable to voice their concern loud enough to be heard.\textsuperscript{261}

V. PROPOSAL

"Societal attitudes towards employee rights in general, and to job security in particular, have evolved significantly in the last fifty years, and the law must respond to this new perception of what is an appropriate set of basic rules."\textsuperscript{262} This comment proposes a basic set of rules for a common law doctrine that reverses the at-will rule. Collectively, these ideas will be referred to as the "equitable discharge rule." The ideas that comprise the equitable discharge rule are heavily based on the Skelley procedures.\textsuperscript{263} Moreover, this proposal is not limited to judicial implementation. In the unlikely event that at-will employees managed to organize and lobby for a

\textsuperscript{255} See STANDLER, supra note 20, at pt.3.
\textsuperscript{256} Rohwer, supra note 205, at 781.
\textsuperscript{257} Id.
\textsuperscript{258} See id.
\textsuperscript{259} See supra Part II.D.
\textsuperscript{260} See supra Part I.
\textsuperscript{261} See STANDLER, supra note 20, at pt.3.
\textsuperscript{262} Rohwer, supra note 205, at 781.
\textsuperscript{263} See supra Part II.D.
statute, the following suggestions would likewise be applicable.

A. What Should the Rule Cover?

Similar to the Stieber and Murray statute, the equitable discharge rule would be limited to only include wrongful discharge actions, including constructive discharge, instead of all disciplinary actions that may be taken by employers (i.e., suspensions, demotions, etc.).

B. Which Employees Would be Covered?

The equitable discharge rule should cover private sector non-union employees. Employees with express contracts would not gain the protection of the rule. Furthermore, the rule would permit at-will employment during an employer specified probationary period not to exceed one year, "in order [to allow] employers to retain the necessary flexibility in determining employee suitability for continued employment."

C. Which Employers Would be Covered?

Employers with five or more workers should be held responsible for adhering to the equitable discharge rule.

D. Acceptable Reasons for Termination

The equitable discharge rule would only allow termination for "just cause." This slippery term has been defined already by thousands of court cases. Some classic examples of just cause include "[e]xcessive absenteeism or tardiness, ... sleeping on the job, ... fighting, ... theft, dishonesty, incompetence, gross negligence, ... possessing or using drugs or alcoholic beverages at work, or reporting to work under the influence of drugs or alcohol ..." The courts could tailor this standard in order to allow necessary business type activities, such as corporate downsizing, to remain unaffected by the equitable discharge rule.

264. See supra Part II.C.1.a.
265. Stieber & Murray, supra note 133, at 338.
266. See supra Part II.C.1.b.
267. Stieber & Murray, supra note 133, at 323.
E. Pretermination Grievance Procedures

Employers wishing to terminate after the employee has passed their probationary period should be required to go through a five step Skelley type procedure. 268

1. Investigation

The employer should be required to engage in a fact finding process to solidify if termination is required. This fact finding process should be thorough and fair and should include interviews with the accused employee and any witnesses.

2. Pre-Discipline Notice

Prior to termination, the employee should be presented with a copy of the reasons and facts that provide a basis for the termination.

3. Pre-Termination Opportunity to Respond

The employee should be entitled to an informal opportunity to rebut the reasons upon which the termination is being based. Although legal counsel is permitted to accompany the employee, this opportunity to respond is not a full blown hearing with judicial rules. After the employee has had a chance to respond, the equitable discharge rule would allow for termination.

4. Appealing the Employer's Decision

After the first three steps are exhausted, the employee may take the issue to court. By affording the employee pre-termination safeguards, it is likely that fewer cases will ever make it to this level in the grievance process.

F. Equitable Discharge Proposals Also Applicable to a Statute

It seems unlikely that Congress or the California state legislature will pass a statute reversing the at-will rule in the near future. 269 If such a statute were to be proposed, however, the above criteria would be just as applicable to the new stat-

268. See supra Part II.D.
269. See supra Part IV.
ute as they are to a judicially created common law rule.

VI. CONCLUSION

The passage of the Montana statute reversing the at-will employment doctrine as well as scholarly proposals to end at-will employment, provide evidence of society's changing attitude towards legal job security.\textsuperscript{270} This is not surprising when roughly sixty million employees have no legal protection from the unfettered discretion of their employers.\textsuperscript{271} The answer lies in a legislative or judicially made rule that reverses the at-will doctrine.\textsuperscript{272} But it is unlikely that either a federal or California state statute of this nature will be passed in the near future.\textsuperscript{273} Like the judge-made product liability protections granted to consumers, the solution to at-will employment must come from the courts.\textsuperscript{274} Accordingly, this comment urges the judiciary to extend public employee protections to private sector employees.\textsuperscript{275}

\textsuperscript{270} See supra Part III. \& V.
\textsuperscript{271} See supra Part I.
\textsuperscript{272} See supra Part V.
\textsuperscript{273} See supra Part IV.
\textsuperscript{274} See supra Part IV.D.
\textsuperscript{275} See supra Part V.