Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for all At-Will Employees?

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Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for all At-Will Employees?

Kurt H. Decker*

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INTRODUCTION

Anyone seeking symmetry and clearly discernable legal patterns will not find them in employment law. Historically, employment law has been a maze of conflicting statutes, common-law doctrines, contract-established rules, and administrative agency findings. Even within a narrow area, employment law may vary considerably on the same issue, depending on whether an administrative agency or a court is involved.1

Conflict between employee and employer lies at the heart of our economic system and social structure. Employment law is concerned with this conflict and its resolution. Statutes and court decisions reflect this shifting conflict balance between employee and employer;2 making employment law one of the most political of

1. For example, the National Labor Relations Board ("NLRB"), the administrative agency created under the National Labor Relations Act ("NLRA"), at times does not follow or acquiesce with the courts regarding the applicable NLRA employment law principle to follow in the decisions it issues. 29 U.S.C. §§ 151-169 (1994). The NLRB's non-acquiescence with court decisions has occurred over: (a) whether the NLRB should initially defer its review procedures in unfair labor practice cases for resolution under the collective bargaining agreement's grievance arbitration procedure; and (b) who constitutes a "successor" employer. See I.P. HARDIN (ED.), THE DEVELOPING LABOR LAW 761-850, 1008-84 (3d ed. 1992) [hereinafter HARDIN, DEVELOPING LABOR LAW]; Maranville, Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism, 39 VAND. L. REV. 471 (1986); see also Charles G. Bakaly, Jr. & James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, 27 VAND. L. REV. 117 (1974); Peter G. Nash et al., The Development of the Cellyer Deferral Doctrine, 27 VAND. L. REV. 23 (1974). Most courts have not taken kindly to the disrespect for judicial authority reflected in an administrative agency's refusal to follow court decisions. See, e.g., NLRB v. Blackstone Co., 685 F.2d 102, 106 n.5 (3d Cir. 1982) ("We consider the Board's contrary instructions to its administrative law judges to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated."). Similar nonacquiescence by administrative agencies has occurred under the Occupational Safety and Health Act ("OSHA") of 1970 and the Social Security Act ("SSA"). See Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32, 33 (3d Cir. 1980) ("[T]he agency is not free to apply its own view of the statute in contradiction of the view of the precedent of this Court."); Holden v. Heckler, 584 F. Supp. 463, 474 (N.D. Ohio 1984) ("Notwithstanding these [court] rulings, the Secretary [of Health, Education, & Welfare] has not applied [Hayes v. Secretary of Health, Education & Welfare, 656 F.2d 204 (6th Cir. 1981)] to any other disability terminations; rather she has continued to instruct BDD [Ohio Bureau of Disability Determinations] and the ALJ's [administrative law judges] to follow SSA's regulations and internal procedures, mandating a current disability standard.").

2. For discussion of the labor movement within the United States, see HARDIN,
legal areas. Today, at-will employment is witnessing this conflict shift between employee and employer.

Developing Labor Law, supra note 1, at 3-68. The NLRA’s adoption in 1935 illustrates the shifting conflict balance between employee and employer. 29 U.S.C. §§ 151-169 (1994). Prior to the NLRA’s adoption, three major themes illustrated this employee, union, and employer conflict in that:

(1) The case law demonstrated that the courts were not institutionally capable of formulating or implementing a uniform, cohesive, and workable labor policy;
(2) The course of legislative and judicial action revealed increasing awareness that the role of organized labor presented a question of national proportions that no state was capable of answering definitely on an individual basis; and
(3) There was the development of two mutually incompatible national policies towards organized labor: one regarding it as creating market restraints inimical to the national economy, and the other regarding it as necessary to a regime of industrial peace based upon a balanced bargaining relationship between employers wielding the combined power of incorporated capital wealth and unions wielding the power of organized labor.

Hardin, Developing Labor Law, supra note 1, at 3.

3. For a discussion of the pace of change in labor and employment law see R. Covington & K. Decker, Individual Employee Rights in a Nutshell, chs. 1, 6 (1995) [hereinafter Covington & Decker]. This pace of change has been characterized as follows:

The volume of labor and employment law has increased so dramatically the past three decades that those who practice it often remark about how little of what they do in 1994 they would have been doing a generation earlier. This can be easily understood if one simply chronicles a few of the major developments, beginning with the end of the Second World War.

Id. at 12-15 (listing statutes and court decisions that influenced labor and employment law since 1947).

4. The conflict between employee and employer that resulted in the NLRA’s adoption is similar to what is currently occurring under the at-will employment doctrine where either the employee or the employer can terminate the employment relationship at any time, for any or no reason, with or without notice. See supra note 2. Regarding the development of the at-will employment doctrine and other areas of individual employee rights, see generally Kurt H. Decker, A Manager’s Guide to Employee Privacy: Laws, Procedures, and Policies (1989); Kurt H. Decker & H.T. Felix, II, Drafting and Revising Employment Handbooks (1991); Kurt H. Decker, Drafting and Revising Employment Policies and Handbooks (1994); Kurt H. Decker, Employee Privacy Forms and Procedures (1988); Kurt H. Decker, Employee Privacy Law and Practice (1987) [hereinafter Decker, Employee Privacy]; Kurt H. Decker, Hiring Legally: A Guide for Employees and Employers (2000); Kurt H. Decker, Privacy in the Workplace (1994); L. Larsen & P. Borowsky, Unjust Dismissal (1987); J. Goodman (Ed.), Employee Rights Litigation: Pleading & Practice (1991); Steven Pepe & S. Dunham, Avoiding and Defending Wrongful Discharge Claims (1980); H. Perritt, Employee Dismissal Law (3d ed. 1992) [hereinafter Perritt, Dismissal Law]; M. Rothstein et al., Employment Law (2d ed. 1999). As Professor Perritt noted:

The most significant employment law development in the last quarter of the twentieth century has been the erosion of the employment-at-will rule and the recognition of a family of common law doctrines protecting employees against wrongful dismissal. Under these wrongful dismissal doctrines, terminated employees may be able to recover damages when they can show that their termination violated employer promises, jeopardized clear public policies, or, sometimes, when the termination did not comport with good faith and fair dealing.

These doctrines, or exceptions to the employment-at-will rule, were virtually unknown
At-will employment allows either the employee or the employer to terminate the employment relationship at any time, for any or no reason, with or without notice. Despite criticism, Pennsylvania before 1970. Until then, an employer could dismiss an at-will employee for any reason or no reason, confident that the law provided the employee no remedy - unless one of a handful of statutes prohibiting discrimination was violated. Now, the three wrongful dismissal doctrines, more than a score of federal statutes, and scores of state statutes provide legal redress where employees can show that their dismissals fit within the factual circumstances covered by the doctrines or the statutes.

PERRITT, DISMISSAL LAW at 3.

5. For example, the Restatement (Second) of Agency's Section 442 refers to at-will employment as follows:

Unless otherwise agreed, mutual promises by principal and agent to employ and serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

RESTATEMENT (SECOND) OF AGENCY § 442 (1958).


Regarding the at-will employment doctrine's modification and criticism throughout the United States, see PERRITT, DISMISSAL LAW, supra note 4, at 3-26; Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1416 (1967) (“[T]he philosophy [of at-will employment] is incompatible with these days of large, impersonal, corporate employers; it does not comport with the need to preserve individual freedom in today's job-oriented, industrial society.”) [hereinafter BLADES]; Cornelius J. Peck, Unjust Discharges from
courts have remained faithful to the doctrine with only minor modifications being made to protect at-will employees.  

7. Spierling v. First Am. Home Health Serv., 737 A.2d 1250, 1254 (Pa. Super. Ct. 1999) (reiterating the at-will employment doctrine's continued viability in Pennsylvania by upholding a nurse's termination who claimed she was wrongfully terminated for reporting evidence of Medicaid fraud to her immediate supervisor as part of the recognized public
In 1992, the Pennsylvania legislature adopted the Whistleblower Law. The Law statutorily codified at-will employment's public policy "whistleblowing" exception.

Initially, the Whistleblower Law was thought to only protect public employees. However, recently the Pennsylvania Superior Court has interpreted the Law to extend to private sector employers. This is because no statute or policy requires a nurse to report a fraudulent insurance claim, as opposed to reporting an employer's alleged unlawful or improper conduct. See infra notes 40-69 and accompanying text.

8. PA. STAT ANN. tit. 43, §§ 1421-1428 (West 1991) (hereinafter "the Law"). See also infra notes 70-99 and accompanying text.

9. "Whistleblowing" generally involves reporting to the employer or to government authorities the employer's or an employee's allegedly unlawful or improper conduct. It essentially involves instances of either: (1) protective whistleblowing; or (2) active whistleblowing. "Protective whistleblowing" occurs when the employee is asked to commit a crime. See Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (termination for refusal to participate in price fixing plan; termination unlawful); Petermann v. Teamsters Local 396, 344 P.2d 25 (Cal. Ct. App. 1959) (employee's refusal to commit perjury before a state legislative committee as instructed by the employer; termination unlawful). "Active whistleblowing" involves the employee seizing the initiative and disclosing his/her suspicions, which may or may not be well-founded, of employer wrongdoing or waste, to either the employer or government authorities. See Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (reporting suspected criminal activity of another employee to police; termination unlawful); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (protesting employer's practice of making illegal loan charges in contravention of state and federal regulations; termination unlawful).

10. See Gallant v. BOC Group, Inc., 886 F. Supp. 202 (D. Mass. 1995) (holding that the scope of Pennsylvania's Whistleblower Law is limited to employees terminated from governmental entities or any other "public body" which is created or funded by the government; former employee of private, for profit company could not maintain claim against company because company was a private corporation and was not funded in any way by the government); Clark v. Modern Group Ltd., 9 F3d 321 (3d Cir. 1993) (holding that under Pennsylvania Law, Whistleblower Law is not indicator of public policy in private termination cases; there is no general public policy of protecting whistleblowers who are not employed in the public sector); Johnson v. Resources for Human Dev., Inc., 843 F. Supp. 974 (E.D. Pa. 1994), aff'd, 77 F3d 462 (3d Cir. 1996) (holding that the Pennsylvania Whistleblower Law applies only to public employees who good faith report instances of wrongdoing or waste to an employer or appropriate authority); Cohen v. Salick Health Care, Inc., 772 F. Supp. 1521 (E.D. Pa. 1991) (holding that the receipt of Medicaid reimbursement by private corporation, which was in business of operating and managing hospital-based out-patient cancer treatment centers throughout nation, was insufficient to bring corporation within definition of "public body" under Pennsylvania Whistleblower Law; it was not Pennsylvania legislature's intention to include doctors and other health care providers as funded public bodies under the Law); Wagner v. General Electric Co., 760 F. Supp. 1146 (E.D. Pa. 1991) (holding that the Pennsylvania's Whistleblower Law would not support wrongful termination action by at-will employee allegedly terminated in reprisal for making critical and derogatory analysis of employer's products to customer, as scope of Law was limited to public or quasi-public employees); Holewinski v. Children's Hospital of Pittsburgh, 649 A.2d 712 (Pa. Super. Ct. 1994), appeal denied, 659 A.2d 560 (Pa. 1995) (holding that the Pennsylvania Whistleblower Law applies only to employees terminated from governmental entities and, thus did not protect private sector hospital employee from termination allegedly due to her whistleblowing conduct); Krajsa v. Keypunch, Inc., 622 A.2d 355 (Pa. Super. Ct. 2000 Whistleblower Law's Extension to Private Sector
Court extended the Law's protections to private sector employees.\textsuperscript{11} These decisions further judicially modified Pennsylvania's at-will employment doctrine.\textsuperscript{12}

As the new millennium dawns, this development\textsuperscript{13} extending the Whistleblower Law's\textsuperscript{14} coverage to private sector employers will generate even further attempts by employees to judicially modify the at-will employment doctrine to protect an even broader employee group. Perhaps the superior court's\textsuperscript{15} recent modification of the doctrine should serve as a beginning point for interested parties to renew discussions over: (1) whether the Pennsylvania legislature should statutorily abrogate or modify the doctrine,\textsuperscript{16} or (2) whether Pennsylvania courts should continue the doctrine's conservative piecemeal modification.\textsuperscript{17}

This article examines the Pennsylvania Whistleblower Law's recent extension to private sector employees and its implications for further modifying at-will employment.\textsuperscript{18} It reviews: (1) at-will employment in the United States and Pennsylvania;\textsuperscript{19} (2) the

\begin{itemize}
  \item[12.] See \textit{infra} notes 40-69 and accompanying text.
  \item[13.] See, e.g., Riggio, 711 A.2d at 497; see also Denton, 739 A.2d at 571.
  \item[14.] PA. STAT. ANN. tit. 43, §§ 1421-1428 (West 1991).
  \item[15.] See, e.g., Riggio, 711 A.2d at 497; see also Denton, 739 A.2d at 571.
  \item[16.] See \textit{infra} notes 136-264 and accompanying text.
  \item[17.] Some Pennsylvania appellate decisions have indicated that courts are not institutionally capable of formulating or implementing a workable policy to address the needs of employees and employers involved in at-will employment terminations and that this is best left to the legislative process. They have taken this position to limit at-will employment's modification and its change, if any, to the legislature. See generally, Veno v. Meredith, 615 A.2d 571, 579 n.3 (Pa. Super. Ct. 1986) \textit{appeal denied}, 616 A.2d 986 (Pa. 1992); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 841 (Pa. Super Ct. 1986) \textit{appeal denied}, 523 A.2d 1132 (Pa. 1987); Darlington v. General Elec., 504 A.2d 306, 309 (Pa. Super. Ct. 1986); see also \textit{In re Hotstuf Foods, Inc.}, 95 B.R. 355, 357 (Bankr. E.D. Pa. 1989) and \textit{supra} note 6 (regarding commentaries that have criticized the at-will employment doctrine and/or recommended a statutory solution).
  \item[18.] See, e.g., Riggio, 711 A.2d at 497; see also Denton, 739 A.2d at 571.
  \item[19.] See \textit{infra} notes 23-69 and accompanying text.
\end{itemize}
Whistleblower Law,\textsuperscript{20} (3) recent decisions extending the Whistleblower Law's protections to certain private sector employees;\textsuperscript{21} and (4) the possibility of statutory protection of at-will employees.\textsuperscript{22}

I. AT-WILL EMPLOYMENT

A. United States

The at-will employment doctrine emerged in the United States not as an outgrowth of English common law, but as a unique development catalyzed by a single legal treatise.\textsuperscript{23} Wood's formulation of the doctrine was unambiguous: "[w]ith us, the rule is inflexible, that a general or indefinite hiring is \textit{prima facie} a hiring at will . . . ."\textsuperscript{24} Quickly adopted by the courts,\textsuperscript{25} the new doctrine's application was equally straightforward.\textsuperscript{26} An employer could terminate "for good cause, for no cause, or even for cause morally wrong without being thereby guilty of a legal wrong."\textsuperscript{27}

Many legal historians have observed that the at-will employment doctrine's ready acceptance reflected its compatibility with the era's contractual law and prevailing principles of \textit{laissez faire} economic theory.\textsuperscript{28} From the end of the nineteenth century until the

\textsuperscript{20} See infra notes 70-99 and accompanying text.
\textsuperscript{21} See infra notes 100-135 and accompanying text.
\textsuperscript{22} See infra notes 136-264 and accompanying text.
\textsuperscript{23} The at-will employment doctrine was first articulated in Horace G. Wood's 1877 treatise \textit{Law of Master & Servant}. \textit{Horace G. Wood, Law of Master and Servant} 277 (1877) [hereinafter \textit{Wood, Master and Servant}]. See Summers, supra note 6, at 485. Wood did not follow the traditional English view that all hirings were presumed to be for one year, a rule he claimed, without basis, had not been followed at the time of his writing in this country. However, early American courts had adopted the English approach. Philip Selznick, Law Society, and Industrial Justice 133 (1969); see, e.g., Davis v. Groton, 16 N.Y. 255 (1857). Moreover, the four cases Wood cited as authority for his position did not support his theory. Nevertheless, Wood succeeded in resolving confusion in the traditional law of master-servant, and made clear that all employment relationships, not just those of a domestic nature, were to be covered by the at-will employment doctrine. See Note, Stanford, supra note 6, at 341-43.
\textsuperscript{24} \textit{Wood, Master & Servant}, supra note 23, at 277.
\textsuperscript{25} For example, the New York Court of Appeals adopted Wood's rule in Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895). In the subsequent two decades, two thirds of the 30 cases involving an employment contract's duration were decided against the employee using the new at-will employment doctrine. Feinman, supra note 6, at 125-27.
\textsuperscript{26} Feinman, supra note 6, at 126.
\textsuperscript{27} Payne v. Western & Atl.R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).
\textsuperscript{28} See Summers, supra note 6. See also Blades, supra note 6. Contra Feinman, supra note 6 (arguing that "the explanation for the at-will employment doctrine was its role as an
mid-1930s, the United States Supreme Court repeatedly further entrenched the doctrine within the employment relationship by striking down state legislation protective of employees using doctrines intrinsic to contract law, including "liberty of contract," and "mutuality of obligation." Courts turned a blind eye to the realities created by the power imbalance between employee and employer. They upheld a doctrine enabling employers to terminate employees for any reason that protected employers from liability even for abusive terminations.

