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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: THE EMPLOYMENT-AT-WILL DOCTRINE IN TEXAS

BONITA K. ROBERTS*

At a time when many employers are eliminating full-time jobs and hiring part-time or temporary employees,¹ the issue of job security becomes increasingly important. While unionized workers' collective bargaining agreements usually require just cause for discharge,² nonunionized employees, the vast majority of the American workforce,³ are governed by the employment-at-will doctrine. The basic tenet of the doctrine is that the employer can terminate the relationship at any time, for any reason, including a bad reason, as long as the reason is not illegal.⁴ Although the Texas Supreme

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1. See Janice Castro, *Disposable Workers*, TIME, Mar. 23, 1993, at 43 (noting that large companies increasingly utilize temporary workers in lieu of permanent employees). There are approximately three times as many temporary employees today as there were ten years ago. *Id.* While the number of people employed by Fortune 500 companies has dropped from 19% to 10% of the workforce over the past two decades, more than 90% of the jobs recently created are part-time. *Id.* at 44; see also William B. Gould, IV, *The Employment Relationship Under Siege: A Look at Recent Developments and Suggestions for Change*, 22 STETSON L. REV. 15, 16-17 (1992) (noting increased number of part-time employees).

2. See Barry I. Mordsley & Steven R. Wall, *The Dismissal of Employees Under the Unfair Dismissal Law in the United Kingdom and Labor Arbitration Proceedings in the United States: The Parameters of Reasonableness and Just Cause*, 16 CORNELL INT'L L.J. 1, 10 (1983) (comparing methods for determining appropriate discharges).

3. See Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 135 (1990) (stating that reduction in union workforce means higher volume of at-will workers).

4. See *East Line & Red River R.R. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (reasoning that when neither party has expressed period for employment, either may terminate at any time).

Court recognizes one narrow exception to the doctrine⁵ and the state legislature has enacted a number of statutory protections for workers,⁶ the doctrine basically remains intact.⁷ Because the Texas Supreme Court is unlikely to abrogate the employment-at-will doctrine,⁸ rejection of the doctrine will fall upon the legislature. Such a task may be made easier for the legislators by careful consideration of both the Wrongful Discharge from Employment Act passed in Montana,⁹ the only state thus far to enact wrongful discharge legislation, and the Model Employment Termination Act (META), approved by the National Conference of Commissioners on Uniform State Law.¹⁰ Described briefly below are common-law and statutory exceptions to the employment-at-will doctrine recognized in Texas, followed by an assessment of the Montana wrongful termination statute and the Model Act.

Although Texas courts recognize written contracts as a means of modifying the employment-at-will doctrine, the specificity of conditions required to effect a modification of the document is unsettled.¹¹ The courts also are divided regarding whether oral

5. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding that only exception applies to discharge for employee's refusal to perform illegal act carrying criminal penalties).

6. *See, e.g.*, TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1993) (promulgating employee protection from discharge because of wage garnishment for child support); TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon 1992) (mandating employee protection from termination for reporting nursing-home patient abuse); TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon Supp. 1993) (providing public employee protection from termination for reporting illegal activities); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993) (requiring employee protection from discharge for filing workers' compensation claim).

7. *See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (reasoning that employment-at-will prevailed as handbook expressly disclaimed contractual agreement); *Schroeder v. Texas Iron Works*, 823 S.W.2d 483, 489 (Tex. 1991) (upholding freedom to terminate when employment is at-will).

8. *See Dutschmann*, 846 S.W.2d at 283 (affirming at-will doctrine).

