Author: Joseph R. Grodin
Source: Labor Lawyer
Citation: 6 Lab. Law. 97 (1990).
Title: *Past, Present and Future in Wrongful Termination Law*

Originally published in LABOR LAWYER. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
Past, Present, and Future in Wrongful Termination Law

Joseph R. Grodin*

Hastings College of Law
University of California
San Francisco, California

I. Introduction

Before discussing recent developments in wrongful termination law, I hope you will tolerate a bit of personal historical musing by someone who began his legal career thirty-five years ago when being a labor lawyer meant understanding such things as the fine distinction the NLRB and the courts made between a rule prohibiting union solicitation during working time and working hours, and when a federal court could say without fear of contradiction that an employer could dismiss an employee for any reason or no reason at all, so long as the reason wasn’t union membership or activity. (Remember the *E.G. Budd* case that’s in all the labor law casebooks?) I have been privileged, since then, to witness the growth and variations in the labor and employment field from a variety of perspectives—as an advocate, teacher, arbitrator, administrative agency member, and state court judge. I have observed at close range the gradual but ineluctable transition of our legal system away from the characteristically American model in which the role of the state is simply to establish a structure within which collective bargaining may occur, toward the characteristically European model, in which the role of the state is to provide certain basic protections to employees; in short, from process to values.

Nostalgia aside, I don’t know that these changes are cause for either lamentation or rejoicing. I doubt that they move us perceptibly closer to either perdition or utopia. They need to be viewed with perspective, as reflections of fundamental changes in our social structure, and in our expectations regarding the relationship between a worker and his job. As a young union lawyer, I dreamed that one day all workers would be represented by democratic and effective unions of their own choosing, and I grieve over the loss of that dream. At the same time, I welcome what appears to be a de-

---

*This paper is based on a presentation made on August 9, 1989, to the ABA Section of Labor and Employment Law.

veloping national consensus, as evidenced by the declaration in the Clayton Act that work is not a commodity, and has a meaning beyond the antitrust laws—that workers have certain interests—for example in personal autonomy, in physical integrity, in freedom of expression, in fair and equal treatment, and in job security—that deserve direct societal protection through law.

There is a certain similarity between the current legal situation with respect to wrongful termination and the legal situation of the 1950s with respect to the relationship between workers and their unions regarding union discipline. I remember sitting in the office of my firm's senior partner, Mathew Tobriner, while he was on the phone with David Dubinsky of the Garment Workers Union trying to persuade him that the union could not get away, in California, with expelling members simply because they had the bad judgment to oppose incumbent officers in a union election. Dubinsky was of the old school—what a union did with or to its members was of no concern of the state. But state courts saw the matter differently and, invoking a variety of common-law techniques, including both contract law and public policy, developed a rather broad range of protection for union members against arbitrary or unjust discipline. The legislatures were soon to follow the judicial lead. The analogy is far from perfect, I grant you, and it may be more atmospheric than analytical, but then atmosphere is part of reality, too.

My point is that the atmosphere has changed, partly as a result of legal changes—there is a certain synergism here—and the notion of the employer's absolute right to hire and fire at will is simply no longer a part of it, no matter how we analyze the legal developments that have occurred. Expectations have been generated, and they are not likely to go away. They are likely, on the contrary, to find their way in one manner or another into the laws of the land. Laws and social expectations are two different things, to be sure, but if history is any guide they tend to coalesce. The question is when, and how.

II. Recent Developments

Courts, during this past year, have for the most part continued the themes which began to be developed a decade or so ago. The Utah, New Mexico, South Dakota, Alaska, Massachusetts, Iowa, New Jersey, and Indiana courts, with varying degrees of enthusi-

asm, have embraced or reconfirmed the proposition that implied or express commitments for continued employment may give rise to contractual limitations upon an employer’s right to terminate employees. And, courts in Oklahoma, South Dakota, Wyoming, and Utah have accepted at least some scope for a public policy exception to the at-will principle. The covenant of good faith and fair dealing, on the other hand, has not played well, at least in the Great Plains: courts in South Dakota, Oklahoma, and Nebraska have said that it simply has no place in a contract of employment.

Of the state court decisions in the wrongful termination field this last year, there are several that deserve special treatment. The first is the California Supreme Court’s decision in Foley v. Interactive Data. Foley has been the subject of so many seminars and commentators that I suspect no extended description of the case is required. Foley, you will recall, alleged he had been fired for reporting to a manager of the company that his newly hired supervisor was under investigation by the FBI for embezzlement on another job—a report, incidentally, which turned out to be quite true; the man was subsequently indicted. Foley claimed his dismissal was unlawful for the usual reasons: it violated an implied promise by his employer of continued employment; it violated the covenant of good faith and fair dealing; and it violated public policy. And, as the case was framed by the supreme court, each of these claims posed an issue requiring decision.