29. The paradigmatic case representing the now discredited era of substantive due process was *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a state law prohibiting bakers from working more than ten hours a day on the basis of the inviolability of "freedom of contract." However, well before *Lochner*, the Pennsylvania Supreme Court decided the first case in the nation affecting factory wage labor, invalidating, again on the basis "liberty of contract," a Pennsylvania statute that required all laborers "in and around the state's iron mills" be paid their wages at regular intervals and in cash. *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886). The statute sought to end a fundamental abuse endured by nineteenth century workers; i.e., "the 'truck system' of paying workers in 'scrip,' or 'orders,' redeemable only at company or 'truck stores.'" *William E. Forbath, The Ambiguities of Free Labor: Labor and Law in the Gilded Age, Wis. L. Rev. 767, 796 (1985)* [hereinafter *FORBATH*]. "The system originated in rural towns built from scratch by a mine, mill, or factory owner [where] the corporation often owned everything from church and school to houses and stores." *Id.* at 796. "From a worker's perspective life . . . consisted of almost unbroken dependency. Receiving clothing and food for one's labor smacked of slavery. Debts to the company stores fastened workers to the mines and factories and the stores' monopolies enabled companies to charge above market prices for the groceries and other provisions . . . ." *Id.* at 796-797. The Pennsylvania Supreme Court, however, found that the statute was "an insulting attempt to put the laborers under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." *Godcharles*, 6 A. at 437.

30. For employees, the freedom of "liberty of contract" was illusory. Labor leaders in the nineteenth century bluntly asked how much this abstract right was worth without the power to exercise it. *Forbath*, *supra* note 29, at 811. Their answer was equally to the point: "The laborer's commodity perishes everyday beyond possibility of recovery. He must sell today's labor today or never . . . An empty stomach can make no contracts. The workers do not consent, they submit but they do not agree." *Forbath*, *supra* note 29, at 811 (quoting labor leader George E. McNeill of the Eight Hour League). Indeed, the reality of employees in factories and sweatshops across the country was poverty and degradation, conditions that led to not infrequent uprisings, violence, and bloodshed. Pennsylvania's own history carries the indelible mark of the Molly Maguires, the Homestead Strike, and the Lattimer massacre, all desperate attempts by hapless and powerless employees to exercise some control over the unbearable hardships faced in the anthracite coal fields, steel mills, and factories. See generally *Paul Johnson, A History of the American People* (1997); *Samuel Eliot Morison, The Oxford History of the American People: 1869 Through the Death of John F. Kennedy*, 1963 (1994); *Michael Novak, The Guns of Lattimer* (1996).

31. See generally *Adair v. United States*, 208 U.S. 161 (1908), and *Copage v. Kansas*, 236 U.S. 1 (1915), both striking down statutes prohibiting an employer from terminating an employee because of union membership. One commentator put it succinctly:
Over ensuing decades, inequities resulting from the at-will employment doctrine became more apparent leading both legislatures and courts to modify the doctrine by shielding some employees from the employer's unbridled power. In addition to statutory protections, state courts, in particular, during the last quarter century began fashioning remedies for wrongful termination, including theories based on an implied-in-fact contract, implied covenants of good faith and fair dealing.

In the late 19th century the [U.S. Supreme] Court strongly endorsed the freedom of enterprise rationale and declared the right of an employer to dispense with the services of an employee is equivalent to the right of the employee to quit. The Court dispensed with the argument that differences in bargaining power rendered employment at will unjust by asserting the necessity of recognizing "as legitimate those inequalities of fortune that are the necessary result of the exercise" of contract and property rights.

32. Federal legislation, for example, protects individual employees from termination under:

(2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2002-17 (1998);

State statutes contain similar limitations. See, e.g., Pa. Stat. Ann. tit. 43, §§ 951-963 (West 1991) (Pennsylvania Human Relations Act, prohibiting various forms of discrimination involving age, sex, race, religion, etc.). For a more comprehensive discussion of federal and state statutory modifications to the at-will employment doctrine see COVINGTON & DECKER, supra note 3, at chs. 1, 6; DECKER, EMPLOYEE PRIVACY, supra note 4, at ch. 2.

33. See, e.g., Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (holding that the presumption that an employment contract is intended to be terminable at-will is subject, like any presumption, to contrary evidence which may take the form of an agreement, express or implied, that the relationship will continue for some fixed time period; oral promise enforceable where employer's practice was to terminate only for just cause); see also Bower v. A.T. & T. Tech., Inc., 852 F.2d 361 (8th Cir. 1988) (holding that laid-off employees could sue their employer for compensatory damages over failing to keep promise of re-employment following a corporate restructuring); Panto v. Moore Bus. Forms, Inc., 547 A.2d 260 (N.H. 1988) (holding that an employer's promise to continue salary, pension, and insurance benefits for three months after possible layoffs could constitute an enforceable unilateral contract, if there was an offer that was accepted by an employee continuing to perform his/her regular duties). But see Miller v. Pepsi-Cola Bottling Co., 259 Cal. Rptr. 56 (Cal. Ct. App. 1989) (granting summary judgment for employer where the only evidence of an implied contract was the employee's longevity of service, regular salary increases, and promotions, which should not change an at-will employee's status to one that is terminable only for cause).

34. See, e.g., Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (holding that in the absence of express individual contractual rights a covenant of good faith
creation of contractual rights in employment handbooks and policies, and public policy exceptions. Despite these statutory and judicial modifications, the at-will employment doctrine remains alive and well within the United States. No one statute or court case has completely abrogated the doctrine to require that as a matter of public policy an at-will employee can only be terminated for some form of "cause." Only one state has adopted legislation abrogating the doctrine. As the new millennium dawns, the common law presumption that employment is at-will still predominates, despite piecemeal judicial attempts to modify it.

and fair dealing is implicit in the employment contract; terminating salesperson to avoid paying earned commissions breached contract); see also Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (Cal. Ct. App. 1980) (holding employment contract, like all contracts, includes an implied covenant of good faith and fair dealing). But see Murphy v. American Home Prods, Inc., 448 N.E.2d 86 (N.Y. 1983) (refusing to imply a covenant of good faith and fair dealing when it would be inconsistent with other terms of the contractual relationship).

35. See, e.g., Wooley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257, 1258 (N.J. 1985), modified, 499 A.2d 515 (N.J. 1985) (finding "absent a clear and prominent disclaimer [that employment is at-will], an implied promise contained in an employment handbook that an employee will be fired only for cause [may be enforceable] against [an] employer even when employment was for an indefinite term and would otherwise be terminable at-will"); see also Hoffmann-LaRoche, Inc. v. Campbell, 512 So.2d 725, 734-35 (Ala. 1987) (holding that provisions in an employment handbook plus continued employment following receipt of handbook created unilateral contract that modified at-will relationship); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (holding that assurances in handbook that employee would only be terminated for "just cause" enforceable against employer); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985) (finding at-will employee's termination unlawful where employer failed to follow the progressive discipline system it had established in its employment manual). But see Fiscella v. General Accident Ins. Co., 114 L.R.R.M. (BNA) 2611 (E.D. Pa. 1983), aff'd without op., 735 F.2d 1348 (3d Cir. 1984) (holding that progressive discipline system in employment handbook not enforceable upon employer to terminate an at-will employee only for "just cause").


37. MONT. CODE ANN. §§ 39-2-902 to 39-2-914 (1998); see infra notes 182-197 and accompanying text.

38. See Summers, supra note 6, at 491.

39. See supra notes 23-38 and accompanying text.
B. Pennsylvania

In Pennsylvania, the at-will employment doctrine was judicially adopted in *Henry v. Pittsburgh & Lake Erie Rail Road.* The Pennsylvania Supreme Court held that an employee may be terminated "with or without cause, at pleasure, unless restricted by some contract . . . questions of malice and want of probable cause have [nothing] to do with the case." The at-will employment doctrine remained unassailable for nearly eight decades until *Geary v. United States Steel Corp.*, where the Pennsylvania Supreme Court in dicta recognized that there were "areas of an employee's life in which his employer has no legitimate interest." The majority concluded that, although there was no compelling public policy under the case's facts, an employee's termination might give rise to a cause of action where a clear mandate of public policy was violated.

In concluding that an employee's termination might be actionable in certain circumstances, the *Geary* court acknowledged what earlier Pennsylvania courts had been unwilling to recognize:

[H]uge corporate enterprises which have emerged in this century wield an awesome power over their employees. It has been aptly remarked that "[w]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely

40. 21 A. 157 (Pa. 1891).
42. 319 A.2d 174 (Pa. 1974). Geary's duties involved the sale of tubular products to the oil and gas industry. *Id.* at 175. His employment was at-will. *Id.* The dismissal is said to have stemmed from a disagreement concerning one of the company's new products, a tubular casing designed for use under high pressure. *Id.* Geary alleged that he believed the product had not been adequately tested and constituted a serious danger to anyone who used it; that he voiced his misgivings to his superiors and was ordered to "follow directions," which he agreed to do; that he nevertheless continued to express reservations, taking his case to a vice-president in charge of sale of the product; that as a result of his effort, the product was re-evaluated and withdrawn from the market. *Id.* Despite these actions, which were in the public's and the company's best interest, he was summarily terminated. *Id.*
43. *Geary, 319 A.2d* at 180. The Pennsylvania Supreme Court stated:

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of the areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened . . . We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at-will has no right of action against his employer for wrongful discharge.

*Id.*
44. *Id.*
dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands."

Geary's recognition of a public policy exception set the stage for subsequent attempts to modify the doctrine; however, on balance the court recognized that this could cause problems.

Since Geary, Pennsylvania courts have struggled to determine when a public policy interest constitutes "a violation of a clearly mandated public policy which strikes at the heart of a citizen's social right, duties, and responsibilities," sufficiently compelling to justify a wrongful termination claim.

Public policy violations have been found for terminating an employee for serving on a jury, refusing to hire a prospective employee for failing to disclose a pardoned conviction, and terminating an employee for reporting a violation of federal nuclear regulations. In each case where the employee was successful, the

45. Id. at 176 (quoting FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1975)).
46. See infra notes 48-69 and accompanying text.
47. Geary, 319 A.2d at 179. The Supreme Court indicated that: (1) suits of this nature could impact on the "legitimate interests of employers in hiring and retaining the best personnel available" and "inhibit the critical judgments by employers concerning employee qualifications," and (2) suits of this nature could "impose a heavy burden upon the judicial system in terms of [both] an increased case load and thorny problems of proof . . . ." Id. Justice Roberts authored a dissenting opinion in which he diverged on this very point concluding that, "society's interest in protecting itself from dangerous products manifestly presents a mandate to the court to recognize a cause of action for wrongful termination." Id. at 180 (Roberts, J., dissenting). Justices Nix and Manderino also dissented. Id. (Roberts, J., dissenting).


49. For example, in Cisco v. United Parcel Service, Inc., the Pennsylvania Superior Court observed: "The sources of public policy [which may limit the employer's right of discharge] include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy . . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations." Cisco v. United Parcel Service, Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (quoting Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 572 (N.J. 1980)). However, the employee in Cisco was not permitted to recover against the employer even though the employee had been cleared of any criminal wrongdoing for theft for which he was terminated and denied reinstatement by the employer. Cisco, 476 A.2d at 344.

court found pertinent statutes and case law to ascertain the specific public policy violated.\textsuperscript{53} Even though acknowledging the public policy exception's existence since \textit{Geary},\textsuperscript{54} Pennsylvania courts have been less than eager to liberally apply it in the majority of cases decided during the past quarter century to set aside employee terminations.\textsuperscript{55}


\textsuperscript{54} See, \textit{e.g.}, \textit{Clark v. Modern Group, Ltd. et al.}, 9 F.3d 321 (3d Cir. 1993) (holding an employee who was terminated after objecting to his employer's refusal to report as taxable income certain auto expense reimbursements to its executives as required by federal tax laws could not claim a wrongful termination under the public policy exception because the exception does not extend to cases in which the underlying act of the employer is not in fact unlawful even if the employee "reasonably believes" that the act is unlawful); \textit{Murray v. Gencorp, Inc.}, 979 F. Supp. 1045 (E.D. Pa. 1997) (employee's claim that he was terminated due to employer's fear that he might be injured and file workers' compensation claim did not state a public policy violation); \textit{Wade v. Metropolitan Life Insurance}, 13 I.E.R. Cas. (BNA) 427 (E.D. Pa. 1997), \textit{aff'd}, 160 F.3d 480 (3d Cir. 1998) (employee who alleged he voluntarily left
A similar result of limiting employee recovery against employers has occurred with employment handbooks and policies. Pennsylvania has recognized that an employment handbook or policy can create an enforceable employer commitment, however,


56. See infra notes 57-59 and accompanying text.

57. See, e.g., Banas v. Matthews Int'l, 502 A.2d 637 (Pa. Super. Ct. 1985) (finding that if the employment handbook contained, if not expressly at least by clear implication, a just cause provision, then an employee's claim might have merit that a handbook created a binding employer commitment); Appeal of Colban, 427 A.2d 313 (Pa. Commw. Ct. 1981) (finding that an employment handbook may create an employment property right that requires a hearing prior to termination).
subsequent case law has not overwhelmingly supported employee claims. These employer documents have only been given limited

58. See, e.g., Anderson v. Haverford College, 851 F. Supp. 179 (E.D. Pa. 1994) (holding no just cause provision exists where an employment handbook specifies that it is not contractual and that the employer intends nothing contained in the handbook to alter the at-will employment relationship); Ritter v. Pepsi-Cola Operating Co. of Chesapeake and Indianapolis, 785 F. Supp. 61 (M.D. Pa. 1992) (employment handbook was not an enforceable contract where clear language stated it was under no circumstances a contract); Miller v. Alcoa, 679 F. Supp. 495 (M.D. Pa. 1988), aff’d, 866 F.2d 184 (3d Cir. 1988) (finding employment handbook that stated that it was the employer’s policy that each salaried employee’s work performance would be objectively appraised, that the primary objective of the system was to improve job performance, and that system would also be used to make career, training, and development decisions did not modify at-will employment relationship); Sendi v. NCR Comten, Inc., 619 F. Supp. 1577 (E.D. Pa. 1986), aff’d, 800 F.2d 1138 (3d Cir. 1985) (finding employment handbook’s provision that employees were required to give at least two weeks written notice of termination did not entitle resigning sales director to remain employed and earn commissions for at least two additional weeks where handbook stated that notice was required to guarantee terminating employee timely receipt of final pay check); Short v. Borough of Lawrenceville, 696 A.2d 1158 (Pa. 1997) (finding municipality’s personnel manual containing provisions for due process in connection with employee’s termination did not give employee reasonable expectation that termination could occur only after due process where municipality could not contract away right to summarily terminate employees absent statutory authority); Luteran v. Loral Fairchild Corp., 688 A.2d 211 (Pa. Super. Ct. 1997) (explaining where an employer unilaterally distributes an employment handbook and reserves the right to unilaterally change its terms, the court will not find a just cause provision even if it lists specific grounds for termination); Small v. Juniata College, 682 A.2d 350 (Pa. Super. Ct. 1996), appeal denied, 689 A.2d 235 (Pa. 1997) (holding college’s personnel manual submitted to all employees, which contained sections discussing termination “for cause” and conflict resolution procedures, did not transform football coach’s consecutive one-year contracts into permanent employment, where the handbook was not referenced by any of the coach’s one year employment contracts); Niehaus v. Delaware Valley Med. Ctr., 631 A.2d 1314 (Pa. Super. Ct. 1994), appeal granted, 644 A.2d 755 (Pa. 1994), rev’d without opinion, 649 A.2d 433 (Pa. 1994) (holding employment handbook’s guarantee of reinstatement after a leave of absence did not constitute a binding commitment); Rutherford v. Presbyterian-University Hosp., 612 A.2d 500 (Pa. Super. Ct. 1992) (finding that no evidence established a contractual understanding that employee would receive benefits of termination proceeding set forth in employment handbook); Ruzicki v. Catholic Cemeteries Ass’n, 610 A.2d 495 (Pa. Super. Ct. 1992) (holding that employer not estopped from terminating employee without resorting to employment handbook’s progressive discipline system where disclaimers that preserve the at-will employment relationship in handbooks protect the employer against claims that it is a contract); Curran v. Children’s Serv. Ctr., 578 A.2d 8 (Pa. Super. Ct. 1990), appeal denied, 585 A.2d 468 (Pa. 1991) (holding employment handbook did not provide basis on which temporary employee could reasonably believe that he could be terminated only for just cause where it permitted termination of temporary employees during probationary period by giving notice); Scott v. Extracorporeal, Inc., 545 A.2d 334 (Pa. Super. Ct. 1988) (holding words implying “permanent employment” not binding employer commitment); Mudd, 543 A.2d 1092 (holding policies embodied in employment handbook constituted neither employment agreement nor agreement to terminate employee for just cause); DiBonventura v. Consolidated Rail Corp., 539 A.2d 865 (Pa. 1988) (finding that a statement that any discipline or termination procedure in the employment handbook did not bind the employer, reserving the employer’s right to use the handbook procedures or any other procedure preserved the at-will
enforcement when a non-termination matter or provision was involved.\textsuperscript{59}

Implied-in-fact contracts, even though recognized,\textsuperscript{60} have generally not been widely embraced.\textsuperscript{61} Likewise, claims based on


\textsuperscript{59} See, e.g., Matson v. Housing Auth. of City of Pittsburgh, 510 A.2d 819 (Pa. Super. Ct. 1986) (holding employee's accumulated vacation and sick leave payment policies enforceable). But see Hamilton v. Air Jamaica, 945 F.2d 74 (3d Cir. 1991) (holding employer may reserve right in employment handbook to reduce or eliminate benefits at any time); Morosetti v. Louisiana Land Exploration, 564 A.2d 151 (Pa. 1989) (holding severance payments unenforceable where no direct communication of the policy by the employer to the employees could be established, but a distributed employee handbook as an inducement for employment can be considered an offer and its acceptance an enforceable contract.