9. MONT. CODE ANN. §§ 39-2-901 to -914 (1992).

10. MODEL UNIF. EMPLOYMENT TERMINATION ACT §§ 1-5 (1991).

11. *See Benoit v. Polysar Gulf Coast, Inc.* 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.) (stating that agreement must limit employer's right to terminate "in a meaningful and special way"); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (requiring written agreement to provide specifically that employer may not discharge at will). *But see Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (finding no apparent mandate for special language in written agreement beyond establishing term of employment's duration).

employment contracts are enforceable,¹² although the Texas Supreme Court may soon resolve this issue. The court has granted a writ in a case to determine whether the employment-at-will doctrine can be orally modified to prohibit discharge except for good cause.¹³ Even among those decisions recognizing enforceability of oral contracts, no consensus exists as to the circumstances that would trigger the statute of frauds, thus precluding enforcement.¹⁴ Less confusion exists, however, regarding employment handbooks

12. Compare *Winograd*, 789 S.W.2d at 310 (stating that employment agreement must be in writing to be enforceable) and *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (requiring written employment contract in order to bring action for wrongful termination) and *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ) (requiring writing in order for employment contract to be enforceable) and *Benoit*, 728 S.W.2d at 406 (holding that in order to bring claim for wrongful termination, written employment contract must exist) with *Scott*, 72 Tex. at 74, 10 S.W. at 104 (recognizing enforceability of oral employment agreement) and *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826 (Tex. App.—Austin 1989, writ denied) (holding that employment agreement did not fall within statute of frauds so as to require writing) and *Kelley v. Apache Prods., Inc.*, 709 S.W.2d 772, 774 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (overturning summary judgment because contract performable within one year is not required to be in writing) and *Hardison v. A.H. Belo Corp.*, 247 S.W.2d 167, 168-69 (Tex. Civ. App.—Dallas 1952, no writ) (finding oral employment agreement to be enforceable).

13. *Goodyear Tire & Rubber Co. v. Portilla*, 836 S.W.2d 664, 670-71 (Tex. App.—Corpus Christi 1992, writ granted).

14. See, e.g., *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775-76 (Tex. 1974) (finding statute of frauds inapplicable when payment of annual bonus was based on oral agreement, but calculated and paid after year's end); *Portilla*, 836 S.W.2d at 669-70 (refusing to apply statute of frauds when employee was assured job security as long as her performance was satisfactory); *Morgan*, 764 S.W.2d at 827 (refusing to apply statute of frauds to indefinite-term oral employment contract); *Kelley*, 709 S.W.2d at 774 (reversing trial court's determination that statute of frauds applied); *Hardison*, 247 S.W.2d at 168-69 (rejecting application of statute of frauds when contingency could happen within year). But see *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991) (holding that employee's own idea that oral agreement would continue for eight years brought it within statute of frauds); *Wal-Mart Stores, Inc. v. Coward*, 829 S.W.2d 340, 342 (Tex. App.—Beaumont 1992, writ denied) (holding that statute of frauds applied to oral agreement that job was employee's, for life if wanted, as long as performance was satisfactory); *Webber*, 720 S.W.2d at 128 (upholding summary judgment that barred claim based on oral assurances that good cause was required to discharge employee); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (applying statute of frauds when oral contract provided that employee would keep job as long as performance was satisfactory). See generally JoAnne Ray & Victoria Phipps, *Oral Contracts to Fire Only for Good Cause: Are They Enforceable in Texas?*, 56 Tex. B.J. 112, 116 (1993) (discussing lack of uniformity in application of statute of frauds and suggesting that Texas Supreme Court confront "tenuous distinctions and convoluted logic engendered by 300 years of statute of frauds litigation").

as a contractual exception to the employment-at-will doctrine because of a recent Texas Supreme Court ruling.¹⁵ In *Federal Express Corp. v. Dutschmann*, the court held that a handbook promising fair treatment in the form of post-termination review did not create a contract requiring good cause for dismissal.¹⁶ The court reasoned that the handbook expressly disclaimed that it was a contract and stated that the review procedures were mere guidelines.¹⁷ While the Fifth Circuit has been less than consistent in its treatment of Texas law on the handbook issue, recent decisions have reached results similar to *Dutschmann*.¹⁸

The Texas Supreme Court also has refused to impose a covenant of good faith and fair dealing upon the employment relationship.¹⁹

15. See *Dutschmann*, 846 S.W.2d at 284 (holding that employment-at-will relationship cannot be altered by employee handbook).

16. *Id.* at 283.

