

**POTENTIAL IMPACT OF PROPOSED "JUST CAUSE"  
LEGISLATION ON DISCIPLINE AND DISCHARGE  
PROCEDURES IN NONUNION**

**FIRMS**

by

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**(ABSTRACT)**

"Just cause" legislation, refers to any local, state, or national law which would provide, to all workers, protection from arbitrary and capricious termination from employment. Under such a law, employers could be required to establish just or reasonable cause for discharging an employee. Such legislation has been proposed, but not enacted, in several states. The purpose of the research was to determine the probable impact of just cause legislation on the discipline and discharge procedures of nonunion, private sector employers if such legislation is enacted.

A review of just cause legislative proposals was conducted in order to determine what standards of just cause would be required under such laws. Since every proposal favored the use of arbitration to resolve discharge disputes, model standards of procedural just cause were derived from arbitration decisions and literature written by arbitrators and other labor authorities.

A sample of nonunion, private sector manufacturing firms in Virginia was surveyed with a mailed questionnaire in order to identify employers' current procedures for disciplining and discharging employees. After an analysis of the

results of the survey, conclusions were drawn based on a comparison of the survey results to the model standards of just cause.

In general, it was concluded that if just cause legislation is enacted employers would need to: undertake a better investigation of mitigating circumstances prior to taking disciplinary action, provide more consistent enforcement and application of rules, and improve the overall formality and documentation of discipline and discharge procedures and actions.

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## CHAPTER I

### INTRODUCTION

The nature of the employer-employee relationship in the U.S. has undergone many changes since 1900. Despite those changes, the liberty and the right of property of the individual protected by the 5th and 14th amendments of the Federal Constitution has been and continues to be the fundamental basis for judging the propriety of employment relationships.

The common law in the U.S., as stated in Adair v. United States, is that where the employment relationship is not specified by contract to be of a definite length of time, it is considered to be "at will" and can be terminated by either party for any reason or no reason at all.<sup>1</sup> While this common law doctrine of employment at will has changed very little since 1908, exceptions to it have been made. These include public sector employees under Civil Service protection, unionized employees with just cause clauses in their contracts, and most employees protected against unlawful discrimination on the basis of sex, race, national origin, age, physical handicap, religion, or union activity.

Attempts to gain protection from the courts have yielded only limited success in cases in which an employee's discharge was contrary to a clear public policy. However, even in these cases the courts have been reluctant to move.<sup>2</sup> Jack Stieber has estimated that firms in private industry fire 1 million

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<sup>1</sup>208 U.S. 161, 52 L. Ed. 438 (1908).

<sup>2</sup>See Geary v. United States Steel Corporation, Pa., 319 A. 2d 174 (1974).

permanent employees each year without a "fair hearing."<sup>3</sup> Currently, as much as two-thirds of the American workforce receive no protection from unjust discipline or discharge except for unlawful discrimination.<sup>4</sup>

### **The Need for the Study**

The policy of employment at will has existed in the U.S. since the mid 1800's. Why then, has there been a substantial increase in the attention given to the issue of job security for nonunion employees? At least four main causes of the recent increase in attention given to unjust discharges can be identified. One cause is the heightened protection afforded to Civil Service and unionized employees. This has increased the disparity of protection between these protected workers and the unprotected nonunion, private sector employees. A second cause is the recent publicity given to the lifetime employment policies of Japanese firms. The current success of Japanese firms has been attributed by some labor authorities to the job security of the workers, and many workers in the U.S. have been quick to blame the problems of American industry on the lack of such job security. A third cause is the economic recession of the early 1980's which caused the loss of many jobs. A fourth cause is the general protection against unjust discharge that is provided in most European countries. All of these factors have caused a heightened awareness of the disparity of job security between protected and at will employees and have prompted authorities in the personnel and labor relations field to call for legislation requiring

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<sup>3</sup>"The Growing Costs of Firing Nonunion Workers," Business Week, (April 6, 1981): 95-96.

<sup>4</sup>See infra note 64.

just cause for discharge or discipline.<sup>5</sup> Three such bills have been introduced into the legislatures of Michigan, New Jersey, and Pennsylvania.<sup>6</sup> A systematic study of the standards of just cause and the current predisciplinary and postdisciplinary procedures of employers is needed in order to assess the potential impact on employers of just cause legislation.

### Research Questions

The assessment of the potential impact of just cause legislation was accomplished through the investigation of the following six research questions:

(1) What is the current status of the employment at will doctrine? This question was addressed through a review of the history of the employment at will doctrine, a summary of recent cases supporting the at will doctrine, and a summary of recent cases that have diverged from the at will doctrine. A review of the current protection afforded to public employees and a review of arbitration standards applied in discipline and discharge cases in unionized firms was conducted to highlight the disparity of protection between at will employees and the protected Civil Service and unionized employees.

(2) What are the recommended alternatives to the employment at will doctrine? To address this question, a summary of the elements of legislation proposed by labor authorities and introduced into state legislatures was examined. This served as the basis for conclusions concerning the probable form of future legislation to prohibit unjust discharge. A review of arbitration practices in union disputes served as the basis for the standards that would

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<sup>5</sup>Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute," Virginia Law Review 62, (April 1976): 481-532.

<sup>6</sup>See infra notes 101-111.

apply under proposed legislation requiring just cause.

(3) What are the current disciplinary practices of private sector, nonunion employers?

(4) What are the reactions of employers to specific elements of just cause legislation and what is their general opinion of such a law?

Questions (3) and (4) were answered through a survey of employers to determine whether they are incorporating the just cause procedural safeguards developed in the literature review. In addition, the survey will gather information on the employers receptivity to specific elements of just cause protection, perceptions of the potential impact on current practices of the specific elements of proposed just cause legislation, and general reaction to proposed legislation.

(5) To what extent do the current disciplinary practices of nonunion, private sector employers differ from the standards of just cause? This question was addressed by comparing the practices indicated by the survey results to the standards derived from the practices of arbitrators in unionized employee disputes.

(6) What would be the likely impact of just cause legislation on nonunion, private sector employers? Conclusions as to the likely impact of just cause legislation will be based on the results of research question (5). The potential impact on the type, formality and consistency of discipline procedures, the use of procedural safeguards against unjust discipline, and on the rights of the employee will be discussed. Rough estimates of the proportion of employers effected will be included. Since the identified standards of just cause will serve as the basis for the survey questions, the comparison will be made in terms of the distribution of responses for each question.

### **Delimitations**

This study was limited to determining the potential impact of proposed just cause legislation on nonunion, private sector employers because the purpose of such legislation is to lessen the disparity of protection between employees in these firms and employees with Civil Service or union contract protection. Just cause legislation also could have a significant, but less predictable, effect on the discipline and discharge practices of government and unionized employers and on the organizing tactics and functioning of unions. The impact on these employers and on unions could provide an interesting subject for further study.

### **Summary**

After more than one hundred years in existence, the employment at will doctrine may be rendered mute by legislation requiring just cause for discharge. The purpose of the present research is to assess the potential impact on employers of such legislation. Chapter two will present a review of the employment at will doctrine, a summary of protection afforded union and government employees against unjust discharge, and a review of various proposals to amend the employment at will doctrine. Chapter three will establish the methodology to be followed in determining the current discipline and discharge procedures of employers and in assessing the potential impact of just cause legislation. Chapter four will present the results of the employer survey and chapter five will present the findings, conclusions, and implications of the research.

## CHAPTER II

### LITERATURE REVIEW

This chapter addresses the first two research questions. The current status of the employment at will doctrine is established by reviews of the history of the employment at will doctrine, recent cases, and exceptions to the doctrine, and by a summary of the protection afforded to non-at will employees. Recommended alternatives to the employment at will doctrine are then discussed, and a just cause model is developed.

#### The History of the Employment At Will Doctrine

In the early nineteenth century, the employment relationship, based largely on English law, was assumed to carry with it certain duties and responsibilities for both the employer and the employee. The employer was presumed to be responsible for the health and safety of the employee. In addition, the courts assumed that indefinite hirings were for one year. However, towards the middle of the nineteenth century the customary employment relationship changed as the theory of contract emerged. Under this theory, the courts reasoned that by accepting employment for wages, workers assumed the risk of on-the-job injuries.<sup>7</sup> Building on the contract theory, the courts also rejected the assumed one year duration of indefinite hirings and concluded that an employment relationship for an indefinite term is terminable at will by either

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<sup>7</sup>Notes, "Protecting At Will Employees Against Wrongful Discharges the Duty to Terminate Only in Good Faith," Harvard Law Review, vol. 93, no. 8 (June 1980): 1824-1825.

party. The terminable at will rule, sometimes called Wood's Rule, was stated by H.G. Wood in his 1877 treatise on master-servant relationships:

With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specific, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.<sup>8</sup>

The employment at will doctrine has survived to this day as the fundamental basis of indefinite employment relationships. However, there has been a continuing struggle to make exceptions to the doctrine of employment at will in the courts as well as the legislatures. The first major attempt to make exceptions to the doctrine was the Erdman Act of June 1, 1898, which made it a criminal offense "for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of his membership in a labor organization."<sup>9</sup> The law was challenged in Adair v. United States. The court ruled that the act was unconstitutional based on the 5th Amendment which declares that no person shall be deprived of liberty or property without due process of law and the 14th Amendment which states that no state can deprive any person of life, liberty, or property without due process of law. Justice Harlan, delivering the opinion of the court, stated that part of the liberty protected is the right to purchase or sell labor.<sup>10</sup> The ruling has had more of an impact on the employment

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<sup>8</sup>H. Wood, "A Treatise on the Law of Master and Servant," Sec. v. 134, (1877): 272, quoted in Peter Shapiro, James F. Tune, "Implied Contract Rights to Job Security," Stanford Law Review 26, (January 1974): 341.

<sup>9</sup>30 Stat. at L. 424, Chapter 370, U.S. Comp. Stat. 1901, p. 3205, 10 cited in Adair v. United States, 208 U.S. 161, 52 L. ed. 436 (1908).

<sup>10</sup>Adair v. United States, 208 U.S. 173, 52 L. Ed. 442 (1908).

relationship in general than on the particular subject of discrimination on the basis of union activity since such discrimination was later prohibited by law.<sup>11</sup>

Adair v. United States further established the employer's freedom to discharge as a constitutional right. Justice Harlan, delivering the opinion of the court, clearly put forward the essence of the at will doctrine:

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the function of government - at least, in the absence of contract between the parties - to compel, any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.<sup>12</sup>

### **Amendments to the At Will Doctrine**

Despite the setback of Adair v. United States, the courts and legislatures have succeeded in amending the at will doctrine in a piecemeal fashion. The initial rationale for amending the at will doctrine was stabilization of the workforce. Promoting the freedom of employees to establish unions was seen as a means of resolving employer-employee conflict with a minimum of work interruption and violence. A more general rationale of promoting the welfare of the worker underlies subsequent amendments to the at will doctrine. The purpose of these amendments has been to prohibit discrimination based on non-work related characteristics, to promote worker health and safety and to

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<sup>11</sup> See table 1.

<sup>12</sup> Adair v. United States, 208 U.S. 174-175, 52 L. Ed. 442 (1908).

assist veterans in returning to private employment. A summary of these legislative amendments is presented in table 1.

In addition to national legislation, there is considerable state legislation restricting employers' freedom to discharge. Such prohibitions include discharges based on political activity or affiliation, discharges because of physical handicap and discharges in retaliation for filing of worker's compensation claims.<sup>13</sup> State laws of this type have resulted from the perception that there is an established public policy which would classify an employment decision based on these factors as a form of unfair discrimination.

While there has been much legislation amending the at will employment doctrine, legislation such as Title VII only serves to restrict employers from making discipline and discharge decisions on the basis of a few narrow considerations. Title VII,

... does not attempt to impose a just cause or business necessity standard on every employment decision. An employer can fire its workers under the at will employment rule for bad reasons or for no reason at all, without running afoul of Title VII, so long as the arbitrary discipline is not applied to the sexes and races discriminatorily, is not grounded in a discriminatory motive, and does not have a disproportionate impact on any particular racial or sex group.<sup>14</sup>

### **Recent Cases Supported by the At Will Doctrine**

Despite the legislative amendments, the at will doctrine is still the prevailing standard of the nonunion, private sector employment relationship. The following review of cases indicates that the at will doctrine remains the employers' best defense for employment decisions which are purely arbitrary

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<sup>13</sup> Notes, "Protecting At Will Employees," p. 1827

<sup>14</sup> Theodore A. Olsen, "Wrongful Discharge Claims Raised By At Will Employees: A New Legal Concern for Employers," Labor Law Journal, (May, 1981): 266-267.

TABLE 1

## LEGISLATION AMENDING THE AT WILL DOCTRINE

Legislation	Purpose or Effect
Railway Labor Act of 1926 <sup>a</sup>	Prohibits employers from interfering with union organization by railway, and later airline employees.
National Labor Relations Act of 1935 <sup>b</sup>	Sets forth the right of employees to organize and bargain collectively free from interference, restraint or coercion. Also prohibits five types of employer practices including discrimination because of union activity.
Fair Labor Standards Act of 1938 <sup>c</sup> (Equal Pay Act of 1963)	Prohibits pay discrimination based on sex and retaliatory discharges against persons exercising rights under the act.
Labor Management Relations act of 1947 <sup>d</sup>	Aimed at correcting the abuses of power by labor organizations, the act prohibits discrimination by management or labor organizations to encourage or discourage membership in any labor organization.
Civil Rights Act of 1964 <sup>e</sup> (Title VII)	Prohibits discriminatory discharges based on race, color, religion, sex or national origin.

<sup>a</sup>Railway Labor Act of 1926, 45 U.S.C. Secs. 151-163, 181-188 (1976).

<sup>b</sup>National Labor Relations (Wagner) Act of 1935, 29 U.S.C. Secs. 151-169 (1976).

<sup>c</sup>Fair Labor Standards Act of 1938, U.S.C. Sec. 215 (a) (3) (1976).

<sup>d</sup>Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. Secs. 141-187 (1976).

<sup>e</sup>Title VII of the Civil Rights Act of 1964, Sec. 703 (a), 42 U.S.C. Secs. 2000e-2 (1976).

TABLE 1

(CONTINUED)

Legislation	Purpose or Effect
Age Discrimination in Employment Act of 1967 <sup>f</sup>	Prohibits discriminatory discharges based on age for persons forty to less than sixty-five years of age.
Consumer Credit Protection Act of 1968 <sup>g</sup>	Prohibits the discharge of employees whose wages are garnished for a single indebtedness.
Occupational Safety and Health Act of 1970 <sup>h</sup>	Prohibits the discharge of employees for exercising their rights under the act.
Vietnam Era Veterans' Readjustment Assistance Act of 1974 <sup>i</sup>	Entitles most veterans to return to prior employment after release from military service and prohibits discharge without cause for one year.

<sup>f</sup> Age Discrimination in Employment act of 1967, 29 U.S.C. Sec. 623 (a) (1976).

<sup>g</sup> Consumer Credit Protection act of 1968, 15 U.S.C. Sec. 1674 (a) (1976).

<sup>h</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 660 (c) (1976).

<sup>i</sup> Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Sec. 202 (1976).

and may even be sufficient to justify a discharge based on the most socially undesirable motives.