\textsuperscript{60} See, e.g., Carlson v. Arnott-Ogden Mem'l Hosp., 918 F.2d 411 (3d Cir. 1990) (holding contract that contains a 90 day notice provision for termination is a contract for at least 90 days of employment); Marder v. Conwed Corp., 75 F.R.D.*48 (E.D. Pa. 1971) (finding additional consideration where employee assumed substantial responsibilities not normally required of a manufacturer's representative and employee was terminated before receiving commissions); Steinberg v. 7-Up Bottling Co., 636 A.2d 677 (Pa. Super. Ct. 1993) (finding employer that terminated employee after one and one-half days breached agreement that employee would be hired on a trial basis, which meant a reasonable time to perform); News Printing Co., v. Roundy, 597 A.2d 662 (Pa. Super. Ct. 1991) (holding that where employee quit job, turned down another job, sold house, purchased new house, and was told by employer that it would take six months to become proficient at the job, additional consideration existed); Cashdollar v. Mercy Hospital, 595 A.2d 70 (Pa. Super. Ct. 1991) (holding that where employee quit a secure, high-paying job, sold house, and moved with his pregnant wife and two year old son additional consideration existed); Scullion v. Emeco Industries, Inc., 580 A.2d 1356 (Pa. Super. Ct. 1990) (holding that where employer told employee that the job was the last he would ever have, received generous fringe benefits including a country club membership, refused a pay increase from his California employer as an inducement to refuse the Pennsylvania job, sold his house in California and purchased a lot in Pennsylvania, additional consideration existed); Schecter v. Watkins, 395 A.2d 363 (Pa. Super. Ct. 1990), appeal denied, 584 A.2d 320 (Pa. 1990) (holding contract that has a term of one year is enforceable especially where the notice period is only expressed in terms of renewal or non-renewal of the contract); Robertson v. Atlantic Richfield Petroleum, 537 A.2d 814 (Pa. Super. Ct. 1987) (employee agreeing to undertake a particular position in exchange for an employer reassignment promise if his job performance proved unsatisfactory at the trial period's end provided sufficient consideration where the employee left his prior position that enhanced his career prospects and relocated); Greene v. Oliver Reality, Inc., 526 A.2d 1192 (Pa. Super. Ct. 1987) (holding employee working for less than union scale in exchange for an employer's lifetime employment contract promise).

\textsuperscript{61} See, e.g., Berda v. CBS, Inc., 800 F. Supp. 1279 (W.D. Pa. 1992) (finding interviewers' statements about job security not enforceable); Schoch v. First Fidelity Bancorp., 1989 U.S. Dist. LEXIS 5990 (E.D. Pa. 1989), a/j'd., 912 F.2d 658 (3d Cir. 1990) (finding an oral employer promise that an employee would be terminated only for just cause and the employer's admission that it generally terminated only for just cause was not sufficient to allow a reasonable employee to regard his at-will status as converted to a contractual one); Donohue v. Custom Management Corp., 634 F. Supp. 1190 (W.D. Pa. 1986) (holding statement as to the
implied covenants of good faith and fair dealing have found little support.\textsuperscript{62}

Despite \textit{Geary},\textsuperscript{63} and other cases\textsuperscript{64} signalling the at-will employment doctrine's modification, the doctrine remains relatively undisturbed in Pennsylvania. Pennsylvania's limited modification of the doctrine can be at best described as illusory. Even though finding that a cause of action may exist under certain circumstances to modify the doctrine,\textsuperscript{65} no employee recovery\textsuperscript{66} has generally occurred in the vast majority of cases litigated since \textit{Geary}.\textsuperscript{67}

Recently, however, the Pennsylvania Superior Court signaled its


\textsuperscript{63} \textit{Geary}, 319 A.2d at 174.

\textsuperscript{64} See supra notes 48-53, 56-57, 60 and accompanying text.

\textsuperscript{65} See supra notes 48-53, 56-57, 60 and accompanying text.

\textsuperscript{66} See supra notes 55, 58, 61-62, and accompanying text.

\textsuperscript{67} \textit{Geary}, 319 A.2d at 174; see supra notes 57, 60, 63-64, and accompanying text.
willingness to make a more viable dent in the doctrine's armor under Pennsylvania's Whistleblower Law by extending its applicability to private sector employees. This modification may renew interest for an even broader judicial modification or a statutory abrogation of the at-will employment doctrine.

II. PENNSYLVANIA'S WHISTLEBLOWER LAW

Pennsylvania's Whistleblower Law ("Law") has been in effect since 1986. The Law was adopted to protect employees who report a violation or suspected violation of federal, state, or local law. It protects employees who participate in hearings, investigations, legislative inquiries, or court actions. Nothing in the Law, however, specifically states that it is to apply only to public sector employees and not also to private sector employees when the right set of circumstances exist.

72. Id. § 1421.
73. Prior to the Pennsylvania Superior Court's 1998 decision in Riggio v. Burns, 711 A.2d 497 (Pa. Super. Ct. 1998) (en banc), appeal dismissed, 739 A.2d 161 (Pa. 1999) (holding private sector employer may be agent of a public body extending Whistleblower Law's protections) and its 1999 decision in Denton v. Silver Stream Nursing and Rehabilitation Center, 739 A.2d 571 (Pa. Super. Ct. 1999) (finding receipt by private sector employer of Medicaid funding is sufficient to qualify as a "public body" for purposes of Whistleblower Law, which defines employer as an agent of a public body), the Law was thought to apply only to public sector employees. See Gallant v. BOC Group, Inc., 886 F. Supp. 202 (D. Mass. 1995) (holding that by its own terms, scope of Pennsylvania's Whistleblower Law is limited to employees terminated from governmental entities or any other "public body" which is created or funded by the government; former employee of private, for profit company could not maintain claim against company because company was a private corporation and was not funded in any way by the government); Clark v. Modern Group Ltd., 9 F.3d 321 (3d Cir. 1993) (rehearing and rehearing in banc denied) (holding under Pennsylvania Law, Whistleblower Law is not indicator of public policy in private termination cases; there is no general public policy of protecting whistleblowers who are not employed in the public sector); Johnson v. Resources for Human Development, Inc., 843 F. Supp. 974 (E.D. Pa. 1994) (holding Pennsylvania Whistleblower Law applies only to public employees who in good faith report about instances of wrongdoing or waste to employer or appropriate authority); Cohen v. Salick Health Care, Inc., 772 F. Supp. 1521 (E.D. Pa. 1991) (holding that Medicaid reimbursement receipt by private corporation, which was in business of operating and managing hospital-based out-patient cancer treatment centers throughout nation, was insufficient to bring corporation within "public body's" definition under Pennsylvania Whistleblower Law; it was not Pennsylvania legislature's intention to include doctors and other health care providers as funded public bodies under the Law); Wagner v. General Elec.
Under the Law, an employer may not "discharge, threaten or otherwise discriminate or retaliate against an employee" who reports (or is about to report) a suspected violation of federal, state, or local law. The employer cannot adversely affect the "employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." A good faith report is considered a "report of conduct [concerning] wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true." A violation also results where an employee is

Co., 760 F. Supp. 1146 (E.D. Pa. 1991) (finding that Pennsylvania's Whistleblower Law would not support wrongful termination action by at-will employee allegedly terminated in reprisal for making critical and derogatory analysis of employer's products to customer; scope of Law was limited to public or quasi-public employees); Holewinski v. Children's Hosp. of Pittsburgh, 649 A.2d 712 (Pa. Super. Ct. 1994), appeal denied, 659 A.2d 560 (Pa. 1994) (holding that the Pennsylvania Whistleblower Law applies only to employees terminated from governmental entities and, thus did not protect private sector hospital employee from termination allegedly due to her whistleblowing conduct); Krajsa v. Key punch, Inc., 622 A.2d 355 (Pa. Super. Ct. 1993) (Pennsylvania Whistleblower Law did not apply to private company's at-will employee's wrongful termination claim that performed government contracts; scope of law was limited to employees terminated from governmental entities or other entities created or funded by government).

74. PA. STAT. ANN. tit. 43, § 1423(a) (West 1991).
75. Id.; see, e.g., Golaschevsky v. Commonwealth, Dept. of Envtl. Resources, 683 A.2d 1299 (Pa. Commw. Ct. 1996), aff'd, 720 A.2d 757 (Pa. 1998) (public employee failed to show causal connection between his statement to employer that he suspected violations of copyright law in office and his subsequent termination four months later to support Pennsylvania's Whistleblower Law's violation; inference of causal connection could not be made solely through passage of time); Rodgers v. Pennsylvania Dept. of Corrections, 659 A.2d 63 (Pa. Commw. Ct. 1995) (corrections officer stated claim against Department of Corrections and its officials under Pennsylvania's Whistleblower Law, notwithstanding contention that is was unclear whether some of matters reported and adverse treatment received fell under Law's provisions; officer alleged that he reported irregularities at facility at which he worked, including unnecessary funds' expenditure, employee's termination for no apparent reason, requests to change evaluation and alter reports, and use of inmates for personal reasons; that after making reports, his shift was changed, his duties were reduced, he was chastised for reports, and he was eventually forced to choose between remaining at facility and being subject to harassment or transfer and demotion); Spiropoulos v. Unemployment Compensation Bd. of Review, 654 A.2d 642 (Pa. Commw. Ct. 1995) (prison employee's release of confidential documents was not protected under Pennsylvania's Whistleblower Law, so that his willful misconduct in violating prison rule by releasing documents was not justified and he was ineligible for unemployment compensation; Law protects only communications or testimony before governmental agencies, and employee released information to private advocacy group).

adversely affected by his/her employer when requested by an appropriate authority to participate in an investigation, hearing, or inquiry held by an appropriate authority or in a court action. 77

Wrongdoing is a "violation which is not of a merely technical or minimal nature." 78 It must concern a federal or state statute or regulation, a political subdivision's ordinance or regulation, or a code of conduct or ethics designed to protect the public's or the employer's interest. 79

1998) (public employee failed to establish that he made good faith report of wrongdoing to his employer as would support Pennsylvania Whistleblower Law's violation arising out of his statement to employer that he suspected violations of copyright law through computer users in office where supervisor encouraged employee to submit list of alleged illegal computer uses and although employee was in position to substantiate illegal computer use by various means, he failed to produce evidence of any alleged illegal computer use); Lutz v. Springettsbury Township, 667 A.2d 251 (Pa. Commw. Ct. 1995) (reargument denied) (for purposes of action under Pennsylvania's Whistleblower Law, "good faith report" is generally one initiated by employee based upon that employee's suspicion of wrongdoing or waste; allegations of former township director of wastewater treatment that he conducted investigation, at township's request, into deficit resulting from undercharging of other municipalities for use of township's treatment facility, that he submitted report on investigation to township, that township declined to follow his recommendations regarding deficit and that he was terminated months later did not set forth viable claim under the Law, even assuming report directed by township was a good faith report within the Law's meaning; former director failed to demonstrate any connection between his termination and either the report or investigation); Gray v. Hafer, 669 A.2d 335 (Pa. 1994), aff'd, 651 A.2d 221 (Pa- Comnww. Ct 1994), (former employee of Department of Auditor General failed to state claim for violation of Pennsylvania's Whistleblower Law, employee alleged only that he filed report of wrongdoing and waste, that Auditor General did not respond until four months later when one of the report's subjects requested copy of report, and that, only then, was he terminated, employee did not allege specifics of wrongdoing, and employee did not show by concrete facts or surrounding circumstances that report led to his termination; however, employee would be given leave to amend his petition to state claim for violation of Law).

77. PA. STAT. ANN. tit. 43, § 1423(b) (West 1991). See, e.g., Freeman v. McKellar, 795 F. Supp. 733 (E.D. Pa. 1992) (on motion to dismiss claim under Pennsylvania's Whistleblower Law by city employee who was terminated for admitting to city property's theft after he testified before grand jury that he had remodeled department head's home on city time with materials that were property of city as he was ordered to do by department head, defense that employee was removed for legitimate reasons could not be sustained; although it might be inferred that employee knowingly participated in scheme to misappropriate and misuse public property and fact that he did so at supervisor's behest would not immunize him from wrongdoing charge, it could reasonably be inferred that employer's motives were retaliatory and that employee was removed for testifying).

78. PA. STAT. ANN. tit. 43, § 1422 (West 1991).

79. Id.; see, e.g., Rankin v. City of Philadelphia, 963 F. Supp. 463 (E.D. Pa. 1997) (employee adequately alleged "wrongdoing" for purposes of motion to dismiss claim under Pennsylvania's Whistleblower Law, where he alleged nursing home that contracted with city was in substantial violation of numerous health and safety requirements; under Law violations need not be concealed to constitute "wrongdoing"); Podgurski v. Pennsylvania State Univ, 722 A.2d 730 (Pa. Super. Ct. 1998) (staff assistant at state university who was disciplined for making complaints stated claim under Pennsylvania's Whistleblower Law; complaints that assistant lodged against her coemployees included expenditures of
Waste is an “employer’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth [of Pennsylvania] or political subdivision sources.”

An appropriate authority for reporting wrongdoing or waste is considered to be a “[f]ederal, [s]tate or local government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.” It is also a “member, officer, agent, representative or supervisory employee of the body, agency or organization.”

The term includes, but is not limited to, the Office of the Attorney General, the Department of the Auditor General, the Treasury Department, the General Assembly and committees of the General Assembly having the power and duty to investigate criminal law

unnecessary funds, dismissal of employees absent any reason, hiring of employees absent proper qualification, false reporting of hours worked, and improper conduct by coemployees while at work; i.e, babysitting children, and this conduct, if proven, fell within Law’s definition of “wrongdoing”); Golaschevsky v. Commonwealth, Dept. of Envtl Protection, 683 A.2d 1299 (Pa. Commw. Ct. 1996), aff’d, 720 A.2d 757 (Pa. 1998) (where public employee alleges that there has been illegal activity within his own agency, term “wrongdoing,” as used in Pennsylvania’s Whistleblower Law, includes not only violations of statutes or regulations that are of the type that the employer is charged to enforce, but violations of any federal or state statute or regulation, other than violations that are merely technical or of minimal nature); Gray v. Hafer, 651 A.2d 221 (Pa. Commw. Ct. 1994), aff’d, 669 A.2d 335 (Pa. 1994) (to fall within definition of “wrongdoing” under Pennsylvania’s Whistleblower Law, violation reported by public employee must be violation of statute or regulation of type that employer is charged to enforce for good of public body or one dealing with employer’s internal administration). But see Connor v. Clinton County Prison, 963 F Supp. 442 (M.D. Pa. 1997) (former county prison employee’s allegations that she was terminated for documenting that prison warden had violated prison’s internal policies requiring paperwork before release of inmate was not “report of wrongdoing” that implicated Pennsylvania’s Whistleblower Law; employee’s private log did not constitute report and internal policy’s violation was not covered by Law); Hays v. Beverly Enters., Inc., 766 F. Supp. 350 (W.D. Pa. 1991), aff’d, 952 F.2d 1392 (3d Cir. 1991) (licensed practical nurse’s report to her supervisor concerning medical condition and treatment of personal boarding facility resident did not concern “wrongdoing” as contemplated by Pennsylvania’s Whistleblower Law and, Law did not provide nurse with cause of action for wrongful termination; regulation relied upon by nurse to establish facility’s wrongdoing placed no duty upon facility to prescribe treatment for resident or to transfer her to health care facility); Riggio v. Burns, 711 A.2d 497 (Pa. Super. Ct. 1998) (en banc), appeal dismissed, 739 A.2d 161 (Pa. 1999) (neurologist’s objections that supervising surgeon at medical institution was not physically present while residents placed depth electrodes in or over epilepsy patients’ brains did not qualify as report of “wrongdoing” under Pennsylvania’s Whistleblower Law; licensing statutes were of no assistance to neurologist because they lacked specificity as to what acts were proscribed; “wrongdoing” does not encompass tort principles unless statute, regulation, or code of conduct or ethics is violated by tortious act or omission).

80. PA STAT. ANN. tit. 43, § 1422 (West 1991).
81. Id.
82. Id.
To be protected under the Law, an employee must be employed by an employer subject to the Law's provisions. The Law defines an employee as any "person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body." To be protected under the Law, an employee must be employed by an employer subject to the Law's provisions. The Law defines an employee as any "person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body." More complicated, however, is determining who an employer is. An employer is: (1) a "person supervising one or more employees, including the employee in question;" (2) "a superior of that supervisor;" or (3) "an agent of a public body."

83. Id.
84. Id.; see, e.g., Rankin, 963 F. Supp. at 463 (under Pennsylvania's Whistleblower Law, nursing home employee was "employee" of city with which nursing home contracted for purposes of Law, as he was performing services for city as employee of city's agent; "employee" must be interpreted to require only that person perform services for public body, even if that person's actual contract of hire is with nonpublic body agent; privity of contract is not required).
85. See PA. STAT. ANN. tit. 43, § 1422 (West 1991). For court decisions considering "employer" to mean a private or public sector employer, see, e.g., Rankin, 963 F. Supp. at 463 (under Pennsylvania's Whistleblower Law, city employees were "employers," as they were employed by city; any person who is an "agent of a public body" is an "employer"); Riggio, 711 A.2d at 497, appeal dismissed, 739 A.2d 161 (Pa. 1999) (private sector employer may be agent of a public body extending Whistleblower Law's protections); Denton, 739 A.2d at 571 (receipt by private sector employer of Medicaid funding is sufficient to qualify as a "public body" for purposes of Whistleblower Law, which defines employer as an agent of a public body); Rodgers, 659 A.2d at 63 (superintendent of correctional institution at which corrections officer was employed and Commissioner of Department of Corrections came within definition of "employer" for purposes of the Law). For decisions that do not consider "employer" to include a private sector employer, see Gallant, 886 F. Supp. at 202 (by its own terms, Pennsylvania Whistleblower Law's scope is limited to employees terminated from governmental entities or any other "public body" which is created or funded by the government, former employee of private, for profit company could not maintain claim against company because company was a private corporation and was not funded in any way by the government); Clark, 9 F.3d at 321 (rehearing and rehearing en banc denied) (under Pennsylvania Law, Whistleblower Law is not indicator of public policy in private termination cases; there is no general public policy of protecting whistleblowers who are not employed in the public sector); Johnson, 843 F. Supp. at 974 (Pennsylvania Whistleblower Law applies only to public employees who good faith report about instances of wrongdoing or waste to employer or appropriate authority); Cohen, 772 F. Supp. at 1521 (on reconsideration) (private, for-profit corporation, which was in business of operating and managing hospital-based out-patient cancer treatment centers throughout nation, did not come within Pennsylvania Whistleblower Law's "employer" definition on ground of its relationship with Commonwealth funded university; relationship between parties and management agreement was specifically characterized as that of independent contractor and not partners or joint venture); Holewinski, 649 A.2d at 712, appeal denied, 659 A.2d 560 (Pa. 1994) (Pennsylvania Whistleblower Law applies only to employees terminated from governmental entities and, did not protect private sector hospital employee from termination allegedly due to her whistleblowing conduct); Krajsa, 622 A.2d at 355 (Pennsylvania Whistleblower Law did not apply to an at-will employee's termination from a company that
A public body is defined as all of the following:

(1) A State officer, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of State government.