17. *Id.* Several state appellate courts have recently issued similar opinions. See, e.g., *Almazan v. United Serv. Auto. Ass'n*, 840 S.W.2d 776, 781 (Tex. App.—San Antonio 1992, writ denied) (stating that handbook containing disclaimers and statement that discharge without cause was permissible did not create contract); *Portilla*, 836 S.W.2d at 669 (holding that plaintiff was not bound by nepotism policy contained in handbook because no contract was created by handbook); *McAlister v. Medina Elec. Coop., Inc.*, 830 S.W.2d 659, 664 (Tex. App.—San Antonio 1992, writ denied) (noting that handbook delineating seniority provision in regard to reduction in force did not create contract); *Day & Zimmerman, Inc. v. Hatridge*, 831 S.W.2d 65, 69 (Tex. App.—Texarkana 1992, writ denied) (rejecting contention that handbook providing for due and proper investigation prior to any disciplinary action created contract prohibiting discharge without good cause).

18. See *Crum v. American Airlines Inc.*, 946 F.2d 423, 428 (5th Cir. 1991) (deciding that limiting words included prior to descriptions of disciplinary procedure do not limit employer's right to terminate at will); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 463 (5th Cir. 1991) (per curiam) (determining that detailed termination procedures included in personnel manual, absent showing that employer treated manual as anything more than guidelines, do not limit employment-at-will doctrine). Compare *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 472-73 (5th Cir. 1991) (per curiam) (finding that company rules and regulations regarding discipline and discharge do not require termination only for good cause), *cert. denied*, 112 S. Ct. 591 (1991) with *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1202 (5th Cir. 1987) (upholding employee contract based on handbook requiring just cause dismissal).

19. See, e.g., *Dutschmann*, 846 S.W.2d at 284 n.1 (finding that tort of breach of covenant of good faith and fair dealing may be found only in "special relationships," not in employment relationships); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d at 724-25 n.2 (Tex. 1990) (relating holdings that have refused to imply duty of good faith into employment-at-will contracts); *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 70 n.1 (Tex. 1989) (refusing to address issue of good faith and fair dealing in employment contracts), *rev'd on other grounds*, 498 U.S. 133 (1990). A covenant of good faith and fair dealing imposes upon employers the requirement of good cause dismissal. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256-57 (Mass. 1977). As of 1989, Alaska, Con-

As a result, discharged employees turn with increasing frequency to traditional tort claims against employers. Courts have imposed liability for fraudulent misrepresentation concerning terms and conditions of employment.²⁰ A number of Texas courts of appeals have recognized claims for intentional infliction of emotional distress,²¹ but the Texas Supreme Court has declined to decide whether the tort exists in the employment context.²² Further, the

necicut, Illinois, Massachusetts, New Hampshire, and California had recognized a covenant of good faith and fair dealing. See generally EMPLOYMENT-AT-WILL: A 1989 STATE-BY-STATE SURVEY (David A. Cathcart & Mark S. Dichter, eds.). California, however, limits recovery solely to contract damages. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398 (Cal. 1988). Montana now requires good cause dismissal by statute. MONT. CODE ANN. §§ 39-2-901 to -914 (1992).

20. See, e.g., *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 433 (Tex. 1986) (holding employer liable for refusing to pay employee promised bonus); *United Transp. Union v. Brown*, 694 S.W.2d 630, 632 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.) (noting that employee was fired when employer breached promise of confidentiality); *K.W.S. Mfg. Co. v. McMahon*, 565 S.W.2d 368, 369 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (relating that employer promised employee 5% of corporation's stock but subsequently refused to pay). In order to establish a cause of action, the plaintiff must show: (1) a material representation was made; (2) the representation was false; (3) the representation was made recklessly without knowledge of its falsity and made as an affirmative assertion or when the defendant knew that it was false; (4) the defendant made it with the intention that the plaintiff act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered injury. See *Levine v. Loma Corp.*, 661 S.W.2d 779, 783 (Tex. App.—Fort Worth 1983, no writ) (delineating requirements to assert fraud cause of action). See generally John H. Spurgin, II, *Developments in the Law of Wrongful Discharge in Texas*, 54 TEX. B.J. 108, 110-11 (1991) (discussing tort of fraud).