A salesman of tubular products for the oil and gas industry had been employed by the United States Steel Corporation for fourteen years when he complained to his supervisor that he believed a new tubular casing, designed for high pressure use, had not been adequately tested and posed a serious danger to anyone using it. He was then ordered to "follow directions." He agreed to follow orders but continued to express his misgivings; eventually to a vice-president in charge of sale of the new product. As a result of his complaints the product was re-evaluated and taken off the market. He was later discharged without notice. He brought suit for wrongful discharge and the Pennsylvania Supreme Court dismissed the complaint.<sup>15</sup>

Justice Pomeroy, recognizing that the company had withdrawn the product from the market, refused to infer that the company fired the worker for the purpose of coercing him to break the law. The worker had asserted that his actions were in the best interests of the general public so therefore, his firing was contrary to public policy. Justice Pomeroy countered that the worker does not consider himself to be an expert on product safety because "so far as the complaint shows, he was involved only in the sale of company products." Therefore, failing to agree to these arguments, the court found that the worker's complaint to his superiors was a plausible and legitimate reason for terminating the at-will employment relationship.<sup>16</sup>

Justice Roberts dissented:

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<sup>15</sup>Geary v. United States Steel Corporation, Pa., 319 H. 2d 174-175 (1974).

<sup>16</sup>Id. at 178-180.

As a salesman, Geary was required to know intimately the products he was selling. He represented United States Steel and it was expected that he would be alert to protect his employer's reputation. Likewise, it was natural that he would seek to shield himself and his employer from the consequences of a dangerous product . . . .

There is no doubt that strong public policies of this commonwealth have been offended by Geary's discharge . . .

Had Geary refrained from notifying his superiors of the defective product, he could have been discharged for violating his duty to come forward with information. No responsible policy is served which permits an employee to be discharged solely for obeying his legal duty to communicate information to his superiors . . .

The reality is that recognizing a cause of action for wrongful discharge in these circumstances will help to check a serious menace in our society, the arbitrary dismissal power of employers.<sup>17</sup>

Another worker had been an employee of S.S. Kresge Company for three years when he was discharged for absenteeism and tardiness. In a suit for alleged breach of an employment contract he stated that an employee handbook, given him at the time of employment, was part of the employment contract. His complaint included references to the handbook with the following provisions:

Management and the advisory committee have agreed on the use of the warning slip as a disciplinary measure.

Smoking in restricted areas, theft and drunkenness are major offenses. The offender is subject to immediate discharge. Lesser offenses make the offender subject to a warning, issued by his foreman or supervisor.

A total of three warnings, of any type, within a twelve month period, brings the individual's case before the committee to state his case if he so wishes. Management in consultation with the Advisory Committee, will determine disposition.<sup>18</sup>

The employee alleged that he was fired for absenteeism and tardiness without first receiving the required three warnings or a hearing. In reply, Kresge confirmed it had provided the handbook which set forth the terms and conditions of employment but they denied that they were required to give three

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<sup>17</sup>Id. at 181-182.

<sup>18</sup>Shaw v. S.S. Kresge Company, 328 N.E. 2d 775, 777 (Ind. Ct. App. 1975), (Emphasis supplied).

warning slips before discharging the worker.<sup>19</sup>

The trial court ruled in favor of Kresge Company stating that "there was no executed contract of employment . . . ; that there was no tenure of employment provided . . . ; that the 'handbook for S.S. Kresge Company . . .', does not establish a contractual relationship . . . and would constitute at most an employment arrangement between the Plaintiff and Defendant at will or at sufferance."<sup>20</sup>

The Court of Appeals of Indiana denied a rehearing stating that even if the handbook constituted a part of the employment contract, "in the absence of a promise on the part of the employer that the employment should continue for a period of time that is either definite or capable of determination, the employment relationship is terminable at the will of the employer."<sup>21</sup>

In the case of Simmons v. Westinghouse Electric Corporation,<sup>22</sup> an employee was discharged after twenty-five years of service at the same plant. The plant had been purchased by Westinghouse Corporation in July of 1969 with, as the employee alleged, an agreement that the employees' seniority rights would continue, that no one would be discharged without just cause and that if an employee was unable to perform at his job he would be offered other employment with the company. He claimed that his discharge was based on a false report to the plant manager that he was sympathetic with a union organization attempt and that therefore his discharge was a breach of the company's promise to discharge only for just cause and to offer other

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<sup>19</sup>Id. at 777.

<sup>20</sup>Id. at 778.

<sup>21</sup>Id. at 779.

<sup>22</sup>La. App., 311 So. 2d 28 (1975).

employment if performance was unsatisfactory in the current job.<sup>23</sup>

The court affirmed the trial courts ruling that as a supervisor the employee was not protected by the National Labor Relations Act and that absent special consideration on the part of the employee there was no binding employment contract. Therefore the employment could be terminated by either party at will.<sup>24</sup>

As these three cases indicate, the at will doctrine is still a valid defense for a discharge without just cause. Generally speaking, the doctrine will support any discharge which is purely arbitrary and capricious; the courts have exhibited a tendency to give the benefit of the doubt to the employer. Even where the employee has reasonably supported a claim that the discharge was based on actions which the employee believed to be in the best interests of public safety and the good of the employer, the court has found a legitimate reason to terminate. Where an employee has presented proof that the employer discharged him without providing warnings or a hearing, both of which were promised in writing, the court ruled there was no enforceable contract because there was no definite term of employment. Where a supervisor was assured that no one would be discharged without just cause and an attempt to provide other employment at the company, the court upheld a discharge based on false report of union sympathy, again because there was no enforceable employment contract. However, when a decision to discharge is based on discrimination against a class or activity which is protected by statute, the at will doctrine

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<sup>23</sup>Id. at 29.

<sup>24</sup>Id. at 30, 31.

offers little or no support.<sup>25</sup> In recent years, new exceptions to the at will doctrine have emerged in the courts.

### **Exceptions to the At Will Doctrine**

For various reasons, courts have established exceptions to the at will doctrine in addition to specific legislative exceptions. The exceptions given here apply in particular to nonunion, private sector employees. Unionized and public sector employees are protected above and beyond what these exceptions cover. The exceptions fall into four distinguishable categories.

#### **Public Policy Exceptions**

The most common exception to the at will doctrine, accepted by the courts in recent years, is "that employers should not be permitted to discipline or discharge employees for reasons violative of an established public policy."<sup>26</sup> While this exception has only recently been argued successfully in the courts, it was referred to by Justice Harlan in Adair v. United States as "such reasonable restraints as the common good or the general welfare may require, . . ."<sup>27</sup> State statutes are the most commonly referred to evidence of an established public policy.

In Frampton v. Central Indiana Gas Company,<sup>28</sup> an employee filed a workers' compensation claim and received a settlement for an arm injury incurred while working. Approximately one month later she was fired with no

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<sup>25</sup> See pp. 8-10.

<sup>26</sup> Olsen, p. 268.

<sup>27</sup> 208 U.S. 174-175, 52 L. Ed. 442 (1908).

<sup>28</sup> Ind., 297 N.E. 2d 425 (1973).

reason given.<sup>29</sup>

The trial court and court of appeals agreed that as an employee at will she could be discharged without cause. The Supreme Court of Indiana granted a petition for transfer and reversed the lower courts decision. The court cited Indiana statute under its Workers' Compensation Act which states: "No contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this Act." The court believed that a discharge or threat of discharge in retaliation for filing a claim served as a "device" in the framework of the statute and therefore constitutes a violation of public policy.<sup>30</sup>

Another example of a public policy exception is provided by Peterman v. International Brotherhood of Teamsters.<sup>31</sup> The worker was employed by the union as a business agent. He alleged that he was instructed to make false statements in testimony before the Assembly Interim Committee on Governmental Efficiency and Economy of the California Legislature. However, he gave a truthful testimony and was discharged the following day.<sup>32</sup>

The court referred to sections of the penal code which make unlawful the commission of perjury. Justice Fox stated, "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a

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<sup>29</sup>Id. at 426.

<sup>30</sup>Id. at 427, 428, (Emphasis supplied).

<sup>31</sup>Cal. App. 2d, 344 p. 2d 25 (1959).

<sup>32</sup>Id. at 26.

designated or unspecified duration, on the grounds that the employee declined to commit perjury, an act specifically enjoined by statute."<sup>33</sup>

A state statute obligating citizens to serve as jurors was used to establish a public policy in the case of Nees v. Hocks.<sup>34</sup> An employee at Hocks Laboratories, was first called for jury duty in 1972 but was granted a 12 month postponement for her honeymoon. She was called again in 1973. Her employer had her carry a letter, requesting she be excused from jury duty, to the court clerk. However, she told the clerk that she had been excused once before and that she would like to serve. She was not excused and several days after her jury duty began she was discharged.<sup>35</sup>

The court established that she had been discharged for willingly serving jury duty. Referring to the Oregon Constitution's provisions for trial by jury and state statutes which state possible excuses from jury duty and penalties for failure to serve, the court concluded that there was an established public policy in the jury system. The court further concluded, "that there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done." However, since the employer had no knowledge that the action was criminal, the court awarded compensatory but not punitive damages.<sup>36</sup>

Another use of the public policy exception can be found in the case of Parks v. Firestone Tire and Rubber Company.<sup>37</sup> The worker had been an employee of

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<sup>33</sup>Id. at 27.

<sup>34</sup>Or., 536 P. 2d 512 (1975).

<sup>35</sup>Id. at 513.

<sup>36</sup>Id. at 515-517.

<sup>37</sup>611 F. 2d 1363 (3rd Cir. 1979).

Firestone for 30 years. Acting on allegations that some employees had been accepting gratuities from representatives of suppliers, company auditors commenced an investigation. As part of that investigation, the auditors conducted two interviews with a particular representative of a supplier. In those interviews, the representative stated that he had provided a prostitute for the worker. When confronted with the allegations, the employee denied the charges. His supervisor requested that he submit to a polygraph exam but he refused. Within one week he was discharged for accepting gratuities.<sup>38</sup>

The courts referred to a Pennsylvania Act which provides: "a person is guilty of a misdemeanor of the second degree if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test." District Judge Ziegler, in the opinion of the court, concluded that the discharge was at least in part, a result of the worker's refusal to take the polygraph and further stated, "We are satisfied that Pennsylvania's anti-polygraph statute embodies a 'recognized facet of public policy'."<sup>39</sup>

Federal statutes also may limit the at will doctrine. For example, the Employee Retirement Income Security Act ("ERISA") was used as proof of an established public policy in favor of "the protection of integrity in pension plans," in the case of Savodnik v. Korvettes, Inc.<sup>40</sup>

In that case, the worker was terminated from employment after thirteen years of service. He claimed he was a model employee and was fired solely to

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<sup>38</sup>Id. at 1364.

<sup>39</sup>Id. at 1365, 1366.

<sup>40</sup>488 F. Supp. 822, 826 (E.D. N.Y. 1980).

avoid vesting of his pension benefits. Korvettes, Inc. did not deny the charge and according to District Judge Platt, "they seem to agree they discharged the worker for this very purpose, and urge that however contemptible such behavior may be, it is simply not illegal."<sup>41</sup>

Judge Platt stated that both the Constitution of the State of New York and ERISA established a strong public policy to protect employee benefit plans. He further stated that "avoiding the vesting of rights . . . under the guise of the employment at will doctrine, does not sit well with this court," and that "such behavior not only suggests the employer never fully intended to comply with the spirit of the Plan, but also that it sought to avoid its obligations thereunder by systematically terminating its employees at will prior to the vesting of their rights under the Plan."<sup>42</sup>

### **Whistle Blower Exceptions**

A special type of public policy exception to the doctrine of termination at will is to protect employees who protest illegal or objectionable activities of their employer. The discharge usually results from an employee's refusal to assist or engage in such activities or from a protest directed to authorities outside the organization. Therefore, such cases are often referred to by the term "whistle blower."<sup>43</sup>

One example is Harless v. First National Bank in Fairmont.<sup>44</sup> The employee,

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<sup>41</sup>Id. at 823-826.

<sup>42</sup>Id. at 826.

<sup>43</sup>See John H. Conway, Comments, "Protecting the Private Sector At Will Employee Who 'Blows the Whistle': A Cause of Action Based Upon Determinants of Public Policy," Wisconsin Law Review, vol. 1977, no. 3 (1977): 777.

<sup>44</sup>246 S.E. 2d 270 (W. Va. 1978).

while manager of the Consumer Credit Department at the bank, became aware that the bank was in violation of State and Federal consumer credit and protection laws because it "had intentionally and illegally overcharged customers on prepayment of their installment loans and intentionally did not make proper rebate." He brought this to the attention of two vice-presidents of the bank, one of which terminated him and one week later reinstated him. He then directed his complaint to a member of the Board of Directors of the bank who promised an investigation. He contended that shortly after this one of the vice-presidents ordered employees to dispose of bank files which reflected the illegal practices. He claims he was then demoted from office manager and thereafter subjected to threats and harassment by the vice-president. Outside auditors were eventually called in and refunds were made to some customers. The bank acknowledged the illegal practices and the employee was reinstated to his position. However, he continued to cooperate with auditors by providing some files which he had retrieved from wastebaskets. Soon after he was fired with no reason given.<sup>45</sup>

The court held that "the legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection," and that "such manifest public policy should not be frustrated by holding that an employee . . . who seeks to ensure that compliance is being made . . . can be discharged without being furnished a cause of action for such discharge."<sup>46</sup>

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<sup>45</sup> Id. at 272, 273.

<sup>46</sup> Id. at 276.

Another example can be found in Tameny v. Atlantic Richfield Company.<sup>47</sup>

The worker had been an employee of the company for fifteen years and his last position was that of retail sales representative. He alleged that his district manager and others engaged in price fixing and pressured him to threaten and cajole the independent service station dealers to cut their prices. He refused to engage in such activities, which are in violation of the Sherman Antitrust Act and the Cartwright Act. Soon after, he was fired for "incompetence" and "unsatisfactory performance."<sup>48</sup>

The court held that "an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order."<sup>49</sup>

### **Implied Contract Exceptions**

A less common and less successful exception to the termination at will doctrine has been the argument that a discharge was motivated by bad faith or malice in violation of an implied contract. There are two major cases in which this exception has been argued successfully.

The most prominent case in this area is Monge v. Beebe Rubber Company.<sup>50</sup> An employee contended, that shortly after being hired by the company, she was subjected to harassment by her foreman because she would not go out with him and that the personnel manager condoned if not shared the hostility toward her.

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<sup>47</sup> Cal., 610 P. 2d, 1330 (1980).

<sup>48</sup> Id. at 1336, 1337.

<sup>49</sup> Id. at 1336, 1337.

<sup>50</sup> N. H., 316 A. 2d 549 (1974).

She testified that shortly after her refusal to go out with the foreman she was moved to another machine at a lower rate of pay. In addition, her overtime was taken away while no one else's was. When she asked for more overtime she was told she could sweep floors and was made to clean washrooms. Later, after being absent several days because of illness, she was found unconscious in the ladies room at work and taken to the hospital. She was absent several days and the company sent her a letter stating that since she had not given notice for three consecutive days she had been "deemed a voluntary quit." However, there was evidence that she had called in during that period. There was also evidence that the personnel manager had visited her at home and she alleged that he told her he was aware of the foreman's use of his position to force his attentions on female employees and he asked her "not to make trouble."<sup>51</sup>

Justice Lampron, wrote: "We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not (in) the best interest of the economic system or the public good and constitutes a breach of the employment contract." In addition, "the foreman's overtures and capricious firing . . . , the seeming manipulation of job assignments, and the apparent connivance of the personnel manager . . . all support the jury's conclusions that the dismissal was maliciously motivated."<sup>52</sup>

Another example of the implied contract exception is Fortune v. National Cash Register Company.<sup>53</sup> A salesman for the National Cash Register Company (NCR) was under a contract which, though terminable at will,

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<sup>51</sup>Id. at 550, 551.

<sup>52</sup>Id. at 551, 552.