(2) A county, city, township, regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency.

(3) Any other body which is created by the Commonwealth [of Pennsylvania] or political subdivision authority or which is funded in any amount by or through [the] Commonwealth or political subdivision authority or a member or employee of that body. 86

To recover under the Law, an employee alleging a violation . . . must show by a preponderance of the evidence that, prior to the alleged [employer adverse action], the employee or a person acting on the employee's behalf had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority. 87

86. PA. STAT. ANN. tit. 43, § 1422 (West 1991). See, e.g., Rankin, 963 F. Supp. at 463 (public body may be held liable for Pennsylvania Whistleblower Law's violation); Riggio, 711 A.2d at 497, appeal dismissed, 739 A.2d 161 (Pa. 1999) (private medical institution that received some funding from state was "public body" for purposes of Pennsylvania's Whistleblower Law).

87. PA. STAT. ANN. tit. 43, § 1424(b) (West 1991). See, e.g., Golashewsky, 683 A.2d at 1299 aff'd, 720 A.2d 757 (Pa. 1998) (public employee failed to establish that he made good faith report of wrongdoing to his employer as would support Pennsylvania Whistleblower Law's violation arising out of his statement to employer that he suspected violations of copyright law through computer users in officer where supervisor encouraged employee to submit list of alleged illegal computer uses and although employee was in position to substantiate illegal computer use by various means, he failed to produce evidence of any alleged illegal computer use); Lutz v. Springettsbury Township, 667 A2d 251 (Pa. Commw. Ct. 1995) (reargument denied) (for purposes of action under Pennsylvania's Whistleblower Law, "good faith report" is generally one initiated by employee based upon that employee's suspicion of wrongdoing or waste; allegations of former township director of wastewater treatment that he conducted investigation, at township's request, into deficit resulting from undercharging of other municipalities for use of township's treatment facility, that he submitted report on investigation to township, that township declined to follow his recommendations regarding deficit and that he was terminated months later did not establish claim under the Law, even assuming report directed by township was a good faith report within meaning of Law; former director failed to demonstrate any connection between his termination and either the report or investigation); Gray, 651 A.2d at 221, aff'd, 669 A.2d at
The person alleging a violation must "bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within 180 days after the occurrence of the alleged violation."88 The employer can defend its actions by showing "by a preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which are not merely pretextual."89 However, the right to a jury trial does not exist.90

A court has considerable latitude in awarding remedies for the Law's violation. The court can order the employee's reinstatement, backpay, restoration of fringe benefits and seniority rights, actual damages, or any combination of these remedies.91

The complainant may be awarded all or a portion of the litigation's cost, including reasonable attorney fees and witness

335 (1994) (former employee of Department of Auditor General failed to state claim for violation of Pennsylvania's Whistleblower Law; employee alleged only that he filed report of wrongdoing and waste, that Auditor General did not respond until four months later when one of subjects of report requested copy of report, and that, only then, was he terminated; employee did not allege specifics of wrongdoing, and employee did not show by concrete facts or surrounding circumstances that report led to his termination; however, employee would be given leave to amend his petition to state claim for violation of Law).

88. See PA. STAT. ANN. tit. 43, § 1424(a) (West 1991). See, e.g., O'Rourke v. Pennsylvania Department of Corrections, 730 A.2d 1039 (Pa. Commw. Ct. 1999) (under Pennsylvania's Whistleblower Law, an action must be filed within 180 days of the alleged violation, and this 180 day time limit is mandatory; courts have no discretion to extend it and claims arising from any alleged acts of retaliation that occurred more than 180 days prior to date that employee filed Whistleblower Law complaint were time-barred); Perry v. Tioga County, 649 A.2d 186 (Pa. Commw. Ct. 1994), appeal denied, 655 A.2d 995 (1995) (public employee's Pennsylvania Whistleblower Law claim was time barred, where it was not brought within 180 days of adverse personnel action).

89. See PA. STAT. ANN. tit. 43, § 1424(c) (West 1991). See, e.g., Freeman v. McKellar, 795 F. Supp. 733 (E.D. Pa. 1992) (on motion to dismiss claim under Pennsylvania's Whistleblower Law by city employee who was terminated for admitting to city property's theft after he testified before grand jury that he had remodeled department head's home on city time with materials that were city's property as he was ordered to do by department head, defense that employee was removed for legitimate reasons could not be sustained; although it might be inferred that employee knowingly participated in scheme to misappropriate and misuse public property and fact that he did so at supervisor's behest would not immunize him from wrongdoing charge, it could reasonably be inferred that employer's motives were retaliatory and that employee was removed for testifying).

90. See, e.g., Williams v. Borough of Braddock, 28 Pa. D. & C.4th 211 (1996) (there being no provision for a jury trial in Pennsylvania's Whistleblower Law, and there having been no common-law action for wrongful termination when Pennsylvania's Constitution was enacted, the court determined that plaintiff had no right to a jury trial); Clark v. Lancaster City Hous. Auth., 14 Pa. D. & C.4th 411 (1992) (a litigant seeking damages for violation of Pennsylvania's Whistleblower Law does not have a right to a jury trial).

fees. These latter remedies may also be available to an unsuccessful employee. The Law does not indicate that the complainant need to be successful for the award. It only uses the word “complainant.” However, punitive damages may not be available.

A person who violates the Law may be subject to certain penalties. A civil fine of not more than $500.00 may be levied. Additionally, except where a person holds elective office, the court may suspend a person for up to six months from public service who is employed by the Commonwealth of Pennsylvania or a political subdivision.

To notify employees of the Law, an employer is required to “post notices and use other appropriate means to notify employees and keep them informed of [the Law’s] protections and obligations.”

III. PENNSYLVANIA’S WHISTLEBLOWER LAW’S EXTENSION TO PRIVATE SECTOR EMPLOYEES

Prior to 1998, it was generally thought that Pennsylvania’s Whistleblower Law was enacted to statutorily protect only public employees from employer retaliation when those employees made good faith efforts to alert appropriate authorities to governmental wrongdoing or waste. However, in Riggio v. Burns, the Pennsylvania Superior Court, sitting en banc, extended the Law’s protections to the private sector where it could be shown that the private sector employer received public monies and acted as a public body’s agent. This position was followed by the superior court’s 1999 decision in Denton v. Silver Stream Nursing and Rehabilitation Center.

As noted above, the Law provides that “[n]o employer may

92. Id.
93. Id. For example, this may be similar to a complainant’s recovery that is permissible under the Civil Rights Act of 1964 (Title VII). See, e.g., Norris v. Sysco Corp., 191 F.3d 1043 (9th Cir. 1999) (an employer’s failure to obtain tangible relief in a Title VII mixed-motive action did not preclude an award of attorneys’ fees in favor of the employee).
95. Rankin, 963 F. Supp. at 463 (holding that punitive damages are not available under Pennsylvania Whistleblower Law).
97. Id. at § 1425.
98. Id.
99. Id. at § 1428.
100. See supra note 75 and accompanying text.
101. Riggio, 711 A.2d at 497.
discharge, threaten or otherwise discriminate or retaliate against an employee . . . because the employee . . . makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.”

“Employee” is defined as “[a] person who performs a service for wages or other remuneration under a contract of hire . . . for a public body.”

Because the Law applies only to an employee of a public body, the superior court in Riggio reasoned that it must first determine whether a private sector employer may be considered a “public body.” The Law defines “public body,” in relevant part, as “[a]ny . . . body which is created by the Commonwealth [of Pennsylvania] or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body.”

In Riggio, the Medical College of Pennsylvania (“College”) admitted in response to interrogatories to receiving yearly appropriations from the Commonwealth of Pennsylvania. Nevertheless, the College maintained that these appropriations could not make it a public body for the Law’s purposes. The College argued that finding it to be a public body would be an absurd result, which the legislature did not intend.

To support this argument, the College pointed to the ambiguity in the legislature’s use of the term “funded,” which the Law did not define. It relied upon Cohen v. Salick Health Care, Inc. In Cohen, the United States District Court for the Eastern District of Pennsylvania wrote after commenting that “[i]t is clear that the legislative intent was to make the law applicable to bodies that receive even one dollar of state funding,” but that the Law’s legislative history was silent as to what was meant by “funded.”

In reviewing Cohen, the superior court examined whether Salick Health Care, Inc. was funded by or through the Commonwealth. Salick Health Care was a California, public for profit corporation, which was involved in a contractual relationship

103. PA. STAT. ANN. tit. 43, § 1423(a) (West 1991).
104. Id. at § 1422.
105. Riggio, 711 A.2d at 499.
106. PA. STAT. ANN. tit. 43, § 1422 (West 1991) (emphasis added).
107. Riggio, 711 A.2d at 499.
108. Id. at 500.
110. Id. at 1526.
111. Id. at 1521.
with Temple University regarding the operation of a cancer treatment center in Philadelphia. The center treated Medicaid-eligible patients and billed the Commonwealth through Temple University. The Medicaid reimbursement was then remitted to Temple, which in turn paid Salick Health Care an amount representing payment for services rendered.\textsuperscript{112}

The federal court in \textit{Cohen} held that this arrangement did not constitute funding by or through Commonwealth authority, and that Salick Health Care was not a public body under the Law.\textsuperscript{113} However, the superior court in response to this holding wrote that even if it were bound by a federal court's decision interpreting a Pennsylvania statute, which it was not, the issue of whether Medicaid reimbursements constituted funding was not before the Court.\textsuperscript{114} In \textit{Riggio}, the College had acknowledged that it received specific appropriations from the Pennsylvania General Assembly.\textsuperscript{115} A more direct form of funding was difficult to envision to bring the College within the Law's coverage.

The College claimed that finding it to be a public body simply because it received state appropriations would be an absurd result.\textsuperscript{116} It would "warp the plain meaning of the term 'public body'" to include all otherwise private entities that receive state appropriations.\textsuperscript{117} Consequently, thousands of these private entities would unexpectedly be subject to the Law. In response, the Superior Court found that the term "public body" was expressly defined by the legislature for the Law's purposes.\textsuperscript{118} Where a statute provides internal definitions, the Court is bound to construe the statute according to those definitions.\textsuperscript{119}

The Law plainly and unequivocally makes any body "funded in any manner by or through Commonwealth . . . authority" a public body.\textsuperscript{120} Where a statute's language is unambiguous on its face, the court must give effect to that language. Parenthetically, the superior court noted that it was not unreasonable for the legislature to condition state funds' receipt on the acceptance of

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  \item \textsuperscript{112} Riggio, 711 A.2d at 500.
  \item \textsuperscript{113} Cohen, 772 F. Supp. 1521.
  \item \textsuperscript{114} Riggio, 711 A.2d at 500.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Riggio, 711 A.2d at 500 (quoting Hodges v. Rodriguez, 645 A.2d 1340, 1348 (Pa. Super. Ct. 1994) \textit{(citing 1 PA. CONS. STAT. ANN. § 1903(a))}).
  \item \textsuperscript{120} Riggio, 711 A.2d at 500.
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the responsibilities embodied in the Law.\textsuperscript{121}

Accordingly, the superior court found that the College was clearly funded by the Commonwealth and the Law applied to the private sector doctor as a public body's employee.\textsuperscript{122} However, the court went on to find that the doctor did not establish a wrongdoing under the Law to permit recovery.\textsuperscript{123}

The Pennsylvania Superior Court subsequently in \textit{Denton v. Silver Stream Nursing and Rehabilitation Center},\textsuperscript{124} followed Riggio\textsuperscript{125} that a private sector employer could be subject to the Law. In \textit{Denton}, the court found that the Law made it clear that it was intended to apply to all agencies that received public monies under the Commonwealth's administration.\textsuperscript{126}

For example, legislatively appropriated funds are not the only monies that will create a "public body" status under the Law. The statutory language differentiates between appropriated and "pass-through" funds and extends the Law to cover both types; i.e., "[a]ny other body which is . . . funded in any amount by or through Commonwealth . . . authority."\textsuperscript{127} The Law clearly indicates that it is intended to be applied to bodies that receive not only money appropriated by the Commonwealth, but also public money that passes through the Commonwealth from the federal government.\textsuperscript{128}

Contrary to Cohen,\textsuperscript{129} the superior court went on to find that the receipt of Medicaid funding by a private sector employer fell within the Law's "public body" definition.\textsuperscript{130} Unlike Riggio,\textsuperscript{131} the court found sufficient facts for the employee to maintain a cause of action under the Law.\textsuperscript{132}

Based on these recent superior court decisions,\textsuperscript{133} the Law's coverage has been extended to encompass any private entity that qualifies as a public body. Obvious private sector employer examples are hospitals, nursing and retirement homes, institutions for the mentally retarded, institutions for the mentally ill, home

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 501-503.


\textsuperscript{125} Riggio, 711 A.2d at 497.

\textsuperscript{126} \textit{Denton}, 739 A.2d at 576.

\textsuperscript{127} \textit{Id.} at 576 (emphasis added).

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Cohen}, 772 F. Supp. 1521.

\textsuperscript{130} \textit{Denton}, 739 A.2d at 576.

\textsuperscript{131} \textit{Riggio}, 711 A.2d at 497.

\textsuperscript{132} \textit{Denton}, 739 A.2d at 576-578.

\textsuperscript{133} \textit{Denton}, 739 A.2d at 571; \textit{Riggio}, 711 A.2d at 497.
health care providers, physicians, chiropractors, podiatrists, ambulance companies, dentists, optometrists, etc. All of the aforementioned generally receive some form of public funding.

An employee who works for any other private sector employer, contractor, or person who does business with a public body is also not precluded from claiming the Law's coverage by these decisions. Examples of these private sector employers are contractors that perform public works projects, those making sales to public bodies, or anyone entering into any contract with a public body to provide services, including legal, consulting, computer, engineering, etc.

These decisions may have judicially modified the Law to its broadest extent possible by statutorily abrogating part of the at-will employment doctrine. The Law may now protect almost every private and public sector employee who seeks to bring a cause of action for a public policy whistleblowing violation.

IV. STATUTORY MODIFICATION OF AT-WILL EMPLOYMENT

A. Why Protect At-Will Employees Statutorily?

As the new millennium dawns, it is time to re-examine the need to statutorily protect at-will employees against not just wrongful terminations but against all types of adverse employment actions. Work is much different today than it was one hundred, fifty, or even twenty-five years ago. It will change even more rapidly as new technology is introduced into the workplace during the next ten years. The law must evolve to meet these workplace changes and challenges as it has in the past.

The vast majority of us depend upon our employer for wages and benefits to cope with and meet life's basic daily responsibilities of providing food, clothing, and shelter. Historical developments during the past century confirm that federal and state statutes have recognized that a concept of fundamental fairness is ingrained in today's employment relations to protect certain adverse employer actions. Based on these economic developments, a persuasive argument can no longer be made why at-will employees should not have the right to contest their employers over any adverse action.

134. Denton, 739 A.2d at 571; Riggio, 711 A.2d at 497.
135. Denton, 739 A.2d at 571; Riggio, 711 A.2d at 497.
136. See, e.g., supra notes 2-3 and accompanying text.
137. See, e.g., supra note 32 and accompanying text.
Employers must be held more accountable and responsible to society for their adverse actions where these actions are arbitrary, capricious, or discriminatory.

At least two million at-will employees are terminated each year.\textsuperscript{138} It can only be speculated how many at-will employees are subject to other employer adverse employment actions involving reprimands, suspensions without pay, demotions, etc.

Many of these adverse employment actions may not be justified by a nonarbitrary, noncapricious, or nondiscriminatory reason that would meet the "just cause" standard for these actions under collective bargaining agreements that protect union represented employees.\textsuperscript{139} The human tragedy in permitting these wrongful

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\textsuperscript{138} ST. ANTOINE, MODEL EMPLOYMENT TERMINATION ACT, supra note 6, at 270.
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\textsuperscript{139} Most collective bargaining agreements in the private and public sectors do, in fact, require some form of "cause" or "just cause" for an employee's termination or other adverse employment action. Where this is not contained in a collective bargaining agreement, many arbitrators imply a "just cause" limitation. For instance, Arbitrator Walter E. Boles held that a "just cause" standard for consideration of disciplinary action is, absent or clear proviso to the contrary, implied in a collective bargaining agreement. See Cameron Iron Works, Inc., 25 Lab. Arb. (BNA) 295, 301 (1955) (Boles, Arb.). The reason is:
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If the Company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply in invoking its claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement — the security of a worker in his job.