21. See, e.g., *Casas v. Wornick Co.*, 818 S.W.2d 466, 471 (Tex. App.—Corpus Christi 1991, writ denied) (allowing claim of intentional infliction of emotional distress); *Havens v. Tomball Community Hosp.*, 793 S.W.2d 690, 692 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (recognizing intentional infliction of emotional distress as cause of action); *Bushell v. Dean*, 781 S.W.2d 652, 658 (Tex. App.—Austin 1989) (finding that evidence supported claim of intentional infliction of emotional distress), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991). To show intentional infliction of emotional distress, the plaintiff must show that the defendant acted either intentionally or recklessly, that the employer's conduct was extreme and outrageous, that the actions caused the emotional distress of the plaintiff, and that the emotional distress was severe. See *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989) (affirming that under Texas law, supervisor's action in placing stolen checks in plaintiff's purse, in order to implicate plaintiff, was extreme); *Tidelands Auto Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (stating that Texas requires extreme and outrageous conduct to show intentional infliction of emotional distress).

22. See *Diamond Shamrock Ref. & Mfg. Co. v. Mendez*, 844 S.W.2d 198, 201-02 (Tex. 1992) (denying claim for intentional infliction of emotional distress in employment context). The court emphasized that an essential element of the tort is outrageous conduct beyond a mere dispute between the employer and employee regarding the reason for termination. *Id.* at 202. In *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), the Texas

Texas Supreme Court has recently refused to recognize a separate cause of action for negligent infliction of emotional distress independent of some other legal duty.²³ Texas courts also have recognized defamation, including self-publication,²⁴ as a cause of action in the employment context.²⁵

The Texas Supreme Court has upheld an employee's right to privacy under the Texas Constitution²⁶ and under the common law,²⁷ although the common-law right to privacy has been narrowly construed.²⁸ Unresolved is whether an employee can state a claim arising out of discharge for "false light" invasion of privacy. Although the Fourth Court of Appeals has recognized this cause of

Supreme Court recognized the tort of intentional infliction of emotional distress in the context of a marital dispute. *Id.* at 620.

23. *See* *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (holding that no general duty to refrain from negligently inflicting emotional distress exists).

24. *See, e.g., Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 442-47 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (discussing defamation resulting from employer's verbally publishing accusation of theft against subcontractor); *First State Bank v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (holding that defamatory matter communicated to defamed person can be considered publication if circumstances facilitate likelihood that information will be communicated to third party).

25. *E.g., Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 630-31 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 617-18 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985).

26. The Texas Constitution has no express guarantee of a right to privacy, but the supreme court has found "zones of privacy" similar to those provisions found in the United States Constitution. *Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987). In *Employees Union*, a public employer attempted to implement a mandatory polygraph-testing policy to monitor patient abuse. The court could not find a state interest compelling enough to justify the use of such an unreliable and intrusive means of monitoring patient abuse. *Id.* at 206. *See generally* Phillip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 42 Sw. L.J. 97, 123-25 (1988) (discussing drug testing and polygraphs).

27. *See* *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973) (delineating right to be free from exploitation of one's personality, publication of private affairs when public has no legitimate concern, and wrongful intrusion in private activities causing shame, mental suffering, or humiliation).

28. *See, e.g., Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App.—Austin 1989, writ denied) (finding no invasion of privacy when urinalysis is done at random and employee has ability to prohibit intrusion by refusing to consent even though termination would result); *Kmart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637 (Tex. App.—Houston [1st Dist.] 1984) (recognizing that employee had expectation of privacy in her locker only because she purchased lock herself), *writ ref'd n.r.e. per curiam*, 686 S.W.2d 593 (Tex. 1985); Phillip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law*, 42 Sw. L.J. 97, 125-26 (1988) (discussing common-law right to privacy); John H. Spurgin, II, *Developments in the Law of Wrongful Discharge in Texas*, 54 Tex. B.J. 108, 112 (1991) (discussing right of privacy).