<sup>53</sup>Mass., 364 N.E. 2d 1251 (1977).

provided for a salary plus a bonus for sales. After making a large sale he was terminated. He was kept on as "sales support," but only received 75% of the \$92,080 bonus which was due under the contract. When he spoke to his manager about the money he was told "to forget about it." Later he was asked to retire and when he refused he was fired. He did not receive any commission on the machines that were delivered after he was fired.<sup>54</sup>

The court held "that NCR's written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract." The court upheld the lower courts finding the NCR acted in bad faith and affirmed the judgement for \$45,649.<sup>55</sup>

### **Expressed Contract Exceptions**

The least successful argument for making an exception to the doctrine of employment at will is the claim that an employment contract prohibited discharge without just cause. In the past, courts have consistently refused to recognize a binding employment contract where employment was for an indefinite term. Such contracts, no matter how explicit, were deemed to be lacking in mutuality of obligation or consideration.<sup>56</sup>

A rare breach of this philosophy recently occurred in W. L. Weiner v. McGraw-Hill, Inc.<sup>57</sup> The worker was an employee of Prentice-Hall when he

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<sup>54</sup>Id. at 1254.

<sup>55</sup>Id. at 1255, 1256.

<sup>56</sup>See e.g., *Shaw v. S.S. Kresge Co.*, supra note 27.

<sup>57</sup>N.Y. App., 57 N.Y. 2d 458 (1982), (Note: At the time of this writing the case was not available in published form. The case, decided on November 18, 1982, was obtained by teletype and the pages numbered 1 to 9 are referred to here as pages 458-466. Published pages may not correspond beyond page 458).

was invited to take part in discussions concerning his joining the staff of McGraw-Hill, Inc. McGraw-Hill's representative assured him in these discussions that his company maintained a firm policy not to terminate without just cause and that therefore, he would have the advantage of job security if he accepted the offer of employment. In addition, the application he signed specified that employment was subject to the provisions of the "handbook on personnel policies and procedures." The relevant part of that handbook stated that "the company will resort to dismissal for just and sufficient cause only, and only, after all practical steps toward rehabilitation or salvage of the employee have been taken and failed."<sup>58</sup>

For eight years he received periodic raises and promotions in rank to director of promotion services. During this period he claimed that he routinely rejected other offers of employment. In February, 1977 he was discharged for "lack of application."<sup>59</sup>

The Supreme Court, Appellant Division, ruled that the employment application and handbook did not spell out the "critical terms of employment" so the employee could be terminated at will.<sup>60</sup> Justice Kupferman dissented stating, "I cannot agree that an employee handbook on personnel policies and procedures is a corporate illusion, 'full of sound . . . signifying nothing' ".<sup>61</sup>

The State of New York Court of Appeals reversed the decision on the basis that the lack of "mutuality", in an agreement for employment which allows the

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<sup>58</sup>Id. at 459, 460.

<sup>59</sup>Id. at 460.

<sup>60</sup>Weiner v. McGraw-Hill, Inc., App. Div., 442 N.Y. S. 2d 11 (1981).

<sup>61</sup>Id. at 12.

employee freedom to quit at will, does not necessarily allow the employer freedom to terminate at will. The court stated that "the presence of consideration . . . is a fundamental requisite" to a binding contract. It further stated that "Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee."<sup>62</sup>

The employee's consideration consisted of his leaving Prentice-Hall which resulted in a loss of current and future benefits, his refusal of offers of employment and his service to McGraw-Hill. His reliance on the assurance of protection from discharge without just cause was based on pre-hire discussions, the employee handbook and on his experience in several occasions where he had recommended discharge of subordinates. On those occasions he was told by his supervisors to strictly comply with the handbook because employees could be discharged only for just cause and that if he failed to do this McGraw-Hill would be liable for legal action.<sup>63</sup>

Four types of exceptions to the at will doctrine have been presented. A discharge may be overturned if it violates a public policy which has been established by some state or federal statute. A particular type of public policy exception arises when an employee protests an illegal or objectionable activity of an employer and therefore is termed a whistle blower exception. Two less common exceptions arise where a discharge is based on bad faith and malice and where a discharge is in violation of an employment contract that meets the test of mutuality of consideration. However, it is still true that nothing in

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<sup>62</sup>57 N.Y. 2d 458, 462 (1982).

<sup>63</sup>Id. at 463.

current legislative or judicial law will prevent an employer from disciplining or discharging an employee without just cause so long as the employment relationship is for an indefinite term and the employer has not entered into a binding contract.

### **Protected Employees**

Two major groups of employees are not subject to the terms of the at will doctrine because their hiring is for a specific term or because state or federal laws have established the terms of their employment. The first group is those employees covered by a union contract with a definite period of enforceability. The second group is federal, state, and local government employees with legislatively established terms of employment.

### **Unionized Employees**

Probably the largest group of employees currently protected from discharge or discipline without just cause is those covered by collective bargaining agreements or union contracts.<sup>64</sup>

Approximately 80% of all agreements state that employees may be disciplined or discharged only for "cause" or just cause. Specific grounds for

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<sup>64</sup>In 1980, government employees constituted approximately 18% of the total nonagricultural workforce. In 1978, the most recent figures given, unionized employees constituted approximately 23.6% of the total nonagricultural workforce - as compared to 28% in 1970. The already present downward trend in union membership percentage; the massive layoffs in strongly unionized industries; such as steel, auto, and trucking; the shift, in the U.S. economy, from heavy industries to less unionized service industries, the migration of workers to the lightly unionized sunbelt states; and the reductions in force or hiring freezes of government employees as a result of the recession would all seem to indicate that the percent of employees protected has declined significantly since these figures were compiled. See Bureau of the Census, U.S. Department of Commerce, Statistical Abstract of the United States: 1981, at 395 (table 668) (Government Employees in Nonagricultural Establishments), at 411 (table 690) (Union Membership - Total and Percentage of Nonagricultural Employment to 1978).

discharge are found in about 65% of agreements. Such grounds most often include violation of the contract, violation of leave provision, intoxication, violation of company rules, dishonesty or theft, incompetence or failure to meet standards, insubordination, unauthorized absence, failure to obey safety rules and misconduct.<sup>65</sup> Even where a collective agreement makes no mention of just cause, many arbitrators will imply such a limitation to prevent management from subverting other provisions of the agreement by discharging or disciplining.<sup>66</sup>

"On the bare words 'just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law." Even though arbitrators do not consider other decisions as binding precedents, they are basically in agreement on what the standards of just cause are in general and in many specific areas. "Results in a discipline case may well depend on the length of the arbitrator's foot, but that leads to relatively small differences, for there are few peg-legs or abominable snowmen among arbitrators, and no one follows in their footsteps."<sup>67</sup>

Because of the large number of published arbitration awards, it is possible to infer the standards to be applied in a wide range of discipline and discharge situations.<sup>68</sup> However, the primary purpose here will be to identify the basic

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<sup>65</sup> BNA Collective Bargaining Negotiations and Contracts, vol. 2, The Bureau of National Affairs, (1978) 40:1.

<sup>66</sup> Frank Elkouri, Edna A. Elkouri, How Arbitration Works, 3d ed., (Washington, D.C.: The Bureau of National Affairs, Inc., 1981): 611.

<sup>67</sup> Summers, pp. 500-501.

<sup>68</sup> See F. Elkouri and E. Elkouri, pp. 610-666.

procedural aspects of just cause under arbitration.

A just cause limitation does not take away managements' right to make rules. "Rules prescribed by management . . . carry a presumed validity and will be upheld so long as they are reasonably related to achieving efficient operation and maintaining order and are not manifestly unfair or do not unnecessarily burden employees' rights."<sup>69</sup>

### **Arbitral Standards**

#### **Publicity of Rules**

Discipline or discharge for just cause must be based on violations of rules which the employee was aware of or on conduct which the employee should have reasonably assumed was prohibited. Therefore, management must take steps to insure that each employee is informed that certain acts of misconduct will result in discipline or discharge. However, it is generally not necessary for management to state that such obvious misconduct as stealing, threatening or attacking other workers or intoxication on the job is prohibited although such actions may not necessarily be just cause for discharge.<sup>70</sup>

#### **Consistency of Enforcement**

Where an employer has declined to take action, over a period of time, on violations of a rule, it is reasonable for employees to assume that management allows, if not condones, such action. Therefore, if it is proven that management was aware of the violations and took no action, arbitrators will usually

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<sup>69</sup>Summers, p. 502.

<sup>70</sup>See F. Elkouri and E. Elkouri, pp. 641-642, Summers, p. 502, Wallace B. Nelson, "The Role of Common Law in Just Cause Disputes," Personnel Journal, vol. 58, (August 1979): 542.

overturn discipline based on a subsequent violation of the rule. The arbitration of a violation or a clear notice to employees that the rule will be enforced in the future will permit management to resume enforcement.<sup>71</sup>

### **Equality of Application**

Arbitrators will allow and often require management to investigate and consider mitigating circumstances when applying discipline.<sup>72</sup> However, to meet the requirements of just cause, "all employees must be judged by the same standard, rules must be uniformly enforced, and penalties must be equally applied."<sup>73</sup> When these requirements are not met management walks a fine line between individualized treatment and disparate treatment.

### **Notice**

A common requirement in union contracts is that notice be given to the employee or union or both that an employee is charged with a violation or that discipline is about to be imposed.<sup>74</sup> If such a provision is not included in the agreement, arbitrators will not necessarily overturn the discipline for failure to give prior notice. However, giving notice and allowing the employee to explain his actions can often bring to light mitigating circumstances and resolve problems before formal action is taken.<sup>75</sup>

### **Progressive Discipline**

The purpose of discipline in labor relations is to correct the employees

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<sup>71</sup>See F. Elkouri and E. Elkouri, p. 643, Summers, p. 502

<sup>72</sup>E.g., 81 - 1 ARB 8206 (Hamby, 1981), 81 - 1 ARB 8226 (Turkus, 1980).

<sup>73</sup>Summers, p. 503. Also see F. Elkouri and E. Elkouri, pp. 643-646.

<sup>74</sup>BNA C.B.N.A., 40: 3.

<sup>75</sup>E.g., 81 - 2 ARB 8435 (Yarowsky, 1981), 81 - 2 ARB 8512 (Jewett, 1981).

behavior. The use of a discharge, on the other hand, is usually based on the assumption that the employee won't change. Discharging one employee for serious offenses such as stealing, violence toward workers or supervisors, and persistent insubordination may have an added benefit of correcting future conduct of other employees. However, the use of a discharge, for a minor offense, to correct the actions of other employees is unacceptable to arbitrators.<sup>76</sup> In other words, the arbitrator will judge the reasonableness of the action and assess whether the penalty fits the crime.

Serious offenses may justify immediate discharge. However, penalties for lesser offenses "must be progressive: reprimands and disciplinary layoffs must be used first to give the employee incentive and an opportunity to change his ways, and discharge may be used only as a last resort when corrective measures hold no promise of reform."<sup>77</sup>

When a discharge fails to meet the standards of just cause, arbitrators will usually order reinstatement. Published awards indicate that arbitrators revoke or reduce the discharge penalty in about half of all such cases they decide.<sup>78</sup>

### **Appeal Procedures**

Once management has made the decisions to impose discipline, a common requirement in the collective bargaining contract is that the employee must be given notice. Usually such notice must include the specific offense which the employee is charged with. Employees are commonly granted the right to appeal

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<sup>76</sup> See Roger I. Abrams, "A Theory for the Discharge Case," Arbitration Journal, vol. 36, no. 3, (September, 1981): 24.

<sup>77</sup> Summers, pp. 504, 505.

<sup>78</sup> Walter Fogel, "Court Review of Discharge Arbitration Awards," Arbitration Journal, vol. 37, no. 2 (June, 1982): 22.

the decision through a wide variety of grievance procedures with the final step consisting of a hearing before an arbitrator.<sup>79</sup>

In the hearing the employee has the right to know all the evidence against him, to address that evidence, to present his own evidence, to cross-examine witnesses, to force the employer to produce evidence and witnesses in the employer's control, to have a representative present during questioning, and to refuse to testify against himself. The employer carries the burden of proof of just cause. The level of proof required may vary with the penalty from more than a bare preponderance of the evidence to beyond a reasonable doubt.<sup>80</sup>

As a result of NLRB v. J. Weingarten, Inc., union employees must be allowed to have a personal representative present at any meeting which the employee reasonably believes may result in disciplinary action.<sup>81</sup> Moreover, in NLRB v. Materials Research Corp., it has been ruled that even nonunion employees have such a right under NLRA. This is because such action by two employees has been recognized as a form of concerted activity which is protected.<sup>82</sup>

### **Public Employees**

Another large group of workers commonly protected from unjust discipline

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<sup>79</sup>BNA C.B.N.A., 40:3, 40:4.

<sup>80</sup>Summers, p. 504, see also F. Elkouri and E. Elkouri, pp. 612-640, Raymond L. Hogler, "Industrial Due Process and Judicial Review of Arbitration Awards," Labor Law Journal, (September, 1980): 570.

<sup>81</sup>420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d. 171 (1975).

<sup>82</sup>262 NLRB No. 122, 110 L.R.R.M. (BNA) 1401, 1406 (1982). The decision was modified in E.I. du Pont de Nemours and Co., Inc. v. National Labor Relations Board, No. 82-7428, (9th Cir. 1983), to recognize such a right only where the activity is "for mutual aid or protection" evidenced by the requesting employee acting "as part of a group." However, the NLRB will usually not change its policy until overturned by the U.S. Supreme Court.

and discharge is Civil Service employees.<sup>83</sup> Included in this group are most Federal and State government employees and many local government employees such as teachers.

### **Statutory Protection**

The general requirement among Federal employees in the competitive Civil Service is that they may be disciplined or discharged only "for such cause as will promote the efficiency of the service."<sup>84</sup> Most state and local government employees have similar protection by legislation which is commonly modeled after Federal Civil Service guidelines.<sup>85</sup>

The Civil Service guidelines separate adverse actions into two categories. The first category includes a suspension for 14 days or less. For such an action an employee is entitled to:

- (1) an advance written notice stating the specific reasons for the proposed action;
- (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefor at the earliest practicable date.<sup>86</sup>

The second category includes a removal, suspension for more than 14 days, reduction in grade, reduction in pay, and a furlough of 30 days or less.<sup>87</sup> For such actions an employee is entitled to:

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<sup>83</sup> See supra note 64.

<sup>84</sup> 5 U.S.C. Secs. 7503 (a), 7513 (a) (1978).

<sup>85</sup> See generally, June Weisberger, Recent Developments in Job Security: Layoffs and Discipline in the Public Sector, (N.Y.: Institute of Public Employment, N.Y. State School of Industrial and Labor Relations, July 1976): 13-43.

<sup>86</sup> 5 U.S.C. Sec. 7503 (b) (1978).

<sup>87</sup> 5 U.S.C. Sec. 7512 (1978).

- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
- (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefor at the earliest practicable date.<sup>88</sup>

In addition, employees may appeal these actions to the Merit Systems Protection Board.<sup>89</sup>

Probationary employees and employees under temporary appointment limited to 1 year or less are not included under these provisions.<sup>90</sup>

### **Constitutional Protection**

Probationary employees (nontenured teachers) may be entitled to a hearing as a result of the United States Supreme Court decisions in Board of Regents v. Roth<sup>91</sup> and Perry v. Sinderman.<sup>92</sup> The court held that such employees are entitled to due process protection when the employee is deprived of "property" or "liberty" interests covered by the Fourteenth Amendment, or when the public employer has violated the employee's rights of free speech covered by the First Amendment.<sup>93</sup> The rationale for requiring due process is that the public

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<sup>88</sup> 5 U.S.C. Sec. 7513 (b) (1978).

<sup>89</sup> 5 U.S.C. Sec. 7513 (d) (1978).

<sup>90</sup> 5 U.S.C. Sec. 7501 (i) (1978).

<sup>91</sup> 408 U.S. 564 (1972).