The issue pertaining to Foley’s first theory was an easy one for the court: whether Foley’s contract claim was barred by the statute of frauds. The court of appeals had held it was; the supreme court had no difficulty deciding on the basis of prior opinions regarding contracts capable of performance within a year that the court of appeals was wrong. The significance of this portion of the court’s opinion lay in its express adoption of the principle, theretofore existing only in the opinions of lower courts, that an employer’s dismissal right could be limited by an implied promise, and that whether such a promise existed was a question for the jury to determine on

the basis of the "entire relationship of the parties,"\textsuperscript{18} including the employer's personnel policies or practices, the employee's longevity of service, actions or communications by the employer reflecting assurances or communications of continued employment, and the practices of the industry in which the employee is engaged.\textsuperscript{19} If a promise if found, no independent consideration is required to support it. The Foley court's statement of the contractual basis for finding continuity of employment is probably the most comprehensive statement by a state supreme court to date.

The issue pertaining to Foley's breach of covenant theory—whether breach of the covenant of good faith and fair dealing is a tort in the employment context, as it is (in California) in the insurance context—was more troublesome. The real issue, of course, is not label but remedy, and the adequacy of contract remedies both in regard to the need to compensate the worker for his loss and to deter the employer from violation of social norms. Implicated in that issue also is whether it is possible to devise principled criteria for distinguishing between what constitutes a breach of the covenant and a mere breach of contract. The majority opinion recognized the possibility that traditional contract remedies might be inadequate in the employment arena, but nevertheless considered that a breach of an employment contract does not place the employee in the same economic dilemma that an insured faces when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits; unlike the insured, the court said, the employee can always look for another job. Moreover, the court reasoned, an employer generally has economic incentives to act in good faith, which an insurer does not. Finally, the difficulty of identifying a category of cases deserving of the tort remedy suggests the age-old answer: the matter should be left to the legislative branch.\textsuperscript{20}

Although an evaluation of the court's reasoning is beyond the scope of this article, two observations come to mind. The first has to do with the scope of contract remedies. The majority opinion in Foley has created some speculation in that regard by expressly declining to state what remedies are available for breach of an employee contract. An interesting dissent by Justice Broussard has added to that speculation by suggesting that they might include compensation for pain and suffering, as is the case with certain contracts in which such damages are said to be within the contem-
polation of the contracting parties. That suggestion is already a part of litigation strategy on the part of California employment law attorneys, we may be sure.

My other observation is this: the court's opinion in Foley accepts the existence of the covenant of good faith and fair dealing in the employment context, contrary to the position of some state courts I have mentioned; it simply rejects the notion that breach of the covenant is a tort. However one evaluates that rejection, the effect may well be to expand the potential scope of the covenant itself. This is so because the covenant no longer needs to be defined in such a way as to provide a principled basis for distinguishing between tort remedies and contract remedies; the court in Foley "liberated" the covenant from that constraint. The question now is, what is the scope of the covenant? Does it mean, for example, that an employer must act in "good faith" even when the relationship is one otherwise terminable at will? And what about "fair dealing"? Does that mean, for example, that an employee may be entitled to some notice of employer dissatisfaction, or the right to respond, even in an at-will relationship? These questions, I would like to emphasize, are not addressed by any of the opinions in Foley: they are simply raised, in my view, by the logic of the conclusion.

Finally, there was Foley's public policy claim, to which all but one member of the court gave rather short shrift. To fire Foley for allegedly reporting that his supervisor was under investigation by the FBI posed no violation of public policy, the majority held, because if Foley's employer wanted to shut his eyes to such information that was his business; there is nothing unlawful, after all, in retaining as a supervisor someone suspected of embezzlement on another job.

Apart from the fact that it may have come as some surprise to Foley to learn that his employer did not want to hear about matters that might affect his business—I suppose that problem might be dealt with under the covenant—the court's treatment of the issue leaves open some interesting issues. Would the situation be different

21. Id. at 410. Justice Durham's opinion for the Utah Supreme Court in Berube, cited in note 2, raises a similar enticing possibility by emphasizing, in its instructions on remand to the trial court, that consequential damages for breach of contract include damages "reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." Berube at 1050 (citing Beck v. Farmers Ins. Exch., 701 P.2d at 801) (emphasis added).

if Foley were reporting unlawful activity by the supervisor in the course of his current employment? The Nevada Supreme Court recently said no to that question: if an employee in a gambling establishment wants to report unlawful activity to the state gaming commission, that’s fine, and he will be protected in doing so, but if the employer wants to have a policy that tells him not to report the unlawful activity internally, within the company, that’s also fine, and the employee can be fired if he tells the manager he saw the supervisor cheating for the house in poker, since that is a private rather than a public communication. It is unclear from the opinion what illegality the supervisor was accused of, but if he was seen cheating the public (as distinguished from cheating the house) I would think the public has some interest in securing a workplace atmosphere in which a worker feels free to report such activity to his own employer. I must say I find that analysis a bit troubling.