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Atwater Mfg. Co., 13 Lab. Arb. (BNA) 747, 749 (1949). The general significance of the terms "cause" or "just cause" were discussed by Arbitrator Joseph McGoldrick as follows:
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\begin{quote}
[It] is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly for "cause." There is no significant difference between these various phrases. These exclude discharge for things for which employees have been traditionally fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or perhaps, more properly as part of the new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

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Worthington Corp., 24 Lab. Arb. (BNA) 1, 6-7 (1955) (McGoldrick, Arb.). Few, if any, collective bargaining agreements define "cause" or "just cause." A seven-question checklist to determine "cause" or "just cause" was developed by Arbitrator Carroll R. Daugherty in Whirlpool Corp., 58 Lab. Arb. (BNA) 421 (1972) (Daugherty, Arb.). This checklist sets forth the following:
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\item (1) Did the employer forewarn the employee orally or in writing of the possible or
adverse employment actions is immeasurable.\textsuperscript{140}

Today, more than ever, each of us identifies ourself and finds value in one's self through our employment. We introduce ourselves as teachers, laborers, carpenters, engineers, bricklayers, steel-workers, etc.\textsuperscript{141} Being gainfully employed is more than a means of earning a living. It is essential to our very "existence and dignity."\textsuperscript{142}

probable consequences of the employee's adverse action?
(2) Was the employer's rule reasonably related to the orderly, efficient, and safe operation of the business and the performance that the employer might reasonably expect of the employee?
(3) Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey an employer rule or order?
(4) Was the employer's investigation conducted fairly and objectively?
(5) At the employer's investigation, did the employer's adjudicator obtain substantial and compelling evidence or proof that the employee was responsible or at fault as alleged?
(6) Has the employer applied its rule, orders, policies, and penalties fairly and without discrimination to all employees?
(7) Was the degree of discipline reasonably related to the seriousness of the offense and the employee's work performance record with the employer?

*Whirlpool Corp.*, 58 Lab. Arb. (BNA) at 421. A negative response to any question on this checklist would overturn the employer's disciplinary action.

Another analysis of "just cause" starts by focusing on the shared interests of management and labor:

Management can have little objection to a fair and consistent system of discipline. Similarly, a union has no cause to object to disciplinary actions occasioned by employee conduct that significantly interferes with management's legitimate concern for production. Although the parties may differ as to whether a particular disciplinary action is fair or whether a given type of behavior warrants a certain measure of discipline, they can agree that the legitimate interests of management and labor provide the standards against which management's action must be judged. In order to establish just cause for disciplinary action, management must first show that its interests were significantly affected by the employee's conduct. Alternatively, management may show that even though the employee is unlikely to repeat the wrongful conduct, it is important to deter other employees from such conduct and that discharge is the only effective form of deterrence. Either of these two explanations would establish a prima facie showing of just cause. In order to rebut this showing of just cause, a union must prove that management failed to give the employee industrial due process or industrial equal protection, or failed to consider mitigating factors. For example, the union may show that management took disciplinary action without adequate investigation, or singled out the employee for discipline when others had been excused for the same conduct, or ignored mitigating circumstances such as illness or provocation.

A\textsuperscript{B}R\textsuperscript{M}S & NOLAN, *supra* note 6, at 610-12.
140. SPRANG, *supra* note 6, at 852.
141. \textit{Id}.

One's job provides not only income essential to the acquisition of the necessities of
It is not surprising that many employees suffer emotional trauma when they are subjected to employer adverse actions.\textsuperscript{143} That distress frequently affects relationships with families and friends.\textsuperscript{144}

Employers also suffer.\textsuperscript{145} Wrongful adverse employment actions do not make good economic sense. Employee morale is negatively affected by the observation of unjust employer actions. Employees wonder whether their own positions are at risk. Consequently, productivity, loyalty, and employee attitudes may suffer.\textsuperscript{146} This may also give rise for the employees to seek security and protection by joining a union.\textsuperscript{147}

During the past century, piecemeal federal and state statutes have recognized employees' rights to challenge adverse employer actions arising out of organizing and forming a union, health and safety matters, and discriminatory conduct.\textsuperscript{148} Yet, the most basic aspect of the employment relationship; i.e., to be free altogether from arbitrary, capricious, and discriminatory actions of one's employer, has been left virtually untouched.

Courts are neither equipped to handle the additional caseload nor sufficiently experienced in the area of daily employment relations.
to deal with adverse employer actions arising out of the at-will employment relationship.\textsuperscript{149} The long and procedurally cumbersome judicial process with its motions, discovery requests, and countless hearings cannot provide adequate or swift relief or remedies to the employee and employer.\textsuperscript{150}

Adequate consideration of the employee's and employer's interests in at-will employment relationships demands new, specialized legislation. The judiciary may appropriately respond to the extreme case or to the atypical situation;\textsuperscript{151} however, courts have no capacity to construct an administrative mechanism for daily enforcement and the average employee has no access to their more formalized process.

Unless more positive action is taken by legislatures to define this area, courts will continue to signal employers that their terminations should not be arbitrary, capricious, or discriminatory by recognizing limited causes of action for possible employee recovery.\textsuperscript{152} This will continue to be an unnecessarily expensive and time-consuming process for employees, employers, and courts.

During the past quarter century, employers have certainly been exposed to and have had sufficient opportunity to learn good human resource management principles for properly hiring, disciplining, and terminating employees. These human resource management principles have been espoused by employer organizations, including the Society for Human Resource Management.\textsuperscript{153}

Undergraduate and graduate programs in human resource management now routinely exist as part of every major college's

\textsuperscript{149} See, \textit{e.g.}, supra notes 6, 17, 48 and infra notes 198-200 and accompanying text.

\textsuperscript{150} ST. ANTOINE, \textit{UNJUST FIRING}, supra note 6, at 35.

\textsuperscript{151} See, \textit{e.g.}, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (terminating an employee for refusing to take a polygraph examination); see also Tackett v. Delco Remy, Division of General Motors Corp., 959 F.2d 630 (7th Cir. 1992) (retaliating against an employee for bringing litigation against the employer); Savodnik v. Korrvettes, Inc., 489 F. Supp. 1010 (E.D.N.Y. 1980) (avoiding the payment of an employee's pension); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (terminating an employee for refusing to participate in an employer's illegal price-fixing scheme); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (III. 1978) (terminating an employee for filing workers' compensation claims); Nees v. Hocks, 536 P.2d 512 (Or. 1975) (terminating an employee for serving on a jury); Petermann v. International Board of Teamsters, Inc., 344 P.2d 25 (Cal. Ct. App. 1959) (terminating an employee for refusing to commit perjury at the employer's command).

\textsuperscript{152} See supra notes 23-69 and accompanying text discussing at-will employment's modification by courts during the past quarter century.

\textsuperscript{153} For example, see the Society for Human Resource Management's web site at <http://www.shrm.org> for a listing of information available to human resource managers in promoting good personnel practices.
and university's curriculum.\footnote{154} Even law schools teach employment law courses that review good human resource management principles and their application to the at-will employment relationship.\footnote{155} These courses and curriculums were not as widespread a quarter century ago. The marketplace for these curriculums and employers willingness to hire individuals with these credentials certainly indicates that employers are more than ever aware of good human resource management principles and the need to incorporate them into the modern workplace.

Employers that have not learned these human resource principles or who care not to follow them should now suffer the consequences. Society can no longer shield or protect these employer errors at the at-will employees' cost. This cost to recover from these harms is far better borne by the irresponsible employer, who has much more economic power and resources than the at-will employee.

Any statute should create responsibilities for both employees and employers in terminations and any other adverse employment actions, including discipline, demotions, and layoffs. Employees should be afforded protection for these unwarranted employer adverse actions. Likewise, employers should be protected for improper employee actions that usurp corporate opportunities to work for a competitor, compete against the employer unfairly or illegally, and steal trade secrets or confidential information.\footnote{156}

With this experience in place, there is no valid reason why courts should not expand the doctrine to its logical conclusion by finding that public policy includes "just cause" for any employer adverse action or that legislatures should not regulate this area in a more orderly fashion to alleviate the courts' burden in handling these disputes. Montana's groundbreaking Wrongful Discharge from Employment Act certainly indicates that no real burden is placed on employers through the doctrine's statutory abrogation.\footnote{157} This

\footnote{154} See generally \textit{Barron's, Profiles of American Colleges} (25th ed. 2000).


\footnote{157} \textit{Mont. Code Ann.} §§ 39-2-902-914 (1998); \textit{see infra} notes 182-197 and
statute has operated effectively for over a decade.

B. State Statutes Protecting At-Will Employees

During the past quarter century at-will employment's modification has evolved in two distinct phases. First, the courts have taken action to provide limited protection. Second, state legislatures have reviewed proposals to provide a more definite, logical, and orderly means for resolving wrongful termination disputes through a statutory framework. This modification of at-will employment parallels the emergence of private sector collective bargaining rights prior to the National Labor Relations Act's (NLRA) 1935 enactment.

No comprehensive federal wrongful termination legislation exists. Piecemeal state legislation has been adopted in Missouri, accompanying text.

158. See supra notes 23-69 and accompanying text discussing at-will employment's modification by courts during the past quarter century. See also Perritt, Dismissal Law supra note 4, at ch. 1 (discussing the increased protection for individual employees from wrongful terminations); Decker, Employee Privacy supra note 4, at ch. 1 (discussing the increased statutory protection for individual employee rights).

159. See Perritt, Dismissal Law, supra note 4, at ch. 9.

160. 29 U.S.C. §§ 151-169 (1998). Prior to the National Labor Relations Act's (NLRA's) enactment, "there developed a gradual sensitivity on the part of some courts to the need for fair procedures in the issuance and enforcement of injunctions and, more important, a legislative sensitivity toward the interests of the laborer." R. Gorman, Basic Text on Labor Law 3 (1976). See also supra notes 2-3 and accompanying text.

161. In 1980, United States Congressman Benjamin S. Rosenthal introduced to the United States Congress the Corporate Democracy Act. It was an attempt at federal legislative relief for at-will employees, which, if passed, was to be incorporated into the National Labor Relations Act. H.R. Rep. No. 96-7010, 126 Cong. Rec. 2490 (1980). Title IV of the bill provided in pertinent part:

It is further declared to be the policy of the United States to protect employees in the security of their employment by ensuring that they are not deprived of such employment on the basis of their having exercised their constitutional rights, or because of their refusal to engage in unlawful conduct as a condition of employment.

Id. at § 401(a). The bill also provided that "[e]mployees shall have the further right to be secure in their employment from discharge or adverse action with respect to the terms or conditions of their employment except for just cause." Id. at § 401(c). The bill defined "just cause" as follows:

The term "just cause" shall be defined in accordance with the common law of labor contracts established pursuant to section 301 of the National Labor Relations Act, except that such term shall not include (A) the exercise of constitutional, civil, or legal rights; (B) the refusal to engage in unlawful conduct as a condition of employment; (C) the refusal to submit to polygraph or other similar tests; or (D) the refusal to submit to a search of someone's person or property, other than routine inspections, conducted by an employer without legal process.

Id. at § 401(b)(15). At the end of the 96th Congress, with no formal action having been taken, the Corporate Democracy Act died. See also Sprang, supra note 6 (discussing the
Puerto Rico,\textsuperscript{163} South Carolina,\textsuperscript{164} South Dakota,\textsuperscript{165} and the Virgin Islands.\textsuperscript{166} Other states have enacted statutes protecting whistleblowers; i.e., employees who report to the government or their superiors some wrongdoing, waste, or questionable conduct of their employers.\textsuperscript{167} Montana is the only state that has adopted a comprehensive wrongful termination statute.\textsuperscript{168} This limited state activity demonstrates a beginning legislative interest in circumscribing and regulating court modification of at-will employment.

To statutorily regulate at-will employment, the National Conference of Commissioners of Uniform State Laws prepared the Model Employment Termination Act ("Model Act").\textsuperscript{169} The Model need for a federal statute abrogating at-will employment).

162. Mo. REV. STAT. § 290.140 (1993) (requiring a corporation to provide any employee who has voluntarily quit or who has been terminated after at least ninety days of employment, with a letter explaining "the nature and character of service rendered by such employee to such corporation and duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service").

163. P.R. LAWS ANN. tit. 29, § 185a (1999) (guaranteeing severance pay for the termination of at-will employees).

164. S.C CODE ANN. § 41-17-10 to 41-17-70 (Law. Co-op. 1986) (requiring the Commissioner of Labor to mediate disputes in wrongful termination cases and all other industrial disputes, strikes, or lockouts).

165. S.D. CODIFIED LAWS ANN. §§ 60-4-5 (Michie 1978) (stating that employment can be terminated at will only if the employee was not hired for a specified term and an employer who wishes to terminate such an employee must show that the termination was justified by "habitual neglect of duty or continued incapacity to perform or any willful breach of duty by the employee in the course of his employment").

166. V.I. CODE ANN. tit. 24, §§ 76-79 (1999) (protecting employees from certain terminations and providing a review procedure).

167. See, e.g., Mich. STAT. ANN. § 17.428 (Law. Co-op. 1989) (prohibiting employer from threatening, terminating, or otherwise discriminating against employee who is about to report a violation of the law by employer); OHIO REV. CODE ANN. § 4113.52 (West 1991) (prohibiting employers from disciplining or taking retaliatory action against employee who reports violation of state or federal statute, ordinance, or regulation by another employer or his/her employer); Pa. STAT. ANN. tit. 43, §§ 1421-1428 (West 1991) (protects employees who report a violation or suspected violation of federal, state, or local law and provides protection for employees who participate in hearings, investigations, legislative inquiries, or court actions). See also supra notes 72-135 and accompanying text regarding Pennsylvania's Whistleblower Law.


169. MODEL EMPLOYMENT TERMINATION ACT (August 8, 1991); see infra notes 170-180 and accompanying text. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") generally promulgates uniform acts in areas of law in which it believes that uniformity among the states is desirable. See generally Day, The National Conference of Commissioners on Uniform State Laws, 8 FLA. L REV. 276 (1955). It was organized in the 1890s in response to a movement by the American Bar Association for reform and unification of American Law. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (1973). Model acts
Act is intended as a model for states to use in modifying the at-will employment relationship.\textsuperscript{170} It protects employees from arbitrary terminations and provides a procedure to review employment terminations.

The Model Act prohibits the termination of employees employed by the same employer for a total period of one year or more and who have worked for the employer at least 520 hours during the 26 weeks next preceding the termination unless "good cause" is present.\textsuperscript{171} Disputes may be submitted to arbitration.\textsuperscript{172} Remedies for an improper termination that the arbitrator has discretion to award include:

(1) reinstatement to the employment position that the employee held when employment was terminated or; if that is impractical, to a comparable position;

(2) full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence;

(3) if reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding 36 months after the date of the arbitrator's award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

are adopted in areas in which there is a "demand for legislation in a substantial number of states," but where is no "pressing need" for uniformity. Day, 8 FLA. L. REV. at 282. Uniform acts are recommended for adoption in all jurisdictions, while model acts are "prepared merely for the convenience of such legislative bodies as may be interested in them." \textit{Id.} The result is that uniform acts should, ideally, be adopted by states with little or no modification. Model acts, on the other hand, serve only as a blueprint for the states, because uniformity is not deemed important. In addition, model acts are not considered by state legislatures as quickly as uniform acts. There are 300 NCCUSL commissioners, with six appointed from each state. The Model Employment Termination Act was defeated as a uniform act by only a four-state margin. It was, however, approved as a model act by a vote of 31-19. Sanborn, \textit{At-Will Doctrine Under Fire,} NAT'L LJ. 40 (Oct. 14, 1991). \textit{See also} SPRANG, \textit{supra} note 6, at nn. 31-32.

\textsuperscript{170} Model Employment Termination Act (August 8, 1991).

\textsuperscript{171} \textit{Id.} at §§ 1(1), 1(4), 3.

\textsuperscript{172} \textit{Id.} at § 6.
(4) reasonable attorney’s fees and costs.\textsuperscript{173}

The arbitrator, however, may not make any award for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award.\textsuperscript{174}

Either the employee or the employer may seek vacation, modification, or enforcement of the arbitrator’s award in the court of general jurisdiction where the termination occurred or where the employee resides.\textsuperscript{175} The court may vacate or modify the award only if it finds that:

1. the award was procured by corruption, fraud, or other improper means;
2. there was evident partiality by the arbitrator or misconduct prejudicing the rights of either the employee or employer;
3. the arbitrator exceeded the powers of an arbitrator;
4. the arbitrator committed a prejudicial error of law; or
5. another ground exists for vacating the award under the state’s arbitration act.\textsuperscript{176}

In lieu of an arbitration procedure, the Model Act also allows a state to elect two additional alternatives as the means of enforcement as a substitute for arbitration.\textsuperscript{177} Alternative A envisions enforcement through an existing or a new state administrative agency.\textsuperscript{178} Alternative B provides for court enforcement.\textsuperscript{179}

The Model Act is also required to be posted by the employer at the workplace.\textsuperscript{180} As yet, no state has adopted the Model Act.\textsuperscript{181}

\textsuperscript{173} Id. at § 7.
\textsuperscript{174} Id.
\textsuperscript{175} MODEL EMPLOYMENT TERMINATION ACT § 8(a) (August 8, 1991).
\textsuperscript{176} Id. at § 8(c).
\textsuperscript{177} Id. Alternatives A-B.
\textsuperscript{178} Id. Alternative A, §§ 5-6.
\textsuperscript{179} Id. Alternative B, §§ 5-6.
\textsuperscript{180} MODEL EMPLOYMENT TERMINATION ACT § 9 (August 8, 1991).
\textsuperscript{181} The following comment has been offered by Professor Sprang regarding the Model Act:

The Model Employment Termination Act marks a step in the right direction. It is significant that the National Conference of Commissioners on Uniform State Laws concluded that the employment-at-will doctrine should be replaced by a statute. In their attempt to draft an acceptable statute, however, the commissioners have compromised too much and have created an inadequate statute that provides many employees with less protection than that which they currently enjoy under common law. The Model Act fails to make innocent victims of wrongful discharge whole and provides no deterrent to wrongful discharge in the future. Furthermore, crafting the statute as a Model Act, to be adopted on a state-by-state basis, is an anachronistic
Montana became the first state to enact a comprehensive statute protecting at-will employees from wrongful termination. The statute protects employees from wrongful termination in the three main areas where at-will employees lack safeguards; i.e., Montana employers are prohibited from terminating employees: (1) without "good cause;" (2) in retaliation for refusing to violate public policy or for reporting a public policy violation; or (3) in violation of the express provisions of an employer's own written personnel policy.