<sup>92</sup> 408 U.S. 593 (1972).

<sup>93</sup> For a general discussion of judicial interpretations of Roth and Sinderman see, June Weisberger, pp. 13-16.

employer is acting as the government when infringing on the rights of its employees who are citizens.

Some essential elements of due process protection have developed through court decisions involving public employees. Specific prior notice of the hearing and charges must be given. The employee has a right to be notified of the names and nature of testimony of adverse witnesses. The final decision in the case must be made by a neutral, impartial person. The employee may also have the right to produce his own witnesses and to cross-examine adverse witnesses. Finally, the final decision should be in writing and should be based on the evidence presented at the hearing. In the last two elements of due process, the requirements will vary depending on the circumstances in the case.<sup>94</sup>

### **Just Cause Protection**

In addition to the protection already discussed, many state civil service laws, education codes, and negotiated contracts state that disciplinary action may not be taken unless there is just cause. Just as in the private sector, the term just cause has evolved to include both procedural and substantive aspects. Where just cause provisions exist in public sector cases, the courts and arbitrators apply essentially the same standards found in private sector arbitration. Such standards include clear and reasonable rules, clear penalties, penalties suited to the seriousness of the violation, progressive discipline, adequate proof of misconduct, fair investigations and nondiscriminatory application of discipline.<sup>95</sup>

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<sup>94</sup> June Weisberger, pp. 16-19.

<sup>95</sup> Ibid, pp. 35-37.

## Proposed Remedies

### **Court Remedies**

Despite the difficulties already discussed with court protection of employees, some labor authorities have proposed court action to solve the problems of unjust dismissals. The reasoning is that since it was the courts that established the doctrine of termination at will, it is up to the courts to make the corrections. J. Peter Shapiro and James F. Tune suggest that "In the absence of further legislative regulation of the employment relationship, it falls to the courts to end the harshness of Wood's Rule." They conclude that such court action should be to imply a contractual right to job security. Further, courts should consider the "existence of separate consideration," length of service, and "the common law of the job" when deciding whether such a right exists. The balancing of employer and employee interests should then be based on arbitration standards.<sup>96</sup>

A Harvard Law Review Note states that the "at will rule is based on outdated assumptions and leads to unnecessarily harsh results." It suggests that "the courts should imply a contract term allowing only good faith discharges, or create a tort duty that employers discharge only in good faith." With respect to the problem of already overburdened courts, the proponents claim that the increase in the case load will be small. This is because of the deterrent effect of expanded liability and the encouragement of out of court settlements by the clearly developed arbitral standards of just cause.<sup>97</sup>

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<sup>96</sup> J. Peter Shapiro, James F. Tune, "Implied Contract Rights," p. 369

<sup>97</sup> Notes, "Protecting At Will Employees," pp. 1842, 1844.

### A Voluntary Remedy

The chief labor counsel with Union Carbide Corporation, John W. Whittlesey, suggests that there is no real perceived need for legislative action. He bases his contention of a lack of perceived need for legislative action on: the fact that specific statutes have already addressed many discharge problems; the fact that union contracts have provided arbitration for a large number of employees; the fact that labor-management relations have not reached the level of antagonism that is present in countries with just cause legislation such as in most European countries; and finally on the fact that there has not been a broad based public demand for court or legislative action. Whittlesey states that the other main arguments, expressed by management, in favor of retaining the employment at will doctrine are that many discharges are for valid reasons which may be difficult to prove or support before an arbitrator, and that in light of the overprotection of civil service and union employees, the at will doctrine is supported "because it represents an effective and useful device for keeping employees on their toes and acts as a spur to better job performance."<sup>98</sup>

Whittlesey does, however, support voluntary procedures for review of terminations. In a statement which may be somewhat contradictory to his contention of a lack of need for legislation, Whittlesey says:

Management may - and not infrequently does - act to terminate employees unjustly, or harshly, or blindly, or in a combination of all three. Conceding that management for the most part is not given to capricious or whimsical firings, enough contrary examples are available to show that employers should from time to time be called to account to improve their personnel policies and practices.

... insofar as imposing additional legislative or judicial limitations on

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<sup>98</sup> John W. Whittlesey, "A View From Management," ILR Report, vol. xx, no. 1, (Fall 1982): 16-17.

employer ability to discharge is concerned, there is no indication that employee terminations for unjust reasons have become so numerous as to warrant such a drastic step. Such actions... appear to be a solution looking for a problem that substantially does not exist.<sup>99</sup>

It seems reasonable to assume that this opinion is representative of management in general. Managers agreement on what ought to be done is usually surpassed by their agreement that they should not be forced to do it. It is likely that out of an enlightened self-interest, firms will continue to adopt voluntary procedures to review terminations. It is also likely that such a change will continue to come slowly.

### **A Legislative Remedy**

Clyde W. Summers, Fordham Professor of Law at the University of Pennsylvania, has proposed a statutory solution to the problem of unjust dismissal. Such a statute would prohibit discharge or discipline without just cause. The term just cause would be defined by the arbitrator rather than by the statute. The legislation, at the state level, would provide for arbitration to define just cause and to resolve disputes. A filing fee for the employees would discourage frivolous cases. At first, employers with 10 or fewer employees may be exempted for administrative reasons. Probationary employees as well as top level executives would also be excluded. Employees protected by a union contract would be required to take advantage of the procedures set forth by that contract.<sup>100</sup>

The Summers proposal seems to deal with most of the problems which may be encountered in just cause legislation. The suggestion that legislation be at

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<sup>99</sup> Ibid, pp. 17-18.

<sup>100</sup> Clyde W. Summers, "The Need for a Statute," ILR Report, vol. xx, no. 1, (Fall, 1982): 10-12. For a detailed discussion of this see also Summers, "Individual Protection," pp. 481-532.

the state level is good because it would allow experimentation with a variety of forms of the law.

At least three states have considered legislation that would prohibit discipline or discharge of employees without just cause. Two of these statutory proposals call for arbitration to settle disputes.

### **The Michigan Bill**<sup>101</sup>

The bill, introduced June 17, 1982 by Representatives Bullard and Emerson, has not been acted on to date. Employees covered by the bill are those who have worked 15 or more hours per week for 6 months and are not protected by a collective bargaining agreement, civil service, or tenure against unjust discharge, or contract employees. Employers with less than 10 employees and confidential or managerial employees are not covered.<sup>102</sup>

The bill states that "an employer shall not discharge an employee except for just cause."<sup>103</sup> The first step in resolving the dispute is to provide for mediation. If mediation is not successful after 30 days, the option of further mediation or final and binding arbitration is given to the employee. If arbitration is chosen, the state provides the employer and employee with a list of 3 arbitrators from which they may each strike one name. The state then appoints one of the remaining arbitrators. The cost of the arbitrator is born equally by the employer and the employee. The procedures set forth for the arbitral hearing follow the accepted standards used with unionized employees and allows the arbitrator to impose remedies including reinstatement with or

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<sup>101</sup> H. Bill 5892, Michigan St. Leg., Judiciary Comm., June 17, 1982.

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Ibid.*

without full or partial back pay, severance pay, and sustainment of the discharge.<sup>104</sup>

### **The Pennsylvania Bill**<sup>105</sup>

The bill, introduced June 30, 1981 by Manderino, Greenfield, Pievsky, Kukovich, Belfanti, Cohen, Gruitza, Pistella, Michlovic, Stewart, Clark, Wozniak and White, has not been acted on to date. Excluded from coverage of this bill are employees protected by a collective bargaining agreement, civil service or tenure against unjust dismissal, and contract employees. All employers of 1 or more employees are covered.<sup>106</sup>

The bill states that "an employer may not discharge an employee except for just cause."<sup>107</sup> The bill provides the same steps for resolving the dispute as does the Michigan Bill with the exception of who shall bear the costs of the arbitrator, which is not mentioned, and how the arbitrator is chosen, which appears to be by the state since the state provides the mediation services.<sup>108</sup>

### **The New Jersey Bill**<sup>109</sup>

The bill, introduced June 16, 1980 by Paterniti, Bornheimer, Karcher, Schwartz, Patero, McManimon, Codey, Garvin, Adubato, Van Wagner, Lesniak,

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<sup>104</sup>Id. at 2-8.

<sup>105</sup>H. Bill 1742, Penn. Gen. Assembly, Labor Relations Comm., July 1, 1981.

<sup>106</sup>Id. at 2.

<sup>107</sup>Ibid.

<sup>108</sup>Id. at 2-5.

<sup>109</sup>A. Bill 1832, N.J. Gen. Assembly, Comm. on Labor, June 16, 1980.

Flynn, Gluck, McConnell, Brown, Pellecchia, Visotcky, Stewart, Herman, Burstein, Mays, Otlowski, Zangari, Riley, Costello, Girgenti, Cardinale T. Gallo, McEnroe, Matthews, Rand, Kalik and Janiszewski, has not been acted on to date. This bill was a proposed act to amend a 1945 antidiscrimination law. The relevant portion of the bill states that:

It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

... for an employer, after the first consecutive 6 months of an individual's employment, to discharge from employment or to discriminate against the individual in compensation or in terms, conditions or privileges of employment without documented justifiable cause if the individual is without the benefit of civil service classification, statutory tenure, or a collective bargaining agreement that contains a grievance procedure covering these matters which terminates in binding arbitration . . .<sup>110</sup>

No mention is made of the enforcement mechanisms, penalties or remedies. However, since binding arbitration is recognized as excluding an employer from coverage, it seems that arbitration standards would be applied in determining just cause. The final statement of the bill is "It is the intention of this bill to reduce the number of firings, suspensions, demotion, etc. which are arbitrary, capricious or generally not grounded in the overall performance of the worker."<sup>111</sup>

### **An Incentive Remedy**

Robert Coulson, President of the American Arbitration Association, suggests that the best solution to the problem of unjust dismissals would be for companies to institute arbitration voluntarily as the final step of their grievance or appeals procedures. Without arbitration, he argues, appeal

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<sup>110</sup>Id. at 1, (Emphasis added).

<sup>111</sup>Id. at 8.

procedures lack credibility. Voluntary adoption would prevent further governmental intervention into employment practices in the form of legislation or court action. Voluntary adoption would also be more simple, more consistent with the philosophy of private dispute resolution and would improve the quality of management decisions as well as the relationship between management and labor. While avoiding the burden of the government bureaucracy would have clear advantages, some scholars believe that incentives must be created for management to adopt arbitration.<sup>112</sup>

One proposal includes creating tax incentives to reward employers who adopt arbitration as the final step of their appeals procedures. This could be accomplished by assessing a lower unemployment insurance tax rate for companies using arbitration. As some companies began to adopt arbitration, the labor market would pressure other employers to follow suit in order to compete for workers. The main advantage of the proposal is that it would not place a burden on employers who already have low tax rates due to infrequent firings. Such legislation would also be less objectionable to employers and pro-business conservatives than plain forced arbitration which would improve chances of passage.<sup>113</sup> The acceptability of the proposal would be enhanced if it would not increase insurance tax rates for firms without arbitration but rather, would cut tax rates for firms with arbitration.

A summary of the seven major proposals discussed is presented in table 2.

### **Conclusions**

The court cases cited indicate that the level of protection currently

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<sup>112</sup> Paul Salvatore, "Legislative Action and Private Initiative: A Practical Solution," ILR Report, vol. xx, no. 1, (Fall, 1982): 13-15.

<sup>113</sup> *Ibid.*

**TABLE 2****SUMMARY OF PROPOSALS TO PROTECT EMPLOYEES FROM UNJUST DISCHARGE**

Proposal	Enforcement Method	Standards Applied (Source)	Coverage
Court Remedy	Court Implied Contract	Promises of the employer and/or Arbitration Standards	All employees
Management Recommendation	Voluntary Review of Terminations	None	Not applicable
General Legislative Remedy (at the state level)	Forced Arbitration upon request (and payment of a filing fee)	Just Cause	All nonprobationary, non-executive employees not already protected by union contract or civil service procedures. Excluded are employers of 10 or less employees.
Michigan Bill	Mediation and forced Arbitration upon request (cost born equally by management and the employee.	Just Cause (Arbitration)	All employees, working 15 or more hours per week for 6 months, not already protected by union contract, civil service, tenure, or employment contract. Excluded are employers of less than 10 employees, confidential employees and managerial employees.

**TABLE 2****(CONTINUED)**

Proposal	Enforcement Method	Standards Applied (Source)	Coverage
Pennsylvania Bill	Mediation and Forced Arbitration Upon Request	Just Cause (Arbitration)	All employees not already pro- tected by union contract, civil service, tenure, or employment contract.
New Jersey Bill	None given	Just Cause (Arbitration implied)	All employees of 6 months or more not already protected by civil service, tenure, or union contract.
Legislative and Private Initiative Compromise	Tax Incentives to Adopt Arbitration	Just Cause (Arbitration)	All employees.

afforded to nonunion, private sector employees is not adequate. This conclusion is further supported by the fact that published arbitration awards indicate that about half of discharge cases brought to arbitration are revoked or reduced.<sup>114</sup>

It also seems clear that while some progress is being made in court action to provide protection to at will employees, future action will most likely continue to be a piecemeal prohibition of discharge for certain reasons. The magnitude of the case load that would result from a judicial decision to require just cause for discharging employees will almost surely prevent such court action. Even with such action, the costs of taking such a case to court and the time involved would discourage all but the most aggressive and financially capable employees from protesting a discharge. Therefore, if any action is taken in the future, it will probably be some form of legislation. The crucial factor in the success of any legislative proposal will be to make it politically acceptable.

### **Probable Form of Legislative Action**

It is a reasonable assumption that any legislative proposal which would force all employers to submit to binding arbitration will face such strong opposition from business that it will have little or no chance of passage in even the most liberal states and virtually no chance of passage at the national level. Employers know too well the difficulty they face in supporting a decision to terminate an employee when faced with an EEO complaint. The prospect of extending protection to the point where they may be called on to defend any termination is likely to motivate even the most passive employers to take action. The power of the lobbying effort that business could put forth under these circumstances would be more than a match for a group of unorganized

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<sup>114</sup>Supra note 80.

and politically unexperienced employees.

Some authorities have speculated that organized labor will also oppose such legislation since its passage would remove one of the main selling points of union organizers which is job security. Robert H. Nichols, a partner in a Chicago law firm which represents local and international unions, in response to that assumption said:

While organized labor surely has been and will continue to be motivated in significant measure by the perceived self-interests of union members, that, it seems to me, is an objective the abandonment of which by labor could well raise questions as to labor's performance of its obligations as representative.<sup>115</sup>

Nichols admits that he doubts that labor will be in the forefront of any effort to gain passage.<sup>116</sup> This author would agree that labor will not openly oppose nor vigorously support such legislation. However, it should be noted that an important force in the passage of legislation will be the support of the traditionally pro-labor politicians. Without pressure from organized labor to support such legislation, or with possible covert pressure to oppose it, such political support is uncertain.

Nevertheless, the support for and the need for some action is growing. Therefore, the relevant question is, what form of legislation has the greatest probability of passage. This author believes that the compromise proposed by Paul Salvatore<sup>117</sup> or some other form of incentive legislation is most likely to arise. The proposed legislation, it seems, will almost certainly provide incentives to adopt arbitration or arbitration standards to resolve discharge

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<sup>115</sup> Robert H. Nichols, "Would Labor Oppose a Statute?" ILR Report, vol. xx, no. 1, (Fall, 1982): 22.

<sup>116</sup> Ibid, p. 23.

<sup>117</sup> Supra note 112.

disputes and possibly other discipline disputes. To assess the potential impact of possible legislation on employers, an idealized model of just cause procedures, developed from arbitration standards, can be used for comparison to the actual practices of nonunion, private firms.