action, the Texas Supreme Court remanded the case without ruling on the issue, acknowledging, however, that false light is one of the four usual categories of private actions for invasion of privacy.²⁹

Torts allowing an employee to bring a wrongful discharge action when that discharge violates a clear public mandate—usually in the form of administrative rules and regulations, legislation, and judicial decisions—fall into the category of public policy exceptions to the employment-at-will doctrine.³⁰ The Texas Supreme Court currently recognizes only one such exception: an employee may bring a wrongful termination suit against an employer who discharges the employee solely for refusing to perform an illegal act for which there are criminal penalties.³¹ This exception has been incrementally extended to protect employees who make good-faith attempts to determine whether the actions they have been directed to perform are illegal.³² However, efforts to expand the public policy exception to include violations of law with only civil penalties have failed thus far.³³ The Texas Supreme Court identified a second public policy exception to the employment-at-will doctrine that favors the integrity of pension plans.³⁴ Although the court ruled that an employer could be held liable for wrongful discharge when an employee is terminated to avoid vesting of pension benefits, the United States Supreme Court reversed, holding that ERISA preempts such an action.³⁵ Therefore, the only public policy exception presently recognized in Texas is the action for wrongful termination of an employee discharged for refusing to perform a criminally illegal act.

29. *Mendez*, 844 S.W.2d at 200. The court refused to rule on the availability of asserting a cause of action for “false light” invasion of privacy because the plaintiff did not submit an essential element of the claim, actual malice. *Id.* Critics vigorously attack the false-light theory as inappropriate for the employment context. See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law: Annual Survey of Texas Law*, 45 Sw. L.J. 1721, 1743 (1992) (asserting that false-light tort theory should not apply to employment cases).

30. See *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (explaining legal basis for tort of wrongful discharge).

31. *Sabine Pilot*, 687 S.W.2d at 735.

32. *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768, 771 (Tex. App.—Corpus Christi 1989, writ denied).

33. *Winters*, 795 S.W.2d at 724-25.

34. *McClendon*, 779 S.W.2d at 71.

35. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990).

In 1990, the Texas Supreme Court rejected further efforts to create another public policy exception when it refused to extend the scope of the Texas Whistleblower Act to include protection for private employees.³⁶ The court offered no explanation for its result, but used the words "at this time on these facts."³⁷ That phrase, along with Justice Doggett's detailed concurrence articulating the elements necessary for a private employee to prove a wrongful discharge for reporting illegal activity,³⁸ has prompted suggestions that legislation is a means of stemming the tide of litigation inevitable to such a decision.³⁹

The whistleblower statute, unsuccessfully invoked in *Winters v. Houston Chronicle Publishing Co.*, ironically represents the one area in which Texas law affords employees the broadest variety of protection from wrongful discharge: legislation. Although general whistleblower protection applies only to public employees,⁴⁰ other statutes cover private employees who report neglect or abuse of nursing-home patients,⁴¹ as well as employees who report violations of the Texas Commission of Human Rights Act,⁴² the Hazardous Communications Act,⁴³ or the Workers Compensation Act.⁴⁴

Another group of statutes protects an employee discharged for performing civic duties or fulfilling other legal obligations, including an employee who complies with a valid subpoena in a civil, criminal, legislative or administrative proceeding,⁴⁵ a jury sum-

36. *Winters*, 795 S.W.2d at 724-25.

37. *Id.*

38. *Id.* at 732-33 (Doggett, J., concurring, joined by Ray and Mauzy, JJ.).

39. See Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law: Annual Survey of Texas Law*, 45 Sw. L.J. 331, 388 (1991) (stating that Texas Legislature has better opportunity than courts to analyze employment-law effects on commerce).

40. TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon Supp. 1993).

41. TEX. HEALTH & SAFETY CODE ANN. § 242.133 (Vernon 1992).

42. TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.05 (Vernon 1987). This statute prohibits discrimination in employment on the basis of race, color, disability, religion, national origin, age, or sex. *Id.* § 5.01. The 1993 legislative session enacted a number of revisions to the statute, conforming to the provisions of the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101, 12108 (West Supp. 1993), and the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (Supp. III 1991), most notably incorporating the caps on damages. See generally Act of May 14, 1993, 73d Leg., R.S., ch. 276, 1993 Tex. Sess. Law Serv. 1287 (Vernon).