Employees who are wrongfully terminated may be awarded lost wages and fringe benefits for up to four years, as well as punitive damages where there is evidence that the employer "engaged in actual fraud or actual malice" in the termination.

"Good cause" is defined 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." "Public policy" includes those policies in effect at the time of the termination governing public health, safety, or welfare and established by constitutional provision, statute, or administrative rule.

The Montana statute preempts common law tort and express or implied contract remedies. It also provides that employees must first exhaust any written, internal employer procedures before filing suit and that any suit against an employer must be filed within a year after the termination date. In lieu of court action, parties

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solution. In this world of national and multinational corporations, only a federal statute will effectively address the problem. The proposed federal statute would treat all wrongful discharges equally, whether motivated by invidious discrimination, arbitrariness and capriciousness, or other reasons.

The United States is the only industrialized nation in the world that does not have national legislation protecting employees from wrongful discharge. The time has come for us not only to join our international colleagues, but to demonstrate leadership by adopting a federal statute that truly protects employees from wrongful termination and provides those employees with meaningful remedies.

Sprang, supra note 6, at 923-24 (internal footnote omitted).

183. Id. at § 39-2-904.
184. Id. at § 39-2-904 (1).
185. Id. at § 39-2-904 (3).
186. Id. at § 39-2-905.
188. Id. at § 39-2-903 (7).
189. Id. at § 39-2-913.
190. Id. at § 39-2-911(2).
can agree to final and binding arbitration.\textsuperscript{191} If a complaint is filed under the statute, either party can make a written offer to arbitrate within 60 days, and the other party has 30 days to accept the offer in writing.\textsuperscript{192}

A termination that is subject to other federal or state statutes providing a procedure or remedy, for example, fair employment practice statutes, is exempt from the Montana statute.\textsuperscript{193} Employees who are covered by collective bargaining agreements or written employment contract for a specific time period are also excluded from coverage.\textsuperscript{194}

The statute's elimination of common law tort actions has not been found to violate the state's constitution provision guaranteeing the right of "full legal redress."\textsuperscript{195} The state's constitution guarantees only an access right to courts in seeking a remedy for wrongs recognized by common law or statute. Furthermore, the Montana statute's limitation on certain noneconomic damages and of punitive damages does not violate equal protection by unconstitutionally burdening a class of claimants seeking wrongful termination damages.\textsuperscript{196} Rejecting a strict scrutiny standard for equal protection, the court found that the statute rationally related to a legitimate state interest of providing greater certainty alleviating problems experienced by employees and employers in termination disputes.\textsuperscript{197}

\section*{C. Pennsylvania's Statutory Proposals}

Should the courts or the legislature be the primary mover in modifying at-will employment in Pennsylvania? The Pennsylvania Superior Court's 1986 decision in \textit{Darlington v. General Electric}\textsuperscript{198} brought this question to the forefront. \textit{Darlington} represents judicial acknowledgment that at-will employment's modification should be left to the legislature and not to the courts by stating

\begin{enumerate}
\item Id. at § 39-2-914.
\item Id. at § 39-2-914(3) (1998).
\item Id. at § 39-2-912(1).
\item Id. at § 39-2-912(2).
\item Johnson \textit{v}. Montana, 776 P.2d 1221 (Mont. 1989) (classifications created under Montana Wrongful Discharge from Employment Act do not violate equal protection guarantees under the state's constitution).
\item 504 A.2d 306 (Pa. 1986).
\end{enumerate}
that "if terminable at-will contracts are to be forbidden, the judicial process may be an inappropriate forum for such sweeping policy change."199 This view echoes what was earlier set forth in Geary200 relating to courts handling these cases.

In Pennsylvania, several wrongful termination legislative proposals have been introduced since 1981.201 Each of these legislative proposals would create a general statutory scheme to protect Pennsylvania's employees from wrongful termination. None of these proposals gained widespread support for adoption; however, legislation protecting employees from wrongful termination arising out of whistleblowing was enacted.202 The Whistleblower Law, even though limited to the at-will employment's public policy exception, however, indicates the willingness of the Pennsylvania legislature to follow Darlington's203 suggestion in regulating this area through statute instead of piecemeal judicial erosion.

Pennsylvania's wrongful termination proposals exclude from coverage employees protected by a collective bargaining agreement, those protected by civil service, tenured employees, or persons

199. Darlington, 504 A.2d at 310. The Darlington court reasoned:
The citadel of the at-will presumption has been eroded of late, but it has not been toppled. Perhaps the time has come for employees to be given greater protection in this area. This was the opinion of one commentator, who cautioned, however, that "Pennsylvania courts . . . should at this time avoid further modification of the at-will employment relationship. Restraint should be observed to minimize the adverse effects that any complete abrogation might have on employment, productive efficiency, and overburdening of the judicial process with additional cases. Time and thought should be given now to whether abrogation of the doctrine should occur through 'judicial erosion' or 'legislative mandate.' " K.H. Decker, At-Will Employment in Pennsylvania - A Proposal for Its Abolition and Statutory Regulation, 87 DICK. L. REV. 477, 479 (1983).

Id. The Pennsylvania Superior Court reasserted its position in two subsequent decisions. See Veno v. Meredith, 515 A.2d 571, 579 n.3 (Pa. Super. Ct. 1986) (stating that "[c]ourts are likely to be long on generalization and short on detail when the situation requires outlining procedures and remedies"); Martin v. Capital Cities Media, 51 A.2d 830, 841 (Pa. Super. Ct. 1986) (stating that "[t]he judicial chamber is ill-equipped to determine what effects such a sweeping policy change [of at-will employment] would have on society. Such a change would best be accomplished by the legislative process, with its attendant public hearings and debate.").

200. Geary, 319 A.2d at 179 (noting that suits of this nature could impose a heavy burden upon the judicial system in terms of an increased case load and thorny problems of proof).


203. Darlington, 504 A.2d at 306.
who have a written employment contract of not less than two years duration and whose contracts require not less than six months' termination notice. The proposals would require employers to

204. See, e.g., H.R. 1020, 169th Leg., Gen. Sess. (Pa. 1985). The text of this proposal provided:

PENNSYLVANIA HOUSE BILL NO. 1020
INTRODUCED APRIL 23, 1985
REFERRED TO THE COMMITTEE ON LABOR RELATIONS
The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:
Section 1. Short title.
This act shall be known and may be cited as the Unjust Dismissal Act.
Section 2. Legislative statement of purpose.
In recent years it has become a well established principle in Pennsylvania case law that employers do not have an absolute right to terminate employees when the cause for dismissal arises from issues dealing with public health and safety or matters of public policy. The right of an employee to be protected from unjust dismissal has, therefore, been significantly advanced. The purpose of this law is to further establish these employee rights and to advance them to the point that all employees would have a process to seek redress when they have been dismissed from employment for any reason other than just cause.
Section 3. Definitions.
The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:
"Bureau." The Bureau of Mediation of the Department of Labor and Industry.
"Dismiss," "dismisses" or "dismissed."
Derivatives of "dismissal."
"Dismissal." An involuntary discharge from employment, including a resignation or voluntary quit resulting from an improper or unreasonable action or inaction of the employer. This term and its derivatives shall not be construed to include layoff or any other type of temporary dismissal.
"Employee." A person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. The term does not include those protected by a collective bargaining agreement or those protected by civil service or tenure against unjust dismissal or a person who has a written employment contract of not less than two years and whose contract requires not less than six months' notice of termination.
"Employer." A person who has one or more employees, including an agent of an employer.
"Registered mail." Includes certified mail.
Section 4. Dismissal of employees.
(a) Grounds — An employer may not dismiss an employee except for just cause.
(b) Notice — An employer who dismisses an employee shall notify the employee orally at the time of dismissal and in writing by registered mail within 15 calendar days after the dismissal of all reasons for the dismissal. The written notice shall set forth the employee's rights and the procedural time limitations prescribed by this act.
Section 5. Complaints of unjust dismissal.
(a) Form — The complaint may be in narrative form or in numbered paragraph form. It shall set forth the name and address of the employer and employee, the date of dismissal and a statement by the employee of the issues. If the
employee has been provided with a written dismissal notice, the notice may be attached to the complaint.

(b) Time for filing — An employee who believes that he or she has been dismissed in violation of section 4(a) may file by registered mail a written complaint with the bureau not later than 30 days after receipt of the employer's written notification of dismissal as provided in section 4(b).

(c) Time when notice requirement not met — If an employer fails to provide the dismissed employee with written notification of the dismissal and the reason for the action, the dismissed employee may file by registered mail a written complaint, with the bureau not later than 45 calendar days after the date of the oral notification of dismissal.

Section 6. Mediation.

(a) Appointment of mediator — Upon receipt of a complaint from a dismissed employee, the bureau shall appoint a mediator to assist the employer and the dismissed employee in attempting to resolve the dispute.

(b) Explanation of arbitration option — If the dispute is not resolved within 30 calendar days after the commencement of mediation, the mediator shall explain to the employer and the employee the process and purpose of final and binding arbitration.

Section 7. Arbitration proceedings.

(a) Request for arbitration — After the option of arbitration is made available to the dismissed employee, the employee or employer may request a continuance of mediation if he or she believes that a mutual resolution is likely, the dismissed employee or the employer may file by registered mail a written request with the bureau for arbitration of the dispute. If continued mediation breaks down and mutual resolution becomes impossible, either party may request arbitration at that time in this same manner.

(b) Hearing — Within 60 calendar days after appointment of an arbitrator, or within further additional periods to which the parties may agree, the arbitrator shall call a final hearing and shall give reasonable notice of the time and place of the hearing to the employer and the employee.

Section 8. Decision of arbitrator.

(a) Time of decision — Within 30 calendar days after the close of the hearing, or within further additional periods to which the parties may agree, the arbitrator shall render a signed opinion and award based upon the issues presented. The arbitrator shall deliver by registered mail a copy of the opinion and award to the employer, the employee and the bureau.

(b) Remedies — The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the dismissal.

(2) Reinstating the employee without backpay or with partial or full back pay.

(3) A severance payment.

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

Section 9. Effect of award.

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

Section 10. Cost of mediation and arbitration.

The normal and necessary expenses of mediation and arbitration, including the cost of
terminate employees only for "just cause." If terminated, the employee would have to receive oral notification at the time of termination and written notification by registered mail within fifteen calendar days of the termination, stating all reasons for the action.

The proposed legislation also permits an employee to file a written complaint concerning his/her termination with the Pennsylvania Bureau of Mediation within thirty days of the written notice's receipt. After the Bureau receives the complaint, it would then appoint a mediator to assist the terminated employee and the employer in resolving the dispute. If, after thirty calendar days from commencement of mediation, no mutually satisfactory resolution occurs, the employee could invoke arbitration proceedings.

After a hearing, the arbitrator could select remedies that include:

- producing a witness, shall be borne by the complainant, but the expenses may be reimbursed if in the judgment of the arbitrator it would be reasonable and proper to do so.

Section 11. Judicial review.
The court of common pleas for the county in which the dispute arose or in which the employee resides may review an award of the arbitrator but only for the reason that the arbitrator was without, or exceeded the scope of, his jurisdiction, or that the award was procured by fraud, collusion or other similar and unlawful means. The pendency of a proceeding for review shall not stay automatically the award of the arbitrator.

Section 12. Contempt.
Any employer or employee who willfully disobeys a lawful order of enforcement issued by the court may be held in contempt. The punishment for each day after issuance that the contempt order remains in effect shall be a fine not to exceed $250 per day.

Section 13. Construction of act.
This act shall not supersede an employer's grievance procedure that provides for impartial, final and binding arbitration of dismissal-related grievances. Upon the request of an employer or employee, the bureau shall determine whether or not an employer's grievance procedure meets with this standard.

Section 14. Posting copy of act.
An employer shall post a copy of this act in a prominent place in the work area. This act shall take effect immediately.


205. See, e.g., id. § 4(a).

206. See, e.g., id. § 4(b).

207. See, e.g., id. § 5(a). Where the employer fails to provide written notification of the termination, the employee may file a complaint within 45 calendar days of the termination.

Id.


209. See, e.g., id. §§ 6(b), 7(a). The employee may, alternatively, request a continuance of the mediation if he or she "believes that a mutual resolution of the dispute is possible." Id. § 7(a).
(1) sustaining the termination; (2) reinstating the employee with no, partial, or full backpay; and (3) ordering a severance payment. The arbitrator's decision would be final and binding upon the parties, and reviewable in the court of common pleas for the county where the dispute arose or where the employee resides. However, if a party sought judicial review, the court could set aside the award only if the arbitrator "was without, or exceeded the scope of, his jurisdiction, or that the award was procured by fraud, collusion or other similar and unlawful means."

Pennsylvania's legislative proposals provide a beginning reference point to modify the at-will employment relationship. However, in their present form they are inadequate to meet today's employment needs. The proposals make no provision for preemption of other federal or state statutes. Exclusivity of the procedure is not provided for when it is selected over competing statutes. Arbitrator selection is not clearly defined even though it would appear to be solely in the Bureau's jurisdiction.

The proposals should not place the costs of the mediation and arbitration initially on the employee. This may have a tendency to deter its use. Standards for an acceptable employer grievance arbitration procedure should be also clearly defined in the statute to provide for a fair, impartial, and regular procedure to include, but not be limited to sharing of the arbitration's cost or placing the cost totally on the employer and selection of the arbitrator by both the employee and employer.

D. Proposed Statute

Based on the Pennsylvania appellate courts' decisions since Geary, it is apparent that even though Pennsylvania recognizes certain exceptions to the at-will employment doctrine, little appellate case law has resulted since 1974 where at-will employees have been overwhelmingly successful against their employers in recovering damages.

Pennsylvania decisions are replete with remands, recognizing a cause of action but not finding sufficient facts to sustain the claim,

210. See, e.g., id. § 8(b).
211. See, e.g., id. § 9.
212. See, e.g., id. § 11.
213. See supra notes 48-67 and accompanying text.
215. See supra notes 48-67 and accompanying text.
etc.216 In other words, "on the books" exceptions to the doctrine exist, but little success at employee recovery is guaranteed because there is always some reason for the court to find in denying recovery.217

Despite these results, employees have continued to bring these claims with the possible implication of overburdening the judiciary.218 In the future, based on the prior quarter century of litigation experience, the appellate court case load can be expected to increase to deal with at-will employment cases.219 Piecemeal modification of the doctrine and overburdening of the courts with these cases will continue until a case arises that shocks the court's sensibility enough to finally find that Pennsylvania's public policy contains a "just cause" provision in every employment contract for every adverse employment action.

The time has come for either Pennsylvania's courts to modify at-will employment by finding a public policy "just cause" requirement arising out of any adverse employment action or for legislation to be enacted to achieve this objective. It is undisputed that courts should not hear these cases unless a separate labor court is created.220

Should a separate labor court not be a viable alternative, final and binding arbitration under a state statute would be the ideal vehicle to accomplish this.221 Arbitration of these disputes coincides with a half century's successful experience under private and public

216. See supra notes 48-67 and accompanying text.
217. See supra notes 48-67 and accompanying text.
218. See supra notes 48-67 and accompanying text.
219. See supra notes 48-67 and accompanying text.
220. This suggestion has been previously advanced by other commentators within the United States. See Dallas L. Jones & Russell A. Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments, 62 Mich. L. Rev. 1115, 1122 and n. 11 (1964). A system of specialized labor courts has been successful in Denmark, Germany, and Sweden. These courts could be operated with a simplified procedure like that used in by district justices. In this way, cases could be readily presented by human resource managers, union representatives, or other laypersons without the necessity of being represented by attorneys. In simple cases, the use of attorneys may only obfuscate and complicate what is readily apparent. These courts would also be equipped to hear complex cases to give full scope to representation by attorneys. See P. Hayes, Labor Arbitration — A Dissenting View 116-18 (1966); see also II. B. Aaron & D. Farwell (eds.), Employment Terminations (1984).
sector collective bargaining agreements.\textsuperscript{222}

An effective statute should take the initial handling of these disputes out of the court's jurisdiction. Instead, arbitrators trained in employment law matters should handle all employment related matters. These arbitrators' awards should receive the same court deference as arbitrators' awards in other labor matters receive.\textsuperscript{223} Arbitration would provide a proven, quick, inexpensive, and final resolution without overburdening the courts.\textsuperscript{224}

The statute should articulate a standard for lawful termination, discipline, or other adverse employment actions in terms similar to "just cause."\textsuperscript{225} Certain employees should be excluded from the statute's coverage. Among those appropriately excluded are probationary employees and employees covered by an employment contract, employment handbook providing a final and binding

\begin{footnotesize}
\begin{itemize}
\item[223.] For example, in the private sector under the National Labor Relations Act, arbitrators' awards are given considerable deference by the courts when these awards are reviewed. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (holding that interpretation of the dispute under the agreement is for the arbitrator and the courts will not review the merits of an arbitration award); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (holding that the arbitrability of the employment dispute is for the arbitrator to determine in the first instance and not the courts; i.e., doubts as to coverage of the arbitration clause should be resolved in favor of arbitrability); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that where a valid arbitration agreement exists, courts will compel arbitration of the dispute where on its face it is covered by the agreement). The grievance arbitration procedure has been described as being \\
\hspace{1cm} at the very heart of the system of industrial self-government. Arbitration is the means of solving the unenforceable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of the disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement ... The grievance procedure is, in other words, a part of the continuous collective bargaining process. Warrior & Gulf Navigation Co., 363 U.S. at 581. See also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (stating that in cases involving collective bargaining agreements, "courts play only a limited role when asked to review the decision of an arbitrator"); Kurt H. Decker, The Recent Impact of Statutory Law on Contract Interpretation in Public Education Grievance Arbitration, 4 J. Collective Negotiations in the Public Sector 359 (1975) (discussing the role of arbitration as the favored means of resolving employment disputes).
\item[224.] See Menneemeier, supra note 6.
\item[225.] See supra note 139 and accompanying text.
\end{itemize}
\end{footnotesize}
arbitration procedure that is fair, regular, and neutral, or collective bargaining agreement providing a final and binding arbitration procedure that is fair, regular, and neutral.