### **Model of Just Cause Procedures**

The following standards of just cause (hereafter, model standards) are derived from the practices of labor arbitrators which were discussed earlier.<sup>118</sup> While some are so crucial as to effect the decision of the arbitrator when considered independently, most are judged in light of the overall practices and motives of management. The judgement of whether each standard has been met is somewhat subjective.

1. Employees can not be held accountable for violations of rules which have not been communicated to them.
2. Employees can not be held accountable for violations of rules which have not been consistently enforced in the past without prior notice given that the rule will be enforced.
3. Management should consider mitigating circumstances prior to taking disciplinary action.
4. While consideration of mitigating circumstances and the severity of the violation may effect the discipline given, all employees must be dealt with equally under like circumstances.
5. Employees should be given prior notice of charges and an opportunity to explain their actions prior to taking disciplinary action.
6. Employees must be given the right to have a personal representative

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<sup>118</sup>See supra notes 70-83.

present during meetings where rule violations and possible disciplinary actions are discussed.

7. For all but the most serious offenses, progressive discipline must be used, incorporating warnings and lesser penalties, prior to discharging.
8. When disciplinary action is taken, employees must be given notice and an explanation of the charges which resulted in disciplinary action.
9. Employees must be provided with some form of an appeal procedure whereby they can petition for review of a disciplinary action to a management official at a higher level than the person who took the disciplinary action and eventually to a mutually agreed on third party who has the authority to reduce or reverse the decision.
10. The final step of the appeal procedure must consist of a hearing where the employee is given the right to have a personal representative present, call witnesses for his/her defense, examine any evidence and cross-examine management's witnesses.

These standards provided the basis for the survey questions. The method used to form the survey questions is discussed in chapter three.

## CHAPTER III

### METHODOLOGY

The purpose of this study was to assess the potential impact on employers of legislation requiring just cause for discharging or disciplining employees. After a review of the current status of the at will doctrine and of the proposals to require just cause for discharge, it was determined that arbitration would most likely be required by any future legislation.<sup>119</sup> The accepted standards of just cause procedures which arbitrators apply have also been established.<sup>120</sup> Therefore, research questions (1), what is the current status of the employment at will doctrine, and (2), what are the recommended alternatives to the employment at will doctrine, have been answered.

The next step of the study was to address research questions (3), what are the current discipline and discharge practices of nonunion employers, and (4), what are the reactions of the employers to specific elements of just cause legislation and to the legislation in general. This chapter explains the methodology that was followed. Included is a discussion of the purpose of the employer survey; the scope, source, and selection method of the sample; the procedure followed in constructing the survey instrument; the survey method; and the method of analysis.

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<sup>119</sup>See pp. 38, 39.

<sup>120</sup>See pp. 39, 40.

The purpose of the survey was to gain information on employers' current discipline and discharge procedures, rather than to test theories concerning such practices. Therefore, the analysis is descriptive in nature. The types of information collected from the survey are: how rules and procedures are communicated to employees, what pre-discipline procedures are used, to what extent is progressive discipline used, what types of appeal procedures are provided, and what are the reactions of employers to the possible requirements of just cause legislation. This information provided a basis for comparison to the model standards of just cause and gave an indication of the likely reaction of employers to just cause legislation.

### **Sample**

The bills and legislative proposals studied expressly excluded from coverage contract employees, civil service employees, and employees with collective bargaining agreements providing protection from unjust discharge. Therefore, the survey sample was limited to nonunion, private sector firms.

The sample was chosen from within the state of Virginia because those firms should identify more closely with Virginia Polytechnic Institute and State University than firms from other states, and should be more willing to respond.

The source of subjects is the 1982 Virginia Industrial Directory. The VID is a listing of manufacturing and mining firms in Virginia compiled and published by the Virginia State Chamber of Commerce. Listings are provided with the assistance of: the State Council of Higher Education for Virginia, the State Corporation Commission, the Virginia Port Authority, the State Department of Aviation of the Commonwealth of Virginia, the International Trade and Development Department of the Virginia Department of Industrial Develop-

ment, the Virginia Employment Commission, the local Chambers of Commerce in Virginia, and individual business firms. The section of the VID used does not include public sector, transportation, trade services firms, or educational institutions. The reason for the selection of the VID is that it was the largest and most complete listing available.

The first step in selecting the survey subjects from the VID listing was to eliminate those firms reported to have less than fifty employees. The reason for this was that smaller firms would be less likely to have formal, well developed discipline policies. This significantly reduced the number of subjects to choose from.

The second step was to cross-reference the remaining firms with the Virginia State Chamber of Commerce's Union Directory of Virginia.<sup>121</sup> This was to eliminate those firms known to be unionized.

The final step was to select a sample from the remaining 972 firms. It was decided that approximately one hundred responses were needed in order to obtain a meaningful description of practices and reactions. The anticipated response rate was fifteen to twenty percent. Based on that assumption, it was determined that a sample of roughly five hundred firms would be needed to produce the desired number of responses. Therefore, every other firm, or fifty percent of the remaining 972, was eliminated to yield a sample of 486.

The method followed does not insure a purely random sample. However, for the purpose of providing descriptive information on the current discipline and discharge procedures, a rough cross section of the firms was adequate.

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<sup>121</sup> A listing of all manufacturing and service companies in Virginia known to be unionized as of January 1, 1982.

### Survey Instrument<sup>122</sup>

The "model of just cause procedures"<sup>123</sup> served as the basis for forming the survey questions. Each of the model standards was formulated into a multiple choice question. Open ended questions were kept to a minimum to decrease the time required for completion. Questions were addressed to procedures for non-exempt employees only to eliminate confusion over management and non-management differences. In several key questions, the terms "written policy," "formal policy" and "formally state" were used. While some employers may be using the procedures referred to in these questions, the lack of formality was considered to be such a crucial flaw as to defeat the purpose of the safeguard. The importance of formality was expressed by Orme W. Phelps who stated that "Formal procedures is the essence of due process."<sup>124</sup> In other questions the formality term was used to insure that respondents absolutely were not following the accepted standard as will be discussed below. The final page of the survey is directed at obtaining the respondents' reactions to possible elements of potential legislation. These questions were also based on the model standards as well as the various legislative proposals.

With reference to the derived "model of just cause procedures," that was developed in the literature review, the following questions were formulated.<sup>125</sup>

Standard 1. Employees can not be held accountable for violations of rules which have not been communicated to them. In order to assess compliance with

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<sup>122</sup>See appendix 2.

<sup>123</sup>See pp. 39, 40.

<sup>124</sup>Orme W. Phelps, Discipline and Discharge in the Unionized Firm, University of California Press, (1959): 20.

<sup>125</sup>See pp. 39, 40, and appendix 2.

this standard. Question I. 1. presented a checklist and asked employers to indicate which methods on the list are used to communicate discipline rules and procedures to employees before disciplinary action is taken. Seven common communication methods and an "other (specify)" response were provided: incorporated into personnel policies and procedures, incorporated into employee handbook, posted on bulletin boards, circulated separately to all nonexempt employees by letter or notice, reviewed orally with each employee by supervisor, reviewed orally with each employee by personnel department staff, and held in writing in personnel office and available on request.

Standard 2. Employees can not be held accountable for violations of rules which have not been consistently enforced in the past without prior notice given that the rule will be enforced. Several clarifications were necessary in the format of this question. A crude standard of consistency, a measure of whether the situation had occurred, and an opportunity for the respondent to indicate how notice is given were included in the question as follows:

II. 3. If management has not enforced a rule consistently in the past (without exception other than for mitigating circumstances), does it formally state that it retains the right to enforce the rule in the future without prior notice? YES ( ) NO ( )

a) Has this circumstance occurred in your firm? YES ( ) NO ( )

b) How is notice given, if given? \_\_\_\_\_

The question as it is worded identifies employers who are not conforming to the model standard. For the purpose of determining the impact of potential legislation this information was considered to be more valuable than determining how many employers are or might be conforming to the standard.

Standard 3. Management should consider mitigating circumstances prior to taking disciplinary action. With a requirement of formality and three examples

of mitigating circumstances the question was presented as follows:

- II. 1. Are supervisors required by written policy to consider mitigating circumstances (i.e., health problems, uncontrollable events, misinformation) prior to taking disciplinary action? YES ( ) NO ( )

Standard 4. While consideration of mitigating circumstances and the severity of the violation may effect the discipline given, all employees must be dealt with equally under like circumstances. This standard is addressing the issue of consistency as in standard 2 and question II. 3. To assess compliance with this specific element of consistency, the question, with allowance for mitigating circumstances and a formality requirement, was presented as follows:

- II. 2. Excluding mitigating circumstances, do supervisors or upper management personnel have, by formal policy, the option of not enforcing the rules in a particular case?

	YES	NO
Supervisors	( )	( )
Upper Management	( )	( )

As with question II. 3., this question is worded to provide information on how many employers by formal policy are not conforming to the standard.

As an additional measure or indication of the consistency of application of rules, a question was included which asked what the lowest level management official was which had the authority to take various disciplinary actions.<sup>126</sup>

Standard 5. Employees should be given notice of charges and an opportunity to explain their actions prior to taking disciplinary action. This standard was used to form two questions. Additional information was gained on the type of notice and to whom an explanation could be addressed in the questions as follows:

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<sup>126</sup>See appendix 2, Question III. 3.

II. 4. Are employees given notice of charges prior to taking disciplinary action?

NO YES  
  - in writing  
  - orally

II. 5. Are employees given an opportunity to explain their actions prior to taking disciplinary action?

YES ( ) NO ( )

If yes, to whom? \_\_\_\_\_

Standard 6. Employees must be given the right to have a personal representative present during meetings where rule violations and possible disciplinary actions are discussed. The standard was formulated into the following question.

II. 6. Are employees allowed to have a personal representative present during meetings where rule violations (by that employee) and possible disciplinary actions are discussed? YES ( ) NO ( )

Standard 7. For all but the most serious offenses, progressive discipline must be used, incorporating warnings and lesser penalties, prior to discharging. The best measure of progressive discipline is the use of oral and written warnings. Therefore, the question was worded as follows:

III. 1. For offenses that are not so serious as to warrant immediate suspension or dismissal, are warnings issued prior to taking more severe disciplinary actions?

	YES	NO
Oral warnings	<input type="checkbox"/>	<input type="checkbox"/>
Written warnings	<input type="checkbox"/>	<input type="checkbox"/>

Standard 8. When disciplinary action is taken, employees must be given notice and an explanation of the charges which resulted in disciplinary action. Since an explanation of charges is in itself a notice, the standard was reworded and the "explanation" made somewhat more specific. Responses were also separated into oral and written in the question as follows:

III. 2. Are employees given an explanation of the charges and the rule violated which resulted in disciplinary action?

NO     YES  
 ( ) - in writing  
 ( ) - orally

Standard 9. Employees must be provided with some form of an appeal procedure whereby they can petition for review of a disciplinary action to a management official at a higher level than the person who took the disciplinary action and eventually to a mutually agreed on third party who has the authority to reduce or reverse the decision. Eight types of appeal were listed in addition to an "other (specify)" choice. Responses were separated into discipline and discharge since procedures for each may be different. The question was presented as follows:

IV. 1. After disciplinary action has been imposed, if the employee is given the opportunity to appeal the decision; to whom may he address his appeal? (Check all that apply).

<u>Discipline</u>	<u>Discharge</u>	
<input type="checkbox"/>	<input type="checkbox"/>	NO -cannot appeal decision
<input type="checkbox"/>	<input type="checkbox"/>	YES, to next level of management
<input type="checkbox"/>	<input type="checkbox"/>	YES, to successively higher levels of management
<input type="checkbox"/>	<input type="checkbox"/>	YES, to the personnel manager
<input type="checkbox"/>	<input type="checkbox"/>	YES, to a management review panel
<input type="checkbox"/>	<input type="checkbox"/>	YES, to the plant manager
<input type="checkbox"/>	<input type="checkbox"/>	YES, to the company president
<input type="checkbox"/>	<input type="checkbox"/>	YES, to a mutually agreed on third party, rendering non-binding decision
<input type="checkbox"/>	<input type="checkbox"/>	YES, to a mutually agreed on third party, rendering binding decision
<input type="checkbox"/>	<input type="checkbox"/>	YES, other (specify)

Standard 10. The final step of the appeal procedure must consist of a hearing where the employee is given the right to have a personal representative present, call witnesses for his/her defense, examine any evidence and cross-examine management's witnesses. The standard was formulated into the following question.

2. In the final step of the appeal process, is the employee given the opportunity to: (disregard if no appeal process)

	<u>YES</u>	<u>NO</u>
Have a personal representative present?	( )	( )
Call witnesses for his/her defense?	( )	( )
Examine any evidence against him/her?	( )	( )
Cross examine management's witnesses?	( )	( )

The final page of the survey presented a list of possible requirements of just cause legislation, based on the model standards and the proposals, and asked the respondents to give a scaled reaction to each one. An open ended question on the effect of just cause legislation and their opinion of the law was also included.

Company information on the number of managerial, office and clerical, and plant employees, the specific industry type of the firm, and the job title of the respondent was also requested. This information was collected to allow a future study of how responses varied among the different groups and to give more information on the types of firms represented in the survey.

The purpose of the cover letter was to encourage cooperation with the study. The main features of the letter were specifically designed for this purpose. First, the subject of proposed legislation to amend the termination at will doctrine and require just cause for discharges was introduced. Second, the scope and purpose of the study was presented. Information that only Virginia firms were included was intended to lend a sense of importance to the individual response as well as to build feeling of affiliation with the other respondents. An assurance that the results would not be used to support or oppose the legislation was included. Third, a list of the benefits of participation was provided. Fourth, the firms were assured that all responses would be held in the strictest confidence. Fifth, the firms were told that the survey could be completed in a short time and that most questions required only a

checkmark. Finally, the letter was printed on the official Virginia Polytechnic Institute and State University letterhead with complete information on the address and telephone number of the school.

The first page of the questionnaire contained a statement that the survey was for nonunion, private sector firms only to correct any errors in classification.

### **Survey Method**

Prior to the final mailing, a pilot survey of four firms was conducted. The pilot consisted of the actual survey and cover letter plus a cover letter explaining what was desired of the firms participating in the pilot. The purpose of the pilot survey was to get feedback, from actual personnel professionals in manufacturing firms, on any questions which were unclear, on the amount of time required to answer the questionnaire, and to obtain other comments or suggestions on how the survey may be improved.

All four firms were contacted by telephone prior to sending out the pilot survey. The survey was mailed in March of 1983 and most firms indicated it was received in two to three days. The firms responded by mail within ten days. All four firms were located in Oklahoma City, Oklahoma for the purpose of convenience only. The subjects consisted of two electronics manufacturers, one auto parts manufacturer and one computer and copying equipment sales office. One of the firms had a large proportion of unionized labor and the other three were nonunion. The survey was completed by two personnel managers, and one human resources manager, and one sales planning manager.

Only one change was made as a result of the pilot survey. The change was to remove the response categories of "Rules" and "Procedures" in Part I

question 1 since they were confusing, time consuming and did not provide any valuable information. The revised question has only one column for responses.<sup>127</sup> Except for that one change, all four firms judged the survey to be acceptable in its present form.

The final survey was mailed, first class, to the "Personnel Manager" of each of the 486 firms. A return addressed envelope was enclosed. The goal was to obtain a sample of a least seventy-five respondents or a response rate of approximately fifteen percent or better.

### Analysis

For each question asked, a frequency distribution of responses was developed. Where a list of choices was presented, an average total number of choices marked and a frequency distribution of total choices marked was calculated. The response rate for each question is also given. The analysis of the results will provide a description of the relative compliance of the employers to the standards of just cause.