But there is a broader issue here: do we want courts to say that the only time an employer’s conduct in terminating an employee is offensive to public policy is when the public suffers some harm independent of the worker? Or do we want them to say—as courts did say in the case of the union-member relationship—that on the basis of identifiable manifestations of policy, such as constitutions, statutes, or prior decisions, the public has an interest in certain aspects of the relationship itself, sufficient to support a limitation on what otherwise might be the absolute assertion of authority over the worker?

The other case I want to discuss casts some interesting light on that question. It is a decision by the Alaska Supreme Court in a case called Luedtke v. Nabors Alaska Drilling, Inc. The employer, Nabors, was engaged in operating drilling rigs on Alaska’s north slope. It fired two of its employees, Clarence and Paul Luedtke, when they refused to submit to urinalysis screening for drug use. The Luedtkes brought suit claiming, among other things, that their terminations violated the privacy provision of the Alaska constitution.

Alaska’s constitution, like those of a number of states, contains an explicit protection of the right of privacy. Alaska’s provision reads: “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.” The employer argued that this provision operated directly as a limitation only on state action, not on private conduct, and the court agreed. So far not terribly interesting. But the court went on to consider whether plaintiff’s termination nevertheless violated public policy.

---

In deciding that issue the court looked back to the constitutional provision, as well as various statutes protective of privacy interests to conclude that there was "sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude."  

This reasoning turned out not to help the Luedtke, since the court concluded on the facts of the case that the employer's insistence on urinalysis testing was justified. However, the principle is an important one nonetheless. It is not the first time that a court has looked to constitutional provisions to find public policy in the private employment context; six years earlier the federal First Circuit in the Novosel case used similar reasoning to derive from the constitutions of the United States and the State of Pennsylvania a public policy that prohibited an employer from firing an employee who refused to participate in the employer's lobbying efforts. Much earlier, in pre-Landrum-Griffin days, state courts looked to constitutional principles to identify the rights of union members. What the parameters might be of that reasoning remains to be seen. In determining the scope of employee privacy rights, or free speech rights, for example, will courts apply standards applicable to public employees under federal and state constitutions? And what rights other than privacy and speech might be implicated by this analysis? How about due process of law? Or the privilege against self-incrimination? The Supreme Court of Alaska appears to be on the frontier in more ways than one.

III. The Future

All of this is good stuff, surely, this case-by-case working out of a new area through the common-law process—the kind of stuff that would have led Roger Traynor to his characteristic observation "ain't law wonderful!" the kind of stuff that law school exams are made of, and needless to say the kind of stuff that billable hours are made of. But if we are of the view that there is more to life than exams and billable hours or the parochial interests of our clients, we have to ask ourselves whether it isn't time to ask the legislatures to get into the act.

By asking that question I don't mean to suggest any impropriety in what courts have done or are doing by way of protecting employees against arbitrary dismissal; on the contrary, if courts are to be criticized at all it is for delaying so long in bringing to bear on the employment relationship doctrines that had been developed in other

26. Luedtke, 768 P.2d at 1133.
areas. But there are a number of reasons why it seems to me the time is now ripe for legislation.

First, existing doctrine and procedures tend to provide meaningful protection to a relatively small group of employees whose pay and status make litigation worthwhile. Joe Boilermaker is not your typical plaintiff.

Second, the area cries out for distinctions and fine tunings that are not within the institutional competence of courts—the exclusion of very small employers, for example, or the establishment of remedial schemes and formulae that do not fall readily within existing categories of contract or tort.

Third, in fairness to employers, litigation with jury trials is surely not the optimum means of evaluating employer decisions against criteria of good cause, or whatever the appropriate criteria might be. If we expect to apply the kind of judgment that a labor arbitrator brings to bear in the collective bargaining arena, then we need someone like an arbitrator to make that judgment.

Finally, despite the very substantial common-law developments that have occurred, an employer intent upon preserving the unilateral authority he possessed before those developments, can probably come close by following carefully the advice of a knowledgeable attorney. If what we want is blanket minimal coverage for all employees of employers over a certain size, legislation is the only way we are likely to get it.

Proponents of legislation confront a number of issues: What should the coverage be as to size or kind of employer? Should workers covered by a collective bargaining agreement be in or out? How should the protections for employees be described—in terms of just cause, or something else? Should the description vary from one category of employee to another? What should be the mode of enforcement: courts, administrative agencies, arbitrators? To what extent should the statute preempt other statutory and nonstatutory protections that employees may now have? What remedies should be available? And, how are costs and attorney fees to be allocated?