43. TEX. HEALTH & SAFETY CODE ANN. § 502.013 (Vernon 1992).

44. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993).

45. TEX. REV. CIV. STAT. ANN. art. 5207c (Vernon Supp. 1993).

mons,⁴⁶ military service,⁴⁷ or court-ordered child support payment.⁴⁸ An employer cannot discharge an employee who attends a political convention,⁴⁹ coerce an employee to vote a certain way,⁵⁰ or refuse to permit an employee time off to vote.⁵¹ Nor can an employer require union membership,⁵² require testing for AIDS as a condition of employment,⁵³ or coerce an employee to buy certain merchandise.⁵⁴ The most recently enacted legislation prohibits discharge of an employee who participates in an emergency evacuation.⁵⁵

Even when considered simultaneously, the statutory and common-law exceptions to the employment-at-will doctrine do not swallow the rule. Instead, they constitute random, narrow efforts affording employees few protections while requiring employers to defend their decisions on a costly, piecemeal basis.⁵⁶ The confused status of the law on employment contracts, the potential expansion of tort claims, and the incremental accumulation of statutes suggest that comprehensive legislation designed to coordinate and systematize the law of discharge would benefit both employees and employers. During the last legislative session, one bill was proposed to abrogate the employment-at-will doctrine under very narrow circumstances.⁵⁷ Although the bill did not leave committee, it is reasonable to expect that future proposals will draw heavily from the features of a Montana statute enacted a few years ago,⁵⁸ as well as from the Model Employment Termination Act.⁵⁹ While these

46. TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (Vernon 1986).

47. TEX. GOV'T CODE ANN. § 431.005 (Vernon 1990).

48. TEX. FAM. CODE ANN. § 14.43(m) (Vernon Supp. 1993).

49. TEX. ELEC. CODE ANN. § 161.007 (Vernon 1986).

50. TEX. ELEC. CODE ANN. § 276.001 (Vernon 1986).

51. TEX. ELEC. CODE ANN. § 276.004 (Vernon 1986).

52. TEX. REV. CIV. STAT. ANN. art. 5207a(2) (Vernon 1987).

53. TEX. HEALTH & SAFETY CODE ANN. § 81.102 (Vernon 1992).

54. TEX. REV. CIV. STAT. ANN. art. 5196g (Vernon 1987).

55. Act of May 26, 1993, 73d Leg., R.S., ch. 755, 1993 Tex. Sess. Law Serv. 2954 (Vernon).

56. Combined legal fees for both sides average more than amounts of recovery. See Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 141 n.35 (1990) (noting that average recovery by plaintiff was \$188,520 and average legal fees totaled \$209,591).

57. An employer could not terminate an employee continuously employed by that employer for at least ten years except for cause. Tex. H.B. 1328, 73d Leg., R.S. (1993).

58. MONT. CODE ANN. §§ 39-2-901 to -914 (1993).

59. MODEL UNIF. EMPLOYMENT TERMINATION ACT §§ 1-5 (1991).

provisions share a common effort to balance the interests of employees and employers, they differ in several important ways.

The Montana statute protects nonprobationary employees discharged for refusing to violate or reporting a violation of public policy,⁶⁰ although the statute does not define "probation." Public policy is defined as a constitutional provision, statute, or administrative rule concerning public health, safety, or welfare.⁶¹ An employer also violates the statute by ignoring the provisions of its own written policy manual, or by lacking good cause for discharging an employee.⁶² The good cause standard, as articulated in the statute, is based broadly on "job-relatedness" and "legitimate business reasons," but provides no examples of those terms beyond the employee's failure to perform job duties or disruption of the employer's operation.⁶³ Damages may be calculated for no more than four years' worth of wages and fringe benefits from the date of discharge, less any amount the employee earned or could have earned in the interim.⁶⁴ Apart from a limited provision permitting punitive damages for certain discharges based on public policy, the Montana statute preempts all other tort damages⁶⁵ and contract remedies⁶⁶ and does not apply to collective bargaining agreements or written employment contracts for a specific term.⁶⁷

The Model Employment Termination Act differs from the Montana statute in several respects. Unlike the Montana law, META defines covered employers and employees.⁶⁸ The Model Act's good cause definition is far more precise in its description, if not broader in its effect.⁶⁹ META eliminates all common-law claims

60. MONT. CODE ANN. § 39-2-904(1) (1993).

61. *Id.* § 39-2-903(7).