The reaction of the employers to the requirements of possible legislation will also be analyzed. The scaled responses will be presented in terms of an average response for each requirement and an average response for all the requirements. The openended question will be analyzed by grouping the responses into categories and presenting the frequency distribution of responses.

The company information on size, industry type and job title of respondent will be presented in a frequency distribution. An average of the number of employees will also be presented.

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<sup>127</sup>See appendix 2.

## CHAPTER IV

### RESULTS

This chapter addresses research questions (3), what are the current practices of nonunion employers, and (4), what are the reactions of the employers to just cause legislation. Included is a discussion of the response rate, the company characteristics, communication methods, pre-discipline procedures, disciplinary actions, appeal procedures, and the reactions to the proposals.

#### Response Rate

Approximately seventy-five responses were received within one week of the mailing. The last response was received about one month after the mailing. The response rate, as detailed below, was considered to be adequate and exceeded the minimum required.

Total Mailing	486
Returned - Undeliverable	16
Returned - Unionized	<u>5</u>
Total	N = 465
Number of Responses	102
Response Rate	= 102/N = 21.9%

#### Company Characteristics

The number of employees varied significantly among responding firms.

Range (total employees)	13 - 51,000
Average (total employees) <sup>128</sup>	413
Median total employees)	174.5

Twelve firms indicated having fifty or less employees. The inconsistency of their given size with that reported in the VID, of fifty or more employees, was attributed to over reporting and reductions in size since the time of reporting. One half of the firms had 174 or less employees. A frequency distribution of firms, by the number of employees, is presented in table 3.

Of the 102 firms responding to the survey, ninety-seven gave their industry type. While "specific industry type" was requested, seventeen of the firms listed "manufacturing" or "general manufacturing." The remaining responses were separated into sixteen categories. The most common industry types of firms were clothing and textile, metal products, building materials, electrical, food processing, furniture, coal mining and printing and binding operations. A frequency distribution of the firms, by industry type, is presented in table 4.

The job title of the respondent was also requested. The purpose was to find out whether the proper person was completing the survey. The majority of the surveys were completed by the personnel manager. The remaining surveys were completed by some other upper management official who presumably was in charge of personnel since the surveys were addressed to the "Personnel Manager." The distribution of job titles is presented in table 5.

The company characteristics were representative of the source used. No

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<sup>128</sup>The firm with 51,000 employees was determined to be an extreme value because it was ten times larger than the second largest firm with 5,100 employees. Therefore, only for calculating the average number of employees, the largest firm (51,000 employees) and the smallest firm (13 employees) were eliminated. Two firms did not give the number of employees. Therefore,  $n = 102 - 2$  (extreme values)  $- 2$  (nonreporting) = 98.

**TABLE 3**  
**FREQUENCY DISTRIBUTION OF FIRMS**  
**BY NUMBER OF EMPLOYEES**

Number of Employees	Number of Firms	Percent of Firms
1-50	12	12
51-100	24	24
101-150	10	10
151-200	13	13
201-300	11	11
301-400	7	7
401-500	5	5
501-750	6	6
751-1,000	2	2
1,001-2,000	5	5
2,001-3,000	2	2
3,001-	3	3
Total*	<u>100</u>	<u>100</u>

\*Two firms did not provide the number of employees.

**TABLE 4**  
**FREQUENCY DISTRIBUTION OF FIRMS**  
**BY INDUSTRY TYPE**

Industry Type	Number of Firms	Percent of Firms
General Mfg. - not specified	17	17.2
Bank - financial service	1	1.0
Box Mfg.	2	2.0
Building Materials Mfg.	11	11.1
Clothing, Textile Mfg.	12	12.1
Coal Mining	6	6.1
Construction	2	2.0
Electrical Parts Mfg.	9	9.1
Fire Equipment Mfg.	1	1.0
Food Processing	8	8.1
Furniture Mfg.	7	7.1
Heavy Equipment Mfg.	1	1.0
Instrument (Industrial) Mfg.	1	1.0
Metal Products Mfg.	12	12.1
Paint, Finishes Mfg.	2	2.0
Printing, Binding	6	6.1
Vocational Rehabilitation, Handicapped	1	1.0
Total*	99	100.0

\*Three firms did not state industry type.

**TABLE 5**  
**FREQUENCY DISTRIBUTION OF JOB**  
**TITLES OF RESPONDENTS**

Title	Number of Respondents	Percent of Respondents
Personnel Manager or Director, Employee Relations Manager, Human Resources Manager, Industrial Relations Manager . . . . .	55	55
Vice-President, Administrative		
Vice-President . . . . .	16	16
President . . . . .	9	9
Director of: Accounting, Manufacturing, Engineering, Treasurer	8	8
Plant Manager . . . . .	5	5
Personnel Assistant, Personnel Staff	3	3
Business Manager . . . . .	1	1
Office Manager . . . . .	1	1
Operations Manager . . . . .	1	1
Owner . . . . .	1	1
Total* . . . . .	100	100.0

\* Two firms did not give this information.

significant bias, such as an inconsistency with the distribution of size and industry type of firms listed in the VID, was observed. Therefore, the sample was judged to be well suited for its purpose of providing a cross section of nonunion, private sector businesses in Virginia.

### **Communication of Rules and Procedures**

Question I. 1. asked employers to indicate steps taken to communicate discipline rules and procedures to employees and provided a check list of the most common methods used. All 102 firms responded to the question. Responses were grouped into written methods and oral methods because written methods are usually more valuable in terms of consistency. The firms indicated an average of three methods used. The most common methods were incorporation into personnel policies and procedures or employee handbooks, posting on bulletin boards, and an oral review with each employee by the supervisor. Table 6 presents the number and percent of firms indicating the use of each method of communication. Table 7 provides a frequency distribution of firms, by the number of methods used.

### **Pre-Discipline Procedures**

This section of the survey was directed at the procedural safeguards that arbitrators, in general, agree are required prior to taking disciplinary action. These safeguards include consideration of mitigating circumstances, consistency of enforcement, notice and opportunity for employees to explain actions, and allowing a personal representative to be present.

The results indicated that less than one-half of the firms required supervisors to consider mitigating circumstances prior to taking disciplinary action. One-third of the supervisors also had, by formal policy, the option of not

**TABLE 6**

**COMMUNICATION TO EMPLOYEES:  
METHODS TAKEN TO COMMUNICATE  
DISCIPLINE RULES AND PROCEDURES**

Method	Number of Firms	Percent of Firms
<b><u>Written</u></b>		
Incorporated into personnel policies and procedures . . . . .	72	70.6
Incorporated into employee handbook . . . . .	61	59.8
Posted on bulletin boards . . . . .	54	52.9
Circulated separately to all non-exempt employees by letter or notice . . . . .	18	17.7
Held in writing in personnel office and available on request . . . . .	27	26.5
<b><u>Oral</u></b>		
Reviewed orally with each employee by supervisor . . . . .	54	52.9
Review orally with each employee by personnel department staff	26	25.5
Other (specify) - "group meetings"	1	1.0
<b><u>Total Written</u></b>	<b>232</b>	<b>= 74.1 %*</b>
<b><u>Total Oral</u></b>	<b>81</b>	<b>= 25.9 %*</b>
<b><u>Total Responses</u></b>	<b>313</b>	

\* Percent of responses.

**TABLE 7**  
**COMMUNICATION TO EMPLOYEES:**  
**FREQUENCY DISTRIBUTION OF FIRMS BY THE**  
**NUMBER OF METHODS TAKEN TO COMMUNICATE**  
**DISCIPLINE RULES AND PROCEDURES**

Number of Methods	Number of Firms	Percent of Firms
1	17	16.7
2	20	19.6
3	31	30.4
4	13	12.8
5	15	14.7
6	5	4.9
7	1	1.0
Total	102	100.1*

Average =  $314/102 = 3.078$

\* Error due to rounding.

enforcing the rules in a particular case. One-fourth of the firms formally stated that they retained the right to enforce a rule without prior notice, even if they had not consistently enforced it in the past. Ninety-five percent gave some notice of charges prior to taking disciplinary action. Ninety-seven percent gave the employees an opportunity to explain their actions prior to taking disciplinary action. Almost one-half did not allow employees to have a personal representative present during meetings concerning possible disciplinary actions. Table 8 includes a restatement of these questions, the distribution of responses, and the number of firms that responded to each question.

### **Disciplinary Actions**

This section of the survey was directed at the types of discipline used and the methods of taking those actions. The main intent was to determine to what extent progressive discipline was used. The questions addressed the use of warnings, explanation of charges, and what level of management had authority to take various actions.

Ninety-nine percent of the firms indicated that warnings were used prior to taking more severe disciplinary action, in cases where the offense did not warrant immediate suspension or discharge. Ninety-nine percent also gave the employee an explanation of the charges and the rule violated which resulted in disciplinary action. The results indicated that the authority to take more serious disciplinary actions rest in higher levels of management. The majority of firms gave supervisors the authority to issue oral and written warnings. However, only twenty-one firms gave supervisors the authority to discharge employees. Table 9 includes a restatement of these questions, the distribution of responses, and the number of firms that responded.

**TABLE 8**

**PRE-DISCIPLINE PROCEDURES**

Question	Response				Total n =
	Yes		No		
	#	%	#	%	
II. 1. Are supervisors required by written policy to consider mitigating circumstances (i.e., health problems, uncontrollable events, misinformation) prior to taking disciplinary action? . . . . .	46	47.9	50	52.1	96
II. 2. <u>Excluding</u> mitigating circumstances, do supervisors or upper management personnel have, by formal policy, the option of not enforcing the rules in a particular case?					
Supervisors . . . . .	33	33.3	66	66.7	99
Upper Management . . . . .	53	52.5	48	47.5	101
Supervisors and Upper Management . . . . .	32	32.3	45	45.5	99*
II. 3. If management has not enforced a rule consistently in the past (without exception other than for mitigating circumstances), does it formally state that it retains the right to enforce the rule in the future without prior notice? . . .	26	27.7	68	72.3	94
a) Has this circumstance occurred in your firm? . . .	21	22.3	73	77.7	94
b) How is notice given, if given?***					
Oral notice - group or individual . . . . .	16	57.1	**	**	28
Written notice - circulated . . . . .	14	50.0	**	**	28
Posted notice - bulletin board . . . . .	7	25.0	**	**	28
Oral and written notice . . . . .	6	21.4	**	**	28
Oral and posted notice . . . . .	1	0.4	**	**	28
Oral, written, and posted notice . . . . .	1	0.4	**	**	28

\*Numbers do not total due to single yes responses.  
 \*\*Not applicable.  
 \*\*\*Columns do not total due to multiple responses.

**TABLE 8**

**(CONTINUED)**

Question	Response				
	Yes		No		Total n =
	#	%	#	%	
II. 4. Are employees given <u>notice</u> of charges prior to taking disciplinary action? . . . . .	**	**	5	5.0	100
Written notice only . . . . .	22	22.0	**	**	100
Oral notice only . . . . .	28	28.0	**	**	100
Oral and written notice . . . . .	45	45.0	**	**	100
II. 5. Are employees given an opportunity to explain their actions prior to taking disciplinary action? . . . . .	99	97.1	3	2.9	102
If yes, to whom?					
Supervisor . . . . .	41	43.6	**	**	94
Upper management . . . . .	10	10.6	**	**	94
Any level desired . . . . .	4	4.3	**	**	94
Supervisor and upper management . . . . .	28	29.8	**	**	94
Three or more positions including supervisor and upper management . . . . .	11	11.7	**	**	94
II. 6. Are employees allowed to have a personal representative present during meetings where rule violations (by that employee) and possible disciplinary actions are discussed?	48	50.5	47	49.5	95

\*\*Not applicable.

**TABLE 9**  
**DISCIPLINARY ACTIONS**

Question	Response				
	Yes		No		Total n =
	#	%	#	%	
III. 1. For offenses that are not so serious as to warrant immediate suspension or dismissal, are warnings issued prior to taking more severe disciplinary actions?					
Oral warnings . . . . .	96	99.0	1	1.0	97
Written warnings . . . . .	84	93.3	6	6.7	90
Oral and written warnings . . . . .	79	**		**	80*
III. 2. Are employees given an <u>explanation</u> of the charges and the rule violated which resulted in disciplinary action? . .	**	**	1	1.0	101
Written explanation only . . . . .	17	16.8	**	**	101
Oral explanation only . . . . .	27	26.7	**	**	101
Oral and written explanation . . . . .	56	55.5	**	**	101
III. 3. What is the lowest level management official which has the authority to take the following disciplinary actions?					

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Action	First Line Supervisor	Department Head	Personnel Manager	Plant Manager	Company President	Other District Manager	Other Administrative Vice-President	Total
Oral Warning	86	8	1	3	0	0	0	98
Written Warning	65	19	4	6	0	0	0	94
Suspension	23	31	16	22	1	0	1	94
Transfer	17	31	17	26	0	0	0	91
Demotion	12	29	16	34	3	0	1	95
Discharge	21	21	18	33	2	2	1	98

\*Seventy-nine responded yes to both and one responded no to both.

\*\*Not applicable.

### **Appeal Procedures**

Question IV. 1. asked the employers to whom an employee may address an appeal if at all. The employer made separate responses for discipline and discharge. Eight levels or alternate reviewing bodies were provided in addition to an "other (specify)" choice. Two categories of "other" responses were developed when compiling results.

The firms indicated they used an average of almost three types of appeal for discipline cases and slightly fewer for discharges. Fourteen firms did not allow an appeal of discharges and eight did not allow an appeal of discipline. Over one-half of the firms allowed an appeal of discipline or discharge to the next level of management, to successively higher levels of management, and to the plant manager. Two firms allowed an appeal of discipline to a mutually agreed on third party rendering a binding decision. One firm allowed such an appeal for discharges. Table 10 presents the number of firms which provided each type of appeal. Table 11 provides a frequency distribution of firms, by the number of types of appeal provided.

Question IV. 2. asked employers whether the employee had the opportunity to have a personal representative, call witnesses, examine evidence, and cross-examine witnesses in the appeal process. At least twenty-two firms failed to respond to each of the four parts of this question. Of those responding, over one-half answered yes in each part. The distribution of responses is presented in table 12.

### **Reactions to the Proposals**

A brief summary and explanation of the proposals of just cause legislation was given in the survey. The employers were then asked "Were you aware of

**TABLE 10**

**APPEAL PROCEDURES:**

**TYPES OF APPEAL PROVIDED**

Type of Appeal Allowed	Number of Firms	
	<u>Discipline</u>	<u>Discharge</u>
To next level of management	69	58
To successively higher levels of management	61	56
To the personnel manager	45	45
To a management review panel	9	14
To the plant manager	53	51
To the company president	42	46
To a mutually agreed on third party, rendering a non-binding decision	2	1
To a mutually agreed on third party, rendering a binding decision	2	1
<u>Other</u> - to the plant coordinator or EEO representative	1	2
<u>Other</u> - to the division or corporate V.P. of personnel or industrial relations	2	2
<u>Total number of firms not allowing appeal</u>	8	14
<u>Total number of firms responding</u>	98	100

**TABLE 11**  
**APPEAL PROCEDURES:**  
**FREQUENCY DISTRIBUTION OF FIRMS**  
**BY THE NUMBER OF TYPES OF APPEAL PROVIDED**

Types Provided *	<u>Discipline</u>		<u>Discharge</u>	
	No. of Firms	Percentage	No. of Firms	Percentage
0	8	8.2	14	14.0
1	27	27.6	26	26.0
2	6	6.1	6	6.0
3	14	14.3	13	13.0
4	20	20.4	14	14.0
5	15	15.3	18	18.0
6	7	7.1	9	9.0
7	0	0.0	0	0.0
8	<u>1</u>	<u>1.0</u>	<u>0</u>	<u>0.0</u>
Total	98	100.0	100	100.0
Average	2.92		2.77	

\* Does not equal number of levels of appeal procedure since one option was "to successively higher levels of management." Therefore the number indicates the minimum number of levels in the appeal procedure.