All of these are difficult questions, as a matter of public policy and perhaps even more as a matter of practical politics, for in this area as in others what is ideal may not be attainable. So far the only

28. See, e.g., Bankey v. Storer Broadcasting Co., 432 Mich. 438, 443 N.W.2d 112 (1989) (employer, upon reasonable notice to employees, may modify employee handbook to provide for employment-at-will); McClain v. Great American Insurance Co., 256 Cal. Rptr. 863 (1989) (at-will disclaimer on job application form did not preclude parol evidence to show just-cause contract based on employer promises); Batton v. Menard, 438 N.W.2d 116 (Minn. 1989) (jury could find explicit at-will contract was modified by employee handbook); Rodies v. Max Factor & Co., 256 Cal. Rptr. 1 (1989) (written contract for at-will employment may have been modified by oral promise 10 years later, supported by new consideration).
legislature that has reached the point of actually adopting a statute is Montana's; and that statute was in a state of constitutional limbo until the state supreme court recently rescued it. 29 Many bills are pending throughout the country, however, and of course, we have the ongoing work of the National Conference of Commissioners on Uniform State Laws and its committee's proposed Employment Termination Act.

It is not possible to explore here all aspects of pending proposals. I would like to touch on one feature of the National Conference draft that also appears in some of the bills that have been introduced, and which appears to have originated in recommendations of the California State Bar Section on Labor and Employment Law under the guidance of Bill Gould at Stanford: that is the proposal that enforcement of the just cause standard be assigned to arbitrators, rather than to judges, juries, or administrative tribunals.

The idea is an intriguing one, and in my view contains much merit. Surely there is a great deal to be said for any procedure that will resolve disputes more expeditiously, with less cost, and with less burden to the litigation system. Of at least equal significance, we have a substantial reservoir of experience and expertise in the arbitral determination of just cause under collective bargaining agreements, and that is a system that appears to have worked well, on the whole, for everyone concerned.

Transplantation of the arbitral system from a voluntary context to a mandatory one does pose a few problems, however, which need to be confronted. Collective bargaining provisions for arbitration are the product of mutual assent. If a wrongful termination statute merely authorizes arbitration upon mutual assents, there is no difference in that respect. But if arbitration is to be mandatory upon both parties, or upon one of them at the option of the other, then it is possible that a state constitutional right-to-jury-trial issue could arise. How that issue would be resolved would depend upon the law of the particular state.

Leaving that question aside, there is the issue of finality of the arbitral award. Most of the proposals for statutory arbitration of wrongful termination claims regard the relative finality of awards as one of the most attractive features of the arbitration model, and seek to limit the grounds for judicial review to those that exist under Steelworker Trilogy principles or the Uniform Arbitration Act. But we are not talking here about the private resolution of private disputes; we are talking about the application of statutory standards

founded, presumably, in substantial public concern. As the National Conference draft recognizes, some states have constitutional requirements pertaining to the scope of review of decisions by administrative agencies, and these might well apply to decisions by arbitrators who substitute for administrative agencies, but leaving the constitutional issue aside, do we want to have a statutory scheme that establishes criteria governing termination from employment but provides no means of assuring the uniform application of those criteria in accordance with statutory policy, or even of developing authoritative guidelines as to their application? If an arbitrator under one collective bargaining agreement says that random drug testing is acceptable and another, operating under a different agreement, says it is not, the parties affected can live with that. They are free to negotiate a different agreement, or a different arbitrator, and produce a different result. If, on occasion, an arbitrator under a collective bargaining agreement applies and misconstrues a statute, we can probably live with that as well; presumably arbitrators will at least attempt in good faith to follow the guidance of the court. But do we really want to have a system in which some arbitrators interpret a statutory just cause standard to preclude random drug testing while others do not, with no possibility of judicial guidance and no means of reconciling the disparity in accordance with public policy? I am not arguing here against arbitration, or for full-scale judicial review; I am only suggesting we may want to build in some form of limited review for gross errors of law, perhaps patterned after the Federal Mediation and Conciliation Service model, or the ERISA pension dispute model, to provide ongoing interpretation of the statute.

There is one final question arising out of transplantation which I want to mention, and that is the question of cost: who pays for the arbitrator? Under a collective bargaining system the cost is typically born equally by the parties. Surely that is not an acceptable solution for a wrongful termination statute. Nowhere else in the legal system do we ask a party seeking to vindicate his rights to pay the cost of the public tribunal established to adjudicate them, and to identify terminated workers for that singular honor would be a peculiar irony. As a society, we ought to be able to do better than that.

But these are problems that can be overcome, like the other problems of principle and politics inherent in the drafting of such a controversial piece of legislation. I suggest that those of us with some experience in this field have a responsibility to our profession and the public to assist in that process. The time has been ripe for quite a while now, and the going won’t get any easier.