Since the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, more and more courts and employers have supported the resolution of employment disputes through arbitration.

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227. A majority of federal and state courts hold that agreements to arbitrate statutory discrimination claims and other workplace employment disputes are valid so long as the employee does not waive any rights or remedies under the statute and the arbitration process is fair. No. 74 DAILY LABOR REPORTER, A-9 (April 19, 1999). See, e.g., *In re Prudential Ins. Co.*, 133 F.3d 225 (3d Cir. 1998) (insurance agents must submit their dispute to arbitration); *Zandford v. Prudential-Bache Sec.*, 112 F.3d 723 (4th Cir. 1997) (terminated securities executive required to submit his dispute to arbitration); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (female disc jockey whose employment contract required arbitration of "any other disputes" must submit sexual harassment, retaliation, and constructive discharge claims to arbitration); *Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997) (employee's discrimination claims are required to be arbitrated under employment handbook's procedure); *Painewebber, Inc. v. Agron*, 49 F.3d 347 (8th Cir. 1995) (arbitration award overturning employee's termination should not be vacated on ground that it violates at-will employment doctrine, where use of arbitration as means of settling employment-related disputes necessarily alters employment relationship from at-will to standard that infers some level of cause so that arbitration panel can determine whether termination was justified); *Continental Airlines v. Mason*, 12 Int'l. Envt'l. Rep. 140 (C.D. Cal. 1995), *aff'd*, 87 F.3d 1318 (9th Cir. 1996) (employee must arbitrate her termination pursuant to employment handbook's arbitration procedure where procedure is neither contrary to parties' reasonable expectations nor unduly oppressive); *Lang v. Burlington Northern R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993) (mandatory arbitration provision that was added to employment handbook 26 years after employee was hired bars wrongful termination lawsuit, where written arbitration provision was distributed to employees for insertion in their handbooks, and became binding unilateral contract when employee accepted employer's offer of changed condition by his continued employment; arbitration provision was not contract of adhesion since there was no evidence that it resulted from fraud or was inherently unfair); *McNulty v. Prudential-Bache Securities*, 871 F. Supp. 567 (E.D.N.Y. 1994) (as an employment condition employee was required to arbitrate disputes); *Southtrust Securities v. McIellen*, 730 So.2d 620 (Ala. 1999) (stockbroker must arbitrate claim); *Gold Kist v. Baker*, 730 So.2d 614 (Ala. 1999) (employee must arbitrate workers' compensation claim); *Lagatree v. Luce, Forward, Hamilton, Scripps*, 88 Cal. Rptr.2d 664 (Cal. Ct. App. 1999) (employee who was terminated for refusing to sign predispute arbitration agreement requiring that nonstatutory work-related disputes be resolved through binding arbitration and that losing party pay all costs, including legal fees, has no claim for wrongful termination in violation of public policy); *Brown v. KFC Nat'l Management Co.*, 921 P.2d 146 (Haw. 1996) (employee compelled to submit to binding arbitration his claims of racial discrimination relating to his resignation or termination); *Rembert v. Ryan's Family Steak House, Inc.*, 596 N.W.2d 208 (Mich. Ct. App. 1999) (predispute agreements to arbitrate statutory employment discrimination claims are valid so long as the employee does not waive any rights or remedies under the statute and the arbitration is fair); *Fastenberg v. Prudential Ins.*, 707 A.2d 209 (N.J. Super. Ct. App. Div. 1998) (insurance company vice president must arbitrate his claims of wrongful termination, defamation, and negligent misrepresentation). But see Circuit
The court's decision in *Gilmer*\textsuperscript{228} represents a departure from the position of some federal courts that had interpreted *Alexander v. Gardner-Denver*\textsuperscript{229} to mean that federal civil rights actions were not subject to compulsory arbitration.\textsuperscript{230} *Gilmer*\textsuperscript{231} decided that employees in the securities industry whose registration agreements included a compulsory arbitration provision could be required to arbitrate age discrimination claims.

In recent years, employers have increasingly evaluated the benefits of alternative dispute resolution (ADR) procedures, which contain final and binding arbitration, to resolve employment related claims.\textsuperscript{232} ADR offers the advantages of decreased litigation costs, minimized back pay awards due to quicker resolution of termination claims, removal of cases from high-risk jury trials, and a private proceeding not open to the public.\textsuperscript{233}

One disadvantage to the inclusion of compulsory arbitration clauses in employment agreements or handbooks has been the perception that arbitration would be of little benefit if employees could bypass arbitration or in addition to using the arbitration procedure still independently litigate federal or state statutory discrimination claims or other employment claims in court or before federal or state administrative agencies.\textsuperscript{234} Employers fear that an arbitrator's decision on a statutory claim might not receive any deference in later litigation.

Any ADR procedure that uses arbitration should be a "true

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\textsuperscript{228} City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999) (refusal to enforce employer's procedure to arbitrate state law discrimination claims); Lambdin v. District Court, 18th Judicial District, Arapahoe County, 903 P.2d 1126 (Colo. 1995) (employee cannot waive statutory rights by entering into an arbitration agreement). See also Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. L. 21 (1997);

\textsuperscript{229} Michael Delikat & Rene Kathawala, *Arbitration of Employment Discrimination Claims under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. & EMP. L.J. 83 (1998);


\textsuperscript{231} See supra note 227.

\textsuperscript{232} See generally H. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE (1999);

\textsuperscript{233} A. WESTIN & A. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (1988).

\textsuperscript{234} See supra note 227.
arbitration procedure." It should at a minimum have: (1) an impartial third-party decision-maker; (2) a mechanism for ensuring neutrality of the third party decision-maker with respect to rendering the decision; (3) a neutral third-party decision-maker chosen by the employee and employer; (4) an opportunity for the employee and employer to be heard; and (5) a final and binding decision as its culmination.

Based on decisions supporting Gilmer it may be worthwhile for the Pennsylvania legislature to consider arbitration of all employment disputes. Characteristics of enforceable arbitration procedures indicate that it should: (1) be contained in an employment handbook or other employer writing; (2) be communicated to the employee; (3) be supported by consideration; (4) be documented that the employee made a knowing and voluntary waiver to file a claim under any federal or state statute; however, the employee should retain the same rights under any federal or state statute waived and the arbitrator should retain the right to award the same remedies under any federal or state statute waived; (5) provide for the employee and the employer to select the neutral arbitrator; (6) require the cost


238. See, e.g., Michalski v. Circuit City Stores, Inc., 177 F.3d 634 (7th Cir. 1999) (arbitration agreement enforceable where mutual consideration to arbitrate present).

239. See, e.g., Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) (female former employees were not bound by any valid agreement to arbitrate employment disputes, since they did not knowingly contract to forego statutory remedies in favor of arbitration).

240. See, e.g., Trumbull v. Century Marketing Corp., 12 F. Supp.2d 683 (N.D. Ohio 1998) (employer was not entitled to enforcement of arbitration clause contained in employment handbook where arbitrator was not permitted to award the same remedies that were available in the judicial forum); Rembert v. Ryan’s Family Steak House, Inc., 596 N.W.2d 208 (Mich. App. 1999) (agreements to arbitrate statutory employment discrimination claims are valid so long as the employee does not waive any rights or remedies under the statute and the arbitration process is fair).

241. See, e.g., Hooters of America, Inc., v. Phillips, 173 F.3d 933 (4th Cir. 1999) (arbitration procedure unenforceable where it was crafted by employer to ensure that arbitrator would not be neutral); Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr.2d 867 (Cal. Ct. App. 1996) (employment handbook’s arbitration provision not
of the arbitrator to be paid entirely by the employer;\textsuperscript{242} (7) allow for the employee to be represented by an attorney or other person; (8) permit the presentation of witnesses and documentary evidence;\textsuperscript{243} and (9) state that it is the sole and exclusive remedy for any and all employment disputes and the results are final and binding on the employee and the employer.\textsuperscript{244}

Further support for the use of employment dispute arbitration for at-will employees exists in previous Pennsylvania legislation recognizing it as a vehicle to resolve these matters.\textsuperscript{245}

Outlined below is a proposal for a statute that protects Pennsylvania's at-will employees and employers when employment disputes arise.

\textbf{ARBITRATION OF EMPLOYMENT DISPUTES FOR EMPLOYEES AND EMPLOYERS}

\textit{Section 1. Short Title.}

This act shall be known and may be cited as the "Act for

\begin{itemize}
\item enfor<e>cal</e> where employee could not participate in neutral arbitrator's selection).
\item \textsuperscript{242} \textit{See}, \textit{e.g.}, Davis v. LPK Corp., 78 Fair Empl. Prac. Cas. (BNA) 32 (N.D. Cal. 1998) (employer cannot preserve validity of arbitration agreement that provides for employee to pay one-half of the costs, even though employer offered to advance all costs subject to reimbursement by the employee if the employer prevailed or to bear entire arbitration cost); Shankle v. B-G Maintenance Management, 74 Fair Empl. Prac. Cas. (BNA) 94 (D. Colo. 1997), aff'd remanded, 163 F.3d 1230 (10th Cir. 1999) (arbitration agreement's provision requiring employee to pay one-half of arbitrator's fees renders agreement unenforceable where provision operates as a disincentive to submitting discrimination claim to arbitration and precludes arbitration from being reasonable substitute for judicial forum); Maciejewski v. Alpha Sys. Lab, Inc., 87 Cal. Rptr.2d 390 (Cal. Ct. App. 1999), as \textit{modified}, 986 P.2d 170 (Cal. 1999) (arbitration agreement splitting costs between employee and employer considered unconscionable and unenforceable).
\item \textsuperscript{243} Cheng-Camindin, 57 Cal. Rptr.2d at 867 (employment handbook's arbitration provision not enforceable where employer controlled what evidence could be presented).
\item \textsuperscript{244} M. Weisel, \textit{After the Gilmer Decision: Effectiveness of Arbitration Clauses in Employment Contracts}, 1 J. of Individual Employment Rights 323 (1992-93).
\item \textsuperscript{245} The Act of June 24, 1968, Act 111, 1968 Pa. Laws 237 (Act 111), established the rights of Pennsylvania police and fire employees to organize and bargain collectively through selected representatives; however, no strike right was granted and disputes were to be resolved through final and binding arbitration. \textit{Pa. Stat. Ann. tit. 43, §§ 217.1-10} (West 1991).
\end{itemize}

All other Pennsylvania public employees were given the right to organize and bargain collectively, including a limited strike right for certain public employees, by the Act of July 23, 1970, No. 195, 1970 Pa. Laws 563 (Act 195), with final and binding arbitration for certain public employees who are not permitted to strike, final and binding arbitration for all public employees and employees who enter into a collective bargaining agreement to resolve any and all disputes arising under the agreement, and either advisory or final and binding arbitration for those public employees and employers who agree to use it to resolve negotiations over a new collective bargaining agreement. \textit{Pa. Stat. Ann. tit. 43, § 1101.101-2301} (West 1991).
Arbitration of Employment Disputes for Employees and Employers."

Section 2. Definitions.
The following words and phrases when used in this act shall have, unless clearly indicated otherwise, the meanings given to them in this section:

"Appointing Authority." The Pennsylvania Bureau of Mediation.

"Bureau." The Bureau of Mediation of the Department of Labor and Industry.

"Court of Common Pleas." The Court of Common Pleas for the county where the employment dispute arose.

"Employee." Any person who performs a service for wages or other remuneration under a contract of hire that is written, oral, express, or implied. Employee includes any person employed by an individual, person, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions, or any agency, authority, board, or commission created by a political subdivision. Employee shall not include anyone: (a) covered by a collective bargaining agreement that contains a final and binding arbitration procedure for the review of all employment disputes arising under or out of the agreement; (b) covered by an employment handbook, employment manual, or employment policy that contains a final and binding arbitration procedure for the review of employment disputes arising out of the employment relationship that permits the employee to participate in selecting a neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; (c) protected by a statutory civil service or tenure procedure of either the Commonwealth of Pennsylvania or any of its political subdivisions, or any agency, authority, board, or commission created by a political subdivision; (d) who has a written employment agreement that contains a final and binding arbitration procedure for the review of employment disputes arising out of or under the agreement that permits the employee to participate in selecting the neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; or (e) that is in a probationary status.
This term shall also include the employee's representative for the purposes of filing a complaint and appearing at the arbitration hearing.

"Employer." Any individual, person, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions or any agency, authority, board, or commission created by a political subdivision. This term shall also include the employer's representative for the purposes of filing a complaint and appearing at the arbitration hearing.

"Employment Dispute." Any adverse employment action that arises out of the employment relationship between an employee and employer, including, but not limited to disputes arising over discipline, termination, resignation, layoff, recall, demotion, promotion, disloyalty, theft of trade secrets, unfair competition, etc., that result from improper action or inaction of an employee or employer. However, disputes relating to the receipt of unemployment compensation and workers' compensation are specifically excluded from this act's coverage and scope.

"Just Cause." As established by arbitrators under the common law developed as part of the federal National Labor Relations Act, 29 U.S.C. §§ 151-169 and the Commonwealth of Pennsylvania's private and public sector collective bargaining statutes.

"Person." Any individual, sole proprietorship, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions or any agency, authority, board, or commission created by a political subdivision.

"Probationary Status." A period of time of one hundred and eighty (180) consecutive calendar days or less that occurs immediately after an employee is initially hired by an employer for the first time unless a time period of at least three (3) years has passed since the employee's last employment by the employer. It shall not include situations where an already employed employee is given a new employment position, advancement, promotion, or demotion by his/her employer.
Section 3. Employment Dispute.

An employee or employer shall not adversely effect the interests of the other in any manner that gives rise to an employment disputes unless there is just cause for the action or inaction that is not arbitrary, capricious, or discriminatory.

Section 4. Employment Disputes — Complaints.

An employee or employer who believes that an employment dispute has occurred or arisen in violation of section 3 may file by certified mail return receipt requested a written request for arbitration of the dispute with the Bureau of Mediation. The written request for arbitration shall be mailed by certified mail return receipt request not later than ninety (90) calendar days after the employment dispute occurred or arose.

Section 5. Arbitration.

(a) Appointment. Where a written request for arbitration has been filed with the Bureau of Mediation, the Bureau shall provide the employee and employer with a list of seven (7) arbitrators names within forty-five (45) calendar days after the request is received. Within fifteen (15) calendar days after receipt of the list by the employee and employer, the employee and employer shall meet for the purpose of selecting the arbitrator by alternately striking one name from the list until one name remains who shall be the arbitrator. The employer shall strike the first name from the list. Within five (5) calendar days after the arbitrator's name is selected from the list, the employee and employer shall in writing notify the Bureau of the arbitrator's name. Upon receipt of the arbitrator's name, the Bureau shall notify the arbitrator in writing of his/her appointment.

(b) Hearing. Within thirty (30) calendar days after appointment, or within further additional time periods as the employee and employer may in writing agree, the arbitrator shall schedule a hearing.

(c) Conduct of Hearing. The hearing shall be conducted in the following manner:246

246. See Decker, supra note 6, at 496-502; American Arbitration Association, National Rules for the Resolution of Employment Disputes (January 1, 1999).
(1) Arbitration Management Conference — As soon as possible after the arbitrator's appointment but not later than sixty (60) calendar days thereafter, the arbitrator shall conduct an Arbitration Management Conference with the employee and employer and/or their representatives, in person or by telephone, to explore and resolve matters that will expedite the arbitration proceedings. The specific matters to be discussed shall include:

(i) The issues to be arbitrated;
(ii) The date, time, place, and estimated duration of the hearing;
(iii) The resolution of outstanding discovery issued and establishment of discovery parameters;
(iv) The law, standards, rules of evidence, and burdens of proof that are to apply;
(v) The exchange of stipulations and declarations regarding facts, exhibits, witnesses, and other issues;
(vi) The names of witnesses, including expert witnesses, the scope of witness testimony, and witness exclusion;
(vii) The value of bifurcating the arbitration hearing into a liability phase and a damages phase;
(viii) The need for a stenographic record;
(ix) Whether the employee and employer will summarize their arguments orally or in writing;
(x) The form of the award; and
(xi) Any other issues relating to the hearing's subject matter or conduct.

The arbitrator shall issue promptly or within a reasonable time period oral and written orders reflecting his/her decisions on the above matters and may conduct additional conferences when the need arises.

(2) Date, Time, and Place of Hearing — The employee and employer may mutually agree upon the locale where the arbitration is to be held. If there is a dispute as to the
appropriate local, the arbitrator shall determine the local and his/her decision shall be final and binding. The arbitrator shall have the authority to set the date, time, and place of the hearing after discussion with the employee and employer. At least thirty (30) calendar days prior to the hearing, the arbitrator shall mail notice of the date, time, and place of the hearing.

(3) *Vacancies* — If the arbitrator should resign, die, withdraw, refuse, or be unable or disqualified to perform his/her duties, the Bureau shall on proof satisfactory to it, declare a vacancy. Vacancies shall be filled by the Bureau in the same manner as the making of the original appointment and the matter shall be reheard by the new arbitrator.

(4) *Representation* — The employee or the employer may be represented at the hearing by an attorney of any other representative of their choosing who is trained or experienced in employment matters.

(5) *Stenographic Record* — If the employee or the employer desires a stenographic record, the employee or the employer shall make the necessary arrangements with a stenographer and shall notify the other of these arrangements at least five (5) calendar days prior to the scheduled hearing. The requesting party or parties shall pay the cost of the stenographic record. If the transcript is agreed to by the employee and the employer, or determined by the arbitrator to be the official record of the proceeding, it shall be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place to be determined by the arbitrator.