62. *Id.* § 39-2-904(3).

63. *Id.* § 39-2-903(5).

64. MONT. CODE ANN. § 39-2-905(1) (1993). A recent amendment requires a deduction from interim earnings for reasonable expenses involved in searching for, obtaining, and relocating to new employment. 1993 MONT. LAWS ch. 442 (to be codified at MONT. CODE ANN. § 39-2-905(1)).

65. MONT. CODE ANN. § 39-2-905(3) (1993).

66. *Id.* § 39-2-913.

67. *Id.* § 39-2-912(2).

68. MODEL UNIF. EMPLOYMENT TERMINATION ACT § 1(1)-(2) (1991).

69. *Id.* § 1(4). Good cause is defined as follows:

(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct (on the job or otherwise), job perform-

and damages.⁷⁰ Recovery for lost wages and fringe benefits may be awarded for no more than three years' worth of wages, reduced by potential earnings and benefits accrued elsewhere.⁷¹ Although META, like the Montana statute, exempts collective bargaining agreements and written contracts for a specific term,⁷² it affords the employer and employee more flexibility to negotiate terms for specific business-related performance standards.⁷³ Most significantly, an employer and employee may mutually waive the good cause requirement by written agreement that provides severance pay equal to no less than one month's pay, up to a maximum of thirty months' wages at the employee's pay rate in effect immediately prior to termination.⁷⁴ Such an agreement constitutes a waiver for both parties of the right to a civil trial.⁷⁵

Enacting a Texas wrongful discharge statute, based on the better defined and more flexible Model Act, merits serious consideration, because the changes in the fluctuating state of employment law will be more controlled through the legislative process.⁷⁶ The Model Act's broad definition of good cause discharge allows a business to maintain reasonable control of its workforce within a predictable framework. Should an employer voluntarily choose to waive the statute, META's severance clause provisions provide a simple means to calculate the cost of that option. While the severance clause option seemingly constitutes an increased cost of doing business, to the contrary, eliminating common-law causes of action and damages reduces the risk of costly adjudication.⁷⁷

ance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

Id.

70. *Id.* § 2(b).

71. *Id.* § 7(b)(3).

72. MODEL UNIF. EMPLOYMENT TERMINATION ACT § 2(d) (1991).

73. *Id.* § 4(b).

74. *Id.* § 4(c).

75. *Id.*

76. Philip J. Pfeiffer & W. Wendell Hall, *Employment and Labor Law: Annual Survey of Texas Law*, 44 Sw. L.J. 81, 138 (1990).

77. See Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 141 (1990) (approving deference to legislation rather than common-law

Employees similarly benefit from a wrongful discharge statute's recognition of a good cause discharge standard, amounting to the philosophical rejection of the employment-at-will doctrine. Such an abstract change, however, means little to the typical discharged employee. More important is the enforcement mechanism in the form of severance pay or lost wages. In that respect, META represents a tradeoff of the common-law causes of action and their attendant damage awards, now available as a practical matter to a very few employees, for smaller, predictable awards.⁷⁸ Ultimately, then, a Texas wrongful discharge statute based on META's terms could provide a workable and systematic improvement over the current haphazard, yet expanding, scope of wrongful discharge law.

choice). A study of wrongful termination cases indicates that defense legal fees and expenses averaged about \$80,000 per case, the average net payment to successful plaintiffs was \$188,520, and average combined legal costs to both sides was over \$200,000. *Id.* at 141 n.35.

78. The typical plaintiff recovers roughly one-half year's worth of severance pay. *Id.*