TABLE 12

**APPEAL PROCEDURES:  
EMPLOYEE RIGHTS IN THE FINAL STEP**

Question	Response				Total n =
	Yes		No		
	#	%	#	%	
IV. 2. In the final step of the appeal process, is the employee given the opportunity to: (disregard if no appeal process)					
Have a personal representative present? . . . . .	41	51.9	38	48.1	79
Call witnesses for his/her defense? . . . . .	58	72.5	22	27.5	80
Examine any evidence against him/her? . . . . .	67	83.3	13	16.2	80
Cross-examine managements witnesses? . . . . .	45	60.8	29	39.2	74

these proposals? YES ( ) NO ( )." Out of one hundred firms that responded to the question, fifty-four or fifty-four percent answered yes and forty-six or forty-six percent answered no.

The main part of this section of the survey consisted of eleven elements of just cause or requirements that might result from just cause legislation. The firms were asked to scale their reaction to each element.

The most positive reactions were to requirements of giving notice and explanation of charges and of progressively severe discipline. As expected, the most negative responses were to requiring a mutual third party appeal for discipline and discharge. The requirements, scaled reactions, and response rate for each part are presented in table 13.

Question V. 12. asked employers:

In general, how do you think the passage of just cause legislation will affect the way in which your company disciplines employees - to what extent would your policies need to be changed to comply? What is your general opinion of such a law?

The purpose of this question was to allow the firms to respond, in their own words, to the proposals and thereby ascertain what objections were most common, how strong those objections are, and what effect the employers expected from just cause legislation. In addition to a "no opinion" category for both effect and opinion, the responses fell into four effect categories and ten opinion categories.

Almost one-half of the firms gave no opinion as to the effect of the legislation or their general opinion of it. Forty-two firms responded that the law would have a slight effect or no effect on their company. Only four firms expected a strong effect. Twenty-two firms were strongly opposed and twenty-seven expressed opposition to a lesser degree. Thirteen firms agreed

**TABLE 13**

**REACTIONS TO REQUIREMENTS OF JUST CAUSE LEGISLATION**

Requirements	Reactions					Average
	Strongly Opposed 1	Somewhat Opposed 2	Neutral 3	Somewhat Favor 4	Strongly Favor 5	
All rules must be in writing. . . . .	12	15	4	18	52	3.82 n=101
Possible disciplinary actions, for violations of a rule, must be in writing. . . . .	10	12	10	18	49	3.85 n=99
Employees can not be held accountable for violations of rules that have not been communicated to them orally.	41	21	9	15	14	2.40 n=100
Employees can not be held accountable for violations of rules that have not been communicated to them in writing. . . . .	37	20	8	14	20	2.60 n=99
Employees can not be held accountable for violations of rules that have not been consistently enforced in the past without prior notice that the rules will be enforced. . . . .	14	17	15	32	22	3.31 n=100

**TABLE 13**  
**(CONTINUED)**

Requirements	Reactions					
	Strongly Opposed 1	Somewhat Opposed 2	Neutral 3	Somewhat Favor 4	Strongly Favor 5	Average
An employee should be given notice and an explanation of charges prior to taking disciplinary action. . . . .	5	8	9	26	52	4.12 n=100
An employee who is discharged shall have the right to appeal the action to a neutral third party who has the power to call for reinstatement with or without back pay if such action is considered to be unjust. . . . .	75	5	2	13	5	1.68 n=100
An employee who is disciplined shall have the right to appeal the action to a neutral third party who has the power to reverse the decision. . . . .	74	11	2	8	5	1.59 n=110

**TABLE 13**  
**(CONTINUED)**

Requirements	Reactions					Average
	Strongly Opposed 1	Somewhat Opposed 2	Neutral 3	Somewhat Favor 4	Strongly Favor 5	
The expense of the third party (arbitrator) shall be born equally by management and the employee. . . . .	73	8	7	4	9	1.69 n=101
Progressively severe disciplinary actions should be taken for all but the most serious offenses. . . . .	8	5	10	34	41	3.97 n=98
Where a disciplinary action is appealed, the burden of proof of guilt will rest on management. . . . .	47	15	8	21	10	2.35 n=100

with the legislation or found it acceptable with some reservations. The expected effects of just cause legislation are summarized in table 14 and the opinions of the legislation are summarized in table 15.

**TABLE 14**

**EXPECTED EFFECT OF JUST CAUSE LEGISLATION ON COMPANY**

Category	Examples	Number of Firms
<u>No opinion given</u>		47
<u>Very little or no effect</u> - already a fair employer	"Do not feel it would effect our way of doing things that much. We feel we give our employees a fair deal and we never discharge without just cause anyway."	21
<u>Slight effect</u> - better documentation, more uniform application of rules, provide for appeal.	"Very little change - not in the habit of discharging employees unjustly or unnecessarily. Policies concerning arbitration and third party representation would need to be implemented."	21
<u>Moderate effect</u> - will need better documentation, revised rules and procedures, provide for appeal, will slow our decision making.	"We would use stricter enforcement of existing rules with more consistent discipline. Policies would need to be worded more clearly so as to make interpretation by a third party more predictable."	9
<u>Strong effect</u> - will need complete revision of rules and procedures, provide for appeal, document everything, will add cost and restrict freedom to make decisions.	"It would affect us adversely - more red tape. We would cover <u>our</u> ( <u>A</u> ) with written policies and documentation."	4

**TABLE 15**

**EMPLOYERS' OPINIONS OF JUST CAUSE LEGISLATION**

Category	Examples	Number of Firms
<u>No opinion given</u>		48
<u>Strongly opposed</u> - will create more red tape, government bureaucracy, an adversary relationship, more government intervention in management and increased costs.	"Passage will no doubt add to administrative costs, create an adversary relationship in the work force thus creating a union type environment, increase worker contempt for management and reduce industries flexibility in hiring and firing."	22
<u>Opposed</u> - not needed, already enough protection.	"... we feel the employee is protected as is."	13
<u>Opposed</u> - to specific elements, arbitration, third party intervention.	"Would not endorse challenging management 'witnesses' face to face."	6
<u>Opposed</u> - not fair (termination at will doctrine).	"What happens when the employee decides to quit - which is the other side of the coin."	1
<u>Opposed</u> - would protect lazy employees, need freedom to discipline in order to maintain control, improve and upgrade work force, keep employees on their toes.	"This is another attempt to rip off management, and protect the lazy and indifferent."	7

**TABLE 15**  
**(CONTINUED)**

Category	Examples	Number of Firms
<u>Acceptable</u> - if limited.	"Acceptable if not allowed to develop into bureaucratic interference."	1
<u>Acceptable</u> - except for arbitration.	"The only part that would complicate matters here would be the 'third party'. I do not agree with this part of the legislation."	3
<u>Agree in principle</u> - but would prefer voluntary compliance or concerned over effect.	"Would prefer voluntary compliance such as 'Employee Privacy' guidelines."	4
<u>Agree</u> - law is needed for some but an unnecessary burden on others.	"My opinion is that some SOB employers need this type often . . . while other, who are fair minded, would be unnecessarily burdened."	2
<u>Agree</u>	"I can see the need for such a law to insure against unjust, unwarranted, or politically motivated (in a general sense) disciplinary action."	3

## **CHAPTER V**

### **SUMMARY, CONCLUSIONS AND IMPLICATIONS**

The study was designed to assess the potential impact of just cause legislation through the investigation of six research questions. In this chapter, the findings with respect to the first four research questions will be briefly summarized. Based on these findings, research questions five and six will be addressed.

#### **Research Question One**

The first research question asked: "What is the current status of the employment 'at will' doctrine?"

A review of current literature resulted in the following conclusions. An employee who is hired for an indefinite period of time, and who is not protected by a union contract or civil service procedures, has virtually no protection from unjust discipline and discharge. While the courts have made substantial progress in prohibiting discipline and discharge that is motivated by discrimination, bad faith or malice or that contravenes an established public policy, these decisions have not placed a burden on the employer to act only with just cause. Even where an employer has made oral and written promises not to discipline or discharge except for just cause, the courts have been easily persuaded that, for lack of mutuality, a contract does not exist.

### **Research Question Two**

The second research question asked: "What are the recommended alternatives to the employment 'at will' doctrine?"

Four general proposals and three actual bills were compared. It was concluded that if any action is taken in the future to prevent discipline or discharge without just cause, it will most likely be in the form of legislation providing tax incentives to adopt arbitration. Based on that conclusion, the arbitration standards of procedural just cause were reviewed. These standards (model standards) were the foundation of the survey questionnaire used to address research questions three and four.

### **Research Questions Three and Four**

Research question three asked: "What are the current disciplinary practices of private sector, nonunion employers?"

Research question four asked: "What are the reactions of employers to specific elements of 'just cause' legislation and what is their general opinion of such a law?"

A description of the discipline and discharge procedures of private sector, nonunion employers, and of their reactions to just cause legislation, was obtained by means of a mailed survey. The sample was drawn from nonunion, private sector business firms in Virginia. The survey results provided a description of employer practices in the areas of communication of rules and procedures, pre-discipline procedures, disciplinary actions, and appeal procedures. The survey results also provided an indication of the employers' reactions to specific requirements which might arise from the passage of just

cause legislation and of their general opinion of the legislation.

### **Research Question Five**

Research question five asked: "To what extent do the current disciplinary practices of nonunion, private sector employers differ from the standards of 'just cause'?"

Since the model standards of just cause provided the basis for the survey questions, the answers to research question five are drawn directly from the survey results. The survey results include four categories of employer practices.

The first category of practices is communication of rules and procedures. The results indicate that most firms meet a minimal standard of communication since all the respondents used at least one method to communicate rules and procedures to employees. However, the results do not indicate whether the consistency and frequency of use of the methods would be judged adequate by an arbitrator.

The second category of practices is pre-discipline procedures. Four areas were addressed. First, arbitrators will consider mitigating circumstances when deciding a case but do not explicitly require management to do so. Less than one-half of the respondents indicated that supervisors were required to consider mitigating circumstances prior to taking disciplinary action. Second, consistency of past enforcement is necessary in order to hold an employee accountable for a rule violation unless prior notice of future enforcement is given. Contrary to this model standard, the results indicated that one-third of the firms had a formal policy allowing supervisors the option of not enforcing rules

and one-fourth of the firms formally stated that they retained the right to enforce a rule without prior notice even where that rule had not been consistently enforced in the past. Third, depending on the circumstances, arbitrators may require employers to give a worker notice of charges and an opportunity to explain his actions prior to taking disciplinary action. The results of the survey indicate that over ninety-five percent of the firms provided notice and an opportunity to explain. Fourth, employees must be allowed to have a personal representative present in meetings where possible disciplinary actions are discussed. The survey results showed that less than one-half of employers were allowing personal representatives to be present.

The third category of practices is disciplinary actions. The model standards state that discipline should be progressively severe for repeat offenses and that when disciplinary action is taken, the employee should be given an explanation of the charges and the rule violated. Ninety-nine percent of the respondents used oral and/or written warnings prior to taking more severe disciplinary action. Ninety-nine percent of the respondents also gave employees oral and/or written explanations of charges and the rule violated when disciplinary action was taken.

The fourth category of practices is appeal procedures. The most obvious difference between procedures in nonunion, private sector firms and unionized firms is the existence of a final step consisting of a decision by a neutral party. The model standard was that employees should be given some form of an appeal procedure with the final step consisting of a mutually agreed on third party with authority to reduce or reverse the decision. Only one firm in the sample allowed an employee to appeal a discharge to binding arbitration. However, the

majority of the respondents did provide some means of appeal for both discipline and discharge. Over one-half of the firms allowed the employee to appeal to successively higher levels of management. Model standards were also developed with respect to the employees rights in the final step of the appeal procedure. In the final hearing the employee must be given the right to have a personal representative, call witnesses, examine any evidence against him, and cross-examine management's witnesses. Over one-half of the respondents allowed each of these four rights.

### **Research Question Six**

Research question six asked: "What would be the likely impact of 'just cause' legislation on nonunion, private sector employer?"

Obviously, the major impact of just cause legislation, if passed, will be the increased use of arbitration in nonunion firms. In addition, several conclusions can be drawn with respect to how the legislation might affect specific policies and procedures in nonunion firms.

### **Communication of Rules and Procedures**

The survey results provide only a general indication of how communication methods compare to the model standard. It seems that all the firms have some method of communicating rules and procedures. However, the respondents reactions, to a requirement that employees can not be held accountable for violations of a rule that has not been communicated to them orally or in writing, were predominantly negative. This may suggest that a significant number of the employers are not in compliance with this standard. Therefore,

it is likely that just cause legislation would compel many employers to provide multiple communication methods and checks to insure that each employee is informed, on a continuing basis, of the companies discipline and discharge rules and procedures.

### **Pre-Discipline Procedures**

The results of the survey provide information on several crucial elements of pre-discipline, procedural just cause. These elements are consideration of mitigating circumstances, consistency of enforcement of rules, notice of charges, and allowance of a personal representative during discipline and discharge investigatory meetings.

Just cause legislation would not specifically require employers to consider mitigating circumstances prior to taking disciplinary action. However, arbitrators will consider the circumstances surrounding a rule violation when passing judgement. Therefore, when faced with the expense and time involved in arbitration, employers will probably choose to implement formal procedures to investigate mitigating circumstances before taking disciplinary action.

The survey results indicate significant problems with respect to consistency of enforcement of rules. Just cause legislation would force as many as one-half or more of the firms to change their policies. In order to take disciplinary action, and make it stick, the firms would have to insure that neither supervisors nor upper management have failed to take disciplinary action for a known violation of a rule unless legitimate mitigating circumstances existed. Where such a failure has occurred, management would be required to give prior notice before resuming enforcement of the rule.

The impact of just cause legislation concerning the practice of giving notice

of charges and an opportunity for the employee to explain will be slight. Almost all of the firms in the survey already followed this practice. The small percentage of firms not providing notice, would probably do so not as a result of a requirement of the legislation, but as a means of screening for mitigating circumstances.

The survey results indicate that just cause legislation would force as many as one-half or more of the employers to change their policies concerning the allowance of a personal representative for employees in meetings concerning disciplinary action. In fact, employers may be forced to make this change before just cause legislation is enacted if the recent NLRB (Weingarten/Materials Research) decision withstands a U.S. Supreme Court test.<sup>129</sup> Some of the respondents indicated a knowledge of this decision by commenting that they would allow a personal representative "if required," "if requested" or "under new law." The NLRB decision, if upheld, would have less impact on employers than would just cause legislation. This is because the employee would have to take legal action, in the courts, against the employer. One legal opinion suggests that without a just cause requirement, the employer can simply choose to discontinue any interview, where the employee requests a personal representative, and proceed to take disciplinary action based on whatever information is known.<sup>130</sup>

### **Disciplinary Actions**

The results of the survey indicate that most of the employers are using

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<sup>129</sup>Supra note 82.

<sup>130</sup>For a discussion of the implications of the recent NLRB decision see: Dave Israel, "The Weingarten Case Sets Precedent for Co-Employee Representation," Personnel Administrator, (February 1983): 23-26.

progressive discipline to some extent by issuing oral and/or written warnings prior to taking disciplinary action. Just cause legislation would compel some employers to begin using warnings for the first time. In addition, it is likely that even those firms already using warnings will be forced to formalize better their procedure of issuing them as well as to use them in greater number of cases and use them more consistently. Disciplinary actions more severe than warnings may also need revision to meet the standard of progressive discipline.

The policy of providing an explanation of charges and the rule violated is present in almost all the firms surveyed. However, just cause legislation may motivate employers to formalize this practice. This will probably result in a greater number of written explanations than are currently used.