(6) *Interpreters* — If the employee or the employer desires an interpreter, the employee or the employer shall make the necessary arrangements directly with the interpreter and shall assume the service's costs and expenses.

(7) *Attendance at Hearings* — The hearing shall be a private and confidential hearing with no right of the public, the press, communications media, or any other person to attend unless the employee and the employer agree to this attendance. The arbitrator shall have the
authority to exclude witnesses, other than a party, from the hearing during the testimony of any witness. The arbitrator also shall have the authority to decide whether any person who is not a witness, outside of those persons excluded by this section, who may attend the hearing; provided that the person has a legitimate interest that is related to the hearing and maintains the hearing's confidentiality.

(8) Confidentiality — The arbitrator shall maintain the hearing's confidentiality and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the employee and employer agree otherwise or the law provides to the contrary.

(9) Postponements — The arbitrator: (a) may postpone any hearing upon the request of the employee or the employer for good cause shown; (b) must postpone any hearing upon the mutual agreement of the employee and the employer; and (c) may postpone any hearing on his/her own initiative.

(10) Oaths — Before proceeding with the testimony, the arbitrator may, in his/her discretion, or if requested by either the employee or the employer require witnesses to testify under oath administered by him/her.

(11) Arbitration in the Absence of Either the Employee or the Employer — The arbitration may proceed in the absence of either the employee or the employer who, after due written notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the employee’s or the employer’s default. The arbitrator shall require whomever is in attendance to present evidence as the arbitrator may require for the making of an award.

(12) Evidence — The employee or the employer may offer any evidence that is relevant and material to the employment dispute and shall produce any evidence as the arbitrator deems necessary to an understanding and determination of the dispute. An arbitrator may subpoena witnesses or documents upon the request of the employee, the employer, or independently by himself/herself. The arbitrator shall be the judge of the relevance
and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary or required. The arbitrator may in his/her discretion direct the order of proof, bifurcate the proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the employee and employer to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of the arbitrator, the employee, and the employer, except where either the employee or the employer is absent without good cause, in default, or has waived the right to be present.

(13) Evidence by Affidavit or Declaration and Post-Hearing Filing of Documents or Other Evidence — The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only the weight as the arbitrator deems it entitled to after consideration of any objection made to its admission. If the employee and the employer agree or the arbitrator directs that documents or other evidence may be submitted to the arbitrator after the hearing, the documents or evidence shall be filed with the Bureau for transmission to the arbitrator, unless the employee and the employer agree to a different method of distribution. The employee and the employer shall be afforded an opportunity to examine these documents or other evidence and to lodge appropriate objections, if any.

(14) Inspection or Investigation — An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration hearing shall advise the employee and the employer. The arbitrator shall set the date, time, and place of the inspection or investigation and advise the employee and the employer in writing. The employee and the employer may be present during the inspection or investigation. In the event that either the employee, the employer, or both is not present during the inspection or investigation, the arbitrator shall make an oral or written report to the employee and the employer and afford them the opportunity to comment.

(15) Interim Measures — At the request of the employee or the employer, the arbitrator may take whatever interim
measures he/she deems necessary with respect to the dispute, including measures for the conservation of property. These interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of these measures.

(16) **Closing of Hearing** — The arbitrator shall specifically inquire of the employee and the employer whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date for the receipt of briefs. If other documents are to be filed as set forth in section 6(c)(13) and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of the hearing's closing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the employee and the employer, upon the hearing's closing.

(17) **Reopening of Hearing** — The hearing may be reopened by the arbitrator upon the arbitrator's initiative, or upon application of the employee or the employer for cause shown, at any time before the award is issued. If reopening the hearing would prevent the making of the award within the specific time for making the award set by this act or within the specific time agreed upon for making the award by the employee and the employer, the hearing may not be reopened unless the employee and the employer agree on an extension of time for making the award.

(18) **Waiver of Oral Hearing** — The employee and the employer may provide, by written agreement, for the waiver of oral hearings in any employment dispute.

(19) **Waiver of Objection/Lack of Compliance with these Procedures** — If the employee or the employer proceeds with the arbitration after any provision or requirement of these procedures has not been complied with, and who fails to state objection thereto in writing, the employee or the employer shall be deemed to have waived the right to
object.

(20) **Time Extensions** — The employee and the employer may modify any time period by mutual written agreement.

(21) **Serving of Notice** — The employee and the employer shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of the arbitration; for any court actions in connection therewith; or for the entry of judgment on an award made under this act may be served upon the employee or the employer by mail or personal service addressed to the employee, the employer, or their respective representative at the last known address. The arbitrator may also use facsimile transmission, telex, telegram, e-mail, or other written forms of electronic communication to give the notice required by these procedures.

(22) **Judicial Proceedings** — The arbitrator is not a necessary party in any subsequent judicial proceedings relating to the arbitration unless the court so requires.

(d) **The Award.** After the hearing’s close, the arbitrator, based upon the issues presented, shall render a written opinion outlining the reasons for the award as follows:

(1) The award shall be made promptly by the arbitrator and, unless otherwise agreed to by the employee and the employer, no later than thirty (30) calendar days from the hearing’s closing date.

(2) An award issued under this act shall not be publicly available unless the employee and the employer agree in writing to make it available.

(3) The award shall be in writing and shall be signed by the arbitrator and it shall provide written reasons for the award unless the employee and the employer agree otherwise.

(4) If the employee and the employer settle their employment dispute during the course of the arbitration, the arbitrator may set forth the terms of the settlement in a consent award.

(5) The employee and the employer shall accept as legal
delivery of the award the placing of the award or a true copy thereof in the mail or by personal service, addressed to the employee, the employer, or their respective representative at the last known address.

(6) Within twenty (20) calendar days after the award’s transmittal, the employee or the employer, upon notice to the other, may request the arbitrator to correct any clerical, typographical, technical, or computational errors in the award. The arbitrator shall not be empowered to redetermine the merits of any claim already decided. The other party shall be given ten (10) calendar days to respond to the request. The arbitrator shall dispose of the request within twenty (20) calendar days after the request’s receipt.

(7) The arbitrator’s award shall be final and binding on the employee and the employer. Judicial review shall limited as set forth in this act.

(e) Remedies. The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the employment dispute against the employee or the employer with or without a monetary award.

(2) Reinstating the employee with no, partial, or full back pay.

(3) A severance payment.

(4) Adding a reasonable rate of interest to any monetary award.

(5) Requiring restitution for any employee or employer property.

(6) Punitive damages in an amount not to exceed three times the amount of monetary damages actually awarded.

(7) Attorney’s fees or other fees for a party’s representative.

(8) A cease and desist order to restrain any employee or employer action.

(9) Any other remedy permitted under the law, including
those under any applicable federal or state law.

(f) Costs of Arbitration. The employee and the employer shall bear their own costs for witnesses and the presenting of their respective position unless otherwise decided by the arbitrator. The arbitrator’s costs shall be paid by the Bureau.

Section 6. Effect of Arbitrator’s Award.

An arbitrator’s decision shall be final and binding upon the employee and the employer and may be enforced in the Court of Common Please for the county in which the employment dispute arose.

Section 7. Judicial Review.

The Court of Common Pleas for the county in which the employment dispute arose shall review the arbitrator’s award, upon petition by the employee or employer filed within thirty (30) calendar days after receipt of the arbitrator’s award. The court’s review shall be limited to the following:

(a) There was evident partiality by the arbitrator or corruption, fraud, or misconduct of the arbitrator prejudicing the rights of the employee or the employer or

(b) The arbitrator exceeded his/her powers under this act.

The pendency of a proceeding for review by the Court of Common Pleas or any further appeal to either the Superior Court in appeals involving private sector employees or the Commonwealth Court in appeals involving public sector employees, or in subsequent appeals to the Supreme Court of Pennsylvania shall not automatically stay enforcement of the arbitrator’s award. To receive the benefit of a stay, either the employee or the employer shall demonstrate some likelihood of success on appeal or extreme prejudice.

Section 8. Enforcement of Award.

Either the employee or the employer as the prevailing party under an arbitrator’s award may seek enforcement of the award against the noncomplying party by filing a petition with the Court of Common Pleas in the county in which the employment law dispute arose.
Section 9. Contempt.

An employee or employer who disobeys a lawful order for the enforcement of an arbitrator's award issued by any court of this Commonwealth, may be held in contempt. The punishment for each day that the contempt occurs shall be a fine as set by the court, imprisonment, or any other enforcement measure deemed appropriate.

Section 10. Conflict with Other Acts.

Initiation of this act's procedures, shall preclude an employee or employer from using this act in addition to any similar proceedings that may be contained under any other federal or state act that provides a remedy for contesting the employment dispute. These federal and state statutes include, but are not limited to those that prohibit adverse employer action for filing complaints, charges, and or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds. Should proceedings be instituted under any of these federal or state acts either prior to initiation of these proceedings, during these proceedings, or anytime after these proceedings have issued a final and binding arbitration award, these proceedings and any award issued under them shall be considered null and void. Initiation of proceedings under this act shall be considered a waiver of any rights an employee or employer may have under any other state act. Initiation of proceedings under any similar federal act shall immediately terminate proceedings under this act. The remedies and procedures of this act shall be exclusive and shall not be construed to duplicate any other federal or state act or be in addition thereto.

Section 11. Notice of this Act.

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

Section 12. Severability.

If any provision of this act or its application to any employee or employer is held invalid, the invalidity shall not affect other provisions or applications of this Act, which can be given effect without the invalid provision or application, and to this end this
act's provisions are severable.

Section 13. Repealer.

This act repeals any and all acts inconsistent with it and specifically repeals [list specific acts repealed].

Section 14. Effective Date.

This act shall take effect 120 calendar days after enactment and shall cover any employment dispute that occurs on or after the act's effective date. This act shall not be retroactive; i.e., this Act shall not apply to any employment dispute that occurs or arises within 120 calendar days of this Act's effective date.

E. Analysis of Proposed Statute

In comparison to statutory schemes for at-will employment's modification that have been suggested within Pennsylvania and other jurisdictions, this proposal is unique. Its scope is much broader than allowing at-will employees the opportunity to sue only over their terminations. The proposal offers an all-encompassing regulatory scheme to set forth procedures for handling all employment disputes between employees and employers.

Efforts to regulate this area must consider and balance both employee and employer rights. Employees must be protected from improper employer adverse actions and employers should be accorded equal recourse against improper employee actions.

The proposed statute is intended to cover all employees and employers in the public and private sectors. Only limited exclusions are provided. An employee does not include anyone: (a) covered by a collective bargaining agreement that contains a final and binding arbitration procedure for the review of all employment disputes arising under or out of the agreement; (b) covered by an employment handbook, employment manual, or employment policy that contains a final and binding arbitration procedure for the review of employment disputes arising out of the employment relationship that permits the employee to participate in selecting a neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; (c) protected by a statutory civil service or tenure procedure of

247. See supra notes 198-212 and accompanying text.
248. See supra notes 159-197 and accompanying text.
either the Commonwealth of Pennsylvania or any of its political subdivisions, or any agency, authority, board, or commission created by a political subdivision; (d) who has a written employment agreement that contains a final and binding arbitration procedure for the review of employment disputes arising out of or under the agreement that permits the employee to participate in selecting the neutral arbitrator with the employer and does not require the employee to pay any charges or fees for the arbitrator's services; or (e) that is in a probationary status. This term shall also include the employee's representative for the purposes of filing a complaint and appearing at the arbitration hearing.

An employment dispute under the proposed statute is defined broadly. It is intended to mean any adverse employment action that arises out of the employment relationship between an employee and employer, including, but not limited to disputes arising over discipline, termination, resignation, layoff, recall, demotion, promotion, disloyalty, theft of trade secrets, unfair competition, etc., that result from improper action or inaction of an employee or employer. However, disputes relating to the receipt of unemployment compensation and workers' compensation are specifically excluded from this act's coverage and scope.

The standard to evaluate an improper adverse action by either an employee or employer is simple. An employee or employer cannot adversely effect the interests of the other in any manner that gives rise to an employment dispute unless there is just cause for the action or inaction that is not arbitrary, capricious, or discriminatory. This standard is similar to that developed under grievance arbitration procedures in the private and public sectors.249

A complaint's initiation requires simply the filing of an arbitration request with the Bureau of Mediation. The proposed statute places no additional burden on the Bureau of Mediation to administer it. The Bureau already has available lists of arbitrators that it considers competent to handle similar disputes. The employee and employer are given the right to select the arbitrator from the list provided by the Bureau.

The arbitration costs would be paid by the Commonwealth of Pennsylvania, removing the financial burden from the employee to discourage the act's use. At first, this may appear as an onerous economic burden to place on the Commonwealth. However, this

249. See supra note 222 and accompanying text.
may, in fact, result in cost savings to it regarding the eventual diminished use of administrative procedures that exist under other state statutes which this act may replace. Once employees and employers realize that the proposed statute's arbitration procedure is quicker and more efficient than the existing state administrative procedures that cover similar disputes, the resulting decreased case load before these administrative agencies should permit the Commonwealth to reduce its funding for these administrative agencies and use part of these savings to fund the proposed statute's arbitrations.

The arbitration would be conducted like any other labor arbitration. An arbitrator's award is final and binding on the employee and employer, and can only be set aside by evidence that there was partiality by the arbitrator or corruption or misconduct of the arbitrator prejudicing the rights of the employee or the employer or that the arbitrator exceeded his/her powers under the act. Failure to conform to an arbitrator's award carries a contempt penalty.

To discourage appeals of other than the most legitimate cases, no automatic stay of enforcement is provided. This lends further to the finality and binding quality of any arbitrator's award. To receive the benefit of a stay, either the employee or the employer must demonstrate some likelihood of success on appeal or extreme prejudice.

The proposed statute is not intended to duplicate any other remedies available for litigating employment disputes. All employees must receive notice of the act. Finally, the act's effective date is postponed for one hundred and twenty calendar days to allow employees and employers to prepare for its implementation.

The proposed statute is an attempt to provide a quick, efficient, and economical means for resolving employment disputes similar to that found under collective bargaining agreements. It is intended as a point to renew discussions for addressing the needs of both employees and employers in resolving employment disputes.

250. For example, the Act of October 27, 1955, No. 222, 1955 Pa. Laws 744 (Act 222), as amended gave Pennsylvania employees protection from discrimination arising out of the employment relationship relating to race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin the use of guide or animal because of blindness, deafness or physical handicap of the user because the user is a handler of support or guide animals. PA. STAT. ANN. tit. 43, §§ 951-963 (West 1991) ("Pennsylvania Human Relations Act").

251. See supra notes 222-223 and accompanying text.
better without recourse to an expensive litigation process and judicial procedure that only prolongs these disputes' resolution.

CONCLUSIONS

The foregoing examination of the at-will employment doctrine and its quarter century modification in Pennsylvania indicates that the time has again arrived to review this important question. The proposed statute serves as a step in the right direction to begin discussion.

The law governing the at-will employment relationship in Pennsylvania has moved forward considerably during the last quarter century. At the beginning of the last century, employees had no right to bargain collectively. They were guaranteed neither a minimum wage, a humane work schedule, or protection against discrimination of any kind.

Pennsylvania has guaranteed the right to bargain collectively and has taken great strides toward eliminating discrimination. Yet, Pennsylvania still attempts to cling to the out-dated at-will employment doctrine. Millions of Pennsylvania employees serve solely at the their employers’ pleasure, subject to discipline and termination for a good reason, a bad reason, no reason, with or without notice. Pennsylvania's courts and its legislature have made some inroads into protecting these employees. As the new millennium dawns, the time has again arrived for all interested

252. See supra notes 40-135 and accompanying text.

253. See supra note 30 and accompanying text.


255. The Act of October 27, 1955, No. 222, 1955 Pa. Laws 744 (Act 222), as amended gave Pennsylvania employees protection from discrimination arising out of the employment relationship relating to race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin the use of guide or animal because of blindness, deafness or physical handicap of the user because the user is a handler of support or guide animals. PA. STAT. ANN. tit. 43, §§ 951-963 (West 1991 & Supp. 1999).

256. See supra notes 40-69 and accompanying text.

257. See supra notes 40-135 and accompanying text.
parties to reexamine this area.\textsuperscript{258} No longer can employers ignore the impact of these disputes. Pennsylvania courts have sent sufficient warning signals for the initiation of legislative action.\textsuperscript{259}

Statutory regulation offers the most realistic manner in which to confront the at-will employment doctrine’s modification. The need for reexamination of legislative solutions in this area is clear after a quarter century of continued litigation to erode the doctrine.\textsuperscript{260} The impact or viability of continuing to litigate this doctrine without a final solution can now be assessed. Courts have continued to develop a common law that encourages overburdening the judicial system by failing to set forth specific guidelines.\textsuperscript{261} This has been costly for employees, employers, and an already overtaxed judicial system. Consequently, at a minimum, the Pennsylvania Superior Court’s recent decisions in \textit{Riggio}\textsuperscript{262} and \textit{Denton}\textsuperscript{263} will only cause additional litigation as private sector employees attempt to avail themselves of the Whistleblower Law’s\textsuperscript{264} protections for public policy violations, which only further complicate this unresolved morass.

\begin{itemize}
    \item \textsuperscript{258} See \textit{supra} notes 6, 17 and accompanying text.
    \item \textsuperscript{259} See \textit{supra} notes 40-135 and accompanying text.
    \item \textsuperscript{260} See \textit{supra} notes 40-135 and accompanying text.
    \item \textsuperscript{261} See \textit{supra} notes 40-135 and accompanying text.
    \item \textsuperscript{262} \textit{Riggio}, 711 A.2d at 497.
    \item \textsuperscript{263} \textit{Denton} 739 A.2d at 571.
    \item \textsuperscript{264} PA. STAT. ANN. tit. 43, §§ 1421-1428 (West 1991).
\end{itemize}