Over twenty percent of the respondents indicated that supervisors had the authority to discharge employees. While the first line supervisor needs some power in order to maintain control, allowing the supervisor to take disciplinary action may result in inconsistent application of rules or action based on conflicting personalities or circumstances unrelated to the workers performance. The likely impact of just cause legislation will be the shifting up of authority to take serious disciplinary actions which are more likely to face arbitration review. More of those decisions would be made at levels above the first line supervisors by department heads, personnel managers, and plant managers.

### **Appeal Procedures**

Other than providing for arbitration, the main effect of just cause legislation in this area will be voluntarily improved appeal procedures. More formal

appeal procedures, involving several levels of management, incorporating better documentation, and backed by stronger support from management will be adopted. Such procedures will primarily result from a desire to screen out weak cases rather than bear the time and expense of arbitration. Once arbitration is provided, the accompanying rights of the employee, to have a personal representative present, to examine evidence against him, to call witnesses and to cross-examine witnesses, would prompt management to better prepare and document its' case prior to taking disciplinary action.

### **Conclusion**

The results of the survey suggest that the majority of employers who have formed an opinion, are strongly opposed to legislation of this type. It seems likely that as employers become more aware of the potential impact of just cause legislation, the opposition will increase. In addition, while organized labor can not afford to be seen as openly opposing just cause legislation, it is clearly not in their best interest to lobby for a law that would provide all workers with the job security that has been organized labor's main selling point. This author would even expect organized labor to provide covert aid in the battle against just cause legislation. All this, combined with the fact that there is not an organized, powerful lobby for the unprotected workers and with the current administration's anti-regulation philosophy, seems to give the proponents of just cause legislation little chance of success at the state level and probably no chance of success at the national level.

Despite the slim chances for passage, the topic of just cause legislation is receiving a great amount of publicity and support is growing. Even if such a law is never passed, the attention given it has already influenced many

employers and personnel professionals. Though the pace may be slow, this author would argue that discipline and discharge procedures are improving. This change will accelerate as more and more employers see the advantages of progressive and fair discipline policies. Among those benefits are: improved employee moral and productivity, less waste of employee talent by unnecessary turnover, better employer-employee relations, reduced training and termination costs, better competitive standing in the labor market, improved public image of the company, and less vulnerability to union organization.

Finally, this author strongly supports the procedural safeguards established by arbitrators and would recommend that employers voluntarily adopt them. The use of a law to force those procedures on all employers seems exceedingly less appealing. Such a law, with forced arbitration, could significantly change the current employer/employee relationship resulting in a more adversarial relationship at a time when the importance of cooperation is just being realized. Hopefully, the mere threat of such legislation or a sense of enlightened self-interest, will spur employers to improve and upgrade their discipline and discharge procedures.

#### **Limitations of the Study**

As stated previously, the survey method did not employ a strict random sample. Therefore, while the results of the study may be a good general representative of the practices and reactions of private sector nonunion business firms in Virginia, any exact conclusions about the general population at nonunion firms should be drawn with great care. The purpose of the study was to gain a general indication of the practices of nonunion, private sector firms rather than to provide data for statistical analysis. Results of the survey may

have only limited significance for states other than Virginia or for the United States as a whole.

## SELECTED BIBLIOGRAPHY

- Abrams, Roger I. "A Theory for the Discharge Case." Arbitration Journal vol. 36, no. 3, (September 1981): 24.
- Bureau of the Census, U. S. Department of Commerce Statistical Abstract of the United States: 1981. Washington, D.C. 1982.
- Conway, John H. "Protecting the Private Sector At Will Employee Who 'Blows the Whistle': A Cause of Action Based Upon Determinants of Public Policy." Wisconsin Law Review vol. 1977, no. 3, (1977): 777.
- Elkouri, Frank, and Elkouri, Edna A. How Arbitration Works. 3d ed., Washington, D.C.: The Bureau of National Affairs, 1981.
- Fogel, Walter. "Court Review of Discharge Arbitration Awards." Arbitration Journal vol. 37, no. 2, (June 1982): 22.
- Foulkes, Fred K. Personnel Policies in Large Nonunion Companies. Englewood Cliffs: Prentice Hall, Inc., 1980.
- Hogler, Raymond, L. "Industrial Due Process and Judicial Review of Arbitration Awards." Labor Law Journal, (September 1980): 570.
- Institute of Personnel Management. Disciplinary Procedures and Practice. London: IPM Information Report 28, 1979.
- Israel, Dave. "The Weingarten Case Sets Precedent for Co-Employee Representation." Personnel Administrator, (February 1983): 23.
- Nelson, Wallace B. "The Role of Common Law in Just Cause Disputes." Personnel Journal 58, (August 1979): 541.
- Nichols, Robert H. "Would Labor Oppose A Statute." ILR Report vol. 20, no. 1, (Fall, 1983): 21.
- Olsen, Theodore A. "Wrongful Discharge Claims Raised By At Will Employees: A New Legal Concern for Employers." Labor Law Journal, (May 1981): 265.
- Patten, Thomas H. Jr. Pay: Employee Compensation and Incentive Plans. New York: Macmillan Publishing Co., Inc. 1977.
- Peres, Richard. Dealing With Employment Discrimination. New York: McGraw-Hill Book Company, 1978.

Phelps, Orme W. Discipline and Discharge in the Unionized Firm. Berkeley University of California Press, 1959.

"Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith." Harvard Law Review vol. 93, no. 8, (June 1980): 1816.

Salvatore, Paul. "Legislative Action and Private Initiative: A Practical Solution." ILR Report vol. 20, no. 1, (Fall 1982): 13.

Shapiro, Peter J., and Tune, James F. "Implied Contract Rights to Job Security." Stanford Law Review 26, (January 1974): 335.

Summers, Clyde W. "Individual Protection Against Unjust Dismissal: Time For a Statute." Virginia Law Review 62, (April 1976): 481.

Summers, Clyde W. "The Need for a Statute." ILR Report vol. 20, no. 1, (Fall 1982): 8.

The Bureau of National Affairs. BNA Collective Bargaining Negotiations and Contracts. vol. 2, Washington, D.C., 1978.

"The Growing Costs of Firing Nonunion Workers." Business Week, 6 April 1981, pp. 95-96.

Union Directory of Virginia. Richmond: Virginia State Chamber of Commerce, 1982.

Virginia Industrial Directory. Richmond: Virginia State Chamber of Commerce, 1982.

Weisberger, June. Recent Developments in Job Security: Layoffs and Discipline in the Public Sector. New York: New York State School of Industrial and Labor Relations, July 1976.

Whittlesey, John W. "A View from Management." ILR Report vol. 20, no. 1, (Fall 1982): 16.



## APPENDIX 1\*

COLLEGE OF BUSINESS

### VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

Blacksburg, Virginia 24061

JOHN M. BARRINGER INDUSTRIAL RELATIONS CENTER (703) 961-5820

Dear Personnel Manager,

In recent years several states have considered legislation that would amend the current doctrine of "termination at will". This legislation would prohibit the discharge of employees without "just cause". To date, no such legislation has been enacted but some authorities believe that it is only a matter of time before such legislation is enacted at the state or national level.

We are conducting a study of discipline practices among manufacturing firms in Virginia to determine the potential impact of such legislation on their operations. We ask that you participate in this study by completing the enclosed questionnaire. We do not intend to use this research to support or oppose the proposals. Our only interest is to assess the impact of possible legislation.

Your participation in the study will produce the following benefits:

1. The questionnaire will serve as a checklist for evaluating your firm's discipline policies and procedures.
2. The survey will provide an indication of how business and personnel professionals will react to the proposed legislation.
3. Participating firms will be able to compare their practices to those of other firms, on an anonymous basis, by requesting a report of the results of this study.

All responses will be held in the strictest confidence. The results will be reported in aggregate form only with no participating firm identified by name.

The survey is designed so that it can be completed in 8 to 10 minutes. Most questions require only a checkmark in the appropriate space. However, please feel free to make comments or explanations in any available space.

Sincerely,

John D. Mashburn  
Project Coordinator

Kent F. Murrmann, Ph.D.  
Assistant Professor  
of Management  
703/961-5820

*Meeting the Challenge of Productivity Improvement  
Through Personnel and Labor Relations Research*

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\* Reduced 74% from the original.

## APPENDIX 2 \*

### SURVEY QUESTIONS

This survey is intended for nonunion, private sector firms only. If your firm is unionized, please notify us of the error.

#### Definitions

"Disciplinary actions" refers to actual sanctions including such actions as suspension and discharge.

"Rules" refers to the required standards of conduct for nonexempt employees. Included are safety rules, performance standards, and basic plant rules.

"Discipline procedures" refers to the method by which conduct is judged and penalties are imposed.

"Discharge" refers to a dismissal from employment.

"Appeal Procedure" refers to a provision which allows an employee to petition for review of a disciplinary action to a management official at a higher level than the person who took the disciplinary action or a third party neutral.

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#### **Part I. Communication to Nonexempt Employees**

1. Indicate which of the following steps are taken to communicate discipline rules and procedures to employees before any disciplinary action is taken. (Check all that apply)

- Incorporated into personnel policies and procedures
- Incorporated into employee handbook
- Posted on bulletin boards
- Circulated separately to all nonexempt employees by letter or notice
- Reviewed orally with each employee by supervisor
- Reviewed orally with each employee by personnel department staff
- Held in writing in personnel office and available on request
- Other (specify)

#### **Part II. Pre-Discipline Procedures for Nonexempt Employees**

1. Are supervisors required by written policy to consider mitigating circumstances (i.e., health problems, uncontrollable events, misinformation) prior to taking disciplinary action? YES ( ) NO ( )

2. Excluding mitigating circumstances, do supervisors or upper management personnel have, by formal policy, the option of not enforcing the rules in a particular case?

	YES	NO
Supervisors	<input type="checkbox"/>	<input type="checkbox"/>
Upper Management	<input type="checkbox"/>	<input type="checkbox"/>

3. If management has not enforced a rule consistently in the past (without exception other than for mitigating circumstances), does it formally state that it retains the right to enforce the rule in the future without prior notice? YES ( ) NO ( )

a) Has this circumstance occurred in your firm? YES ( ) NO ( )

b) How is notice given if given? \_\_\_\_\_

4. Are employees given notice of charges prior to taking disciplinary action?

NO	YES
<input type="checkbox"/>	<input type="checkbox"/>

- in writing  
( ) - orally

5. Are employees given an opportunity to explain their actions prior to taking disciplinary action? YES ( ) NO ( )

If yes, to whom? \_\_\_\_\_

6. Are employees allowed to have a personal representative present during meetings where rule violations (by that employee) and possible disciplinary actions are discussed? YES ( ) NO ( )

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\* Reduced 74% from the original.

**Part III. Disciplinary Actions for Nonexempt Employees**

1. For offenses that are not so serious as to warrant immediate suspension or dismissal, are warnings issued prior to taking more severe disciplinary actions?

	<u>YES</u>	<u>NO</u>
Oral warnings	( )	( )
Written warnings	( )	( )

2. Are employees given an explanation of the charges and the rule violated which resulted in disciplinary action?

<u>NO</u>	<u>YES</u>
( )	( ) - in writing
	( ) - orally

3. What is the lowest level management official which has the authority to take the following disciplinary actions?

	First Line Supv.	Dept. Head	Pers. Mgr.	Plant Mgr.	Co. Pres.	Other Specify
Oral warning	( )	( )	( )	( )	( )	( )
Written warning	( )	( )	( )	( )	( )	( )
Suspension	( )	( )	( )	( )	( )	( )
Transfer	( )	( )	( )	( )	( )	( )
Demotion	( )	( )	( )	( )	( )	( )
Discharge	( )	( )	( )	( )	( )	( )
Other (specify)	( )	( )	( )	( )	( )	( )

**Part IV. Appeal Procedures for Nonexempt Employees**

1. After disciplinary action has been imposed, if the employee is given the opportunity to appeal the decision; to whom may he address his appeal? (check all that apply)

Discipline	Discharge	
( )	( )	NO - cannot appeal decision
( )	( )	YES, to next level of management
( )	( )	YES, to successively higher levels of management
( )	( )	YES, to the personnel manager
( )	( )	YES, to a management review panel
( )	( )	YES, to the plant manager
( )	( )	YES, to the company president
( )	( )	YES, to a mutually agreed on third party, rendering non-binding decision
( )	( )	YES, to a mutually agreed on third party, rendering binding decision
( )	( )	YES, other (specify)

2. In the final step of the appeal process, is the employee given the opportunity to: (disregard if no appeal process)

	<u>YES</u>	<u>NO</u>
Have a personal representative present?	( )	( )
Call witnesses for his/her defense?	( )	( )
Examine any evidence against him/her?	( )	( )
Cross examine management's witnesses?	( )	( )

**Part V. Your Reaction to Proposals**

In the past two years bills have been introduced in the Pennsylvania General Assembly, the Michigan State Legislature, and the New Jersey General Assembly that if passed will prohibit the discharge of employees without just cause and provide for some form of arbitration to settle disputes. In addition,

several labor professionals have proposed that such legislation be enacted on a national level and possibly include both discipline and discharge under a just cause requirement. If such legislation were to be enacted it would probably follow the protection currently provided to Civil Service and unionized employees.

Were you aware of these proposals? YES ( ) NO ( )

The following requirements have been drawn from the three bills mentioned and from arbitration standards since arbitration is likely to be used to settle disputes if just cause legislation is enacted. Assuming some form of just cause legislation is inevitable what would be your position on each of the following elements which might be included in such legislation or result from its enactment. Use the scale below to indicate your reactions. (Circle the number)

1 Strongly opposed   2 Somewhat opposed   3 Neutral   4 Somewhat in favor of   5 Strongly in favor of

	<u>Reaction</u>				
	1	2	3	4	5
1. All rules must be in writing.	1	2	3	4	5
2. Possible disciplinary actions, for violations of a rule, must be in writing.	1	2	3	4	5
3. Employees can not be held accountable for violations of rules that have not been communicated to them orally.	1	2	3	4	5
4. Employees can not be held accountable for violations of rules that have not been communicated to them in writing.	1	2	3	4	5
5. Employees can not be held accountable for violations of rules that have not been consistently enforced in the past without prior notice that the rules will be enforced.	1	2	3	4	5
6. An employee should be given notice and an explanation of charges prior to taking disciplinary action.	1	2	3	4	5
7. An employee who is discharged shall have the right to appeal the action to a neutral third party who has the power to call for reinstatement with or without back pay if such action is considered to be unjust.	1	2	3	4	5
8. An employee who is disciplined shall have the right to appeal the action to a neutral third party who has the power to reverse the decision.	1	2	3	4	5
9. The expense of the third party (arbitrator) shall be born equally by management and the employee.	1	2	3	4	5
10. Progressively severe disciplinary actions should be taken for all but the most serious offenses.	1	2	3	4	5
11. Where a disciplinary action is appealed, the burden of proof of guilt will rest on management.	1	2	3	4	5
12. In general, how do you think the passage of just cause legislation will effect the way in which your company disciplines employees - to what extent would your policies need to be changed to comply? What is your general opinion of such a law?	1	2	3	4	5

**Part VI. Company Information**

Approximately how many people are employed by your company in the following areas:  
 Managerial \_\_\_\_\_ Office & Clerical \_\_\_\_\_ Plant Employees \_\_\_\_\_

What is your firms specific industry type? \_\_\_\_\_

What is your job title? \_\_\_\_\_

If you wish to receive a report of the results of this study please send us your name, address and phone number on an index card with this survey, or send your request in a separate letter.

**Would you please let us have a copy of your firm's disciplinary rules and procedures? Thank you for your cooperation and prompt response!**

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the scanned document**