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Interaction between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers

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THE INTERACTION BETWEEN THE EMPLOYMENT-AT-WILL DOCTRINE AND EMPLOYER-EMPLOYEE AGREEMENTS TO ARBITRATE STATUTORY FAIR EMPLOYMENT PRACTICES CLAIMS: DIFFICULT CHOICES FOR AT-WILL EMPLOYERS

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In 1991, the Supreme Court signalled a change in its attitude toward the enforcement of agreements between employers and individual employees to arbitrate statutory fair employment practice claims. Although Gilmer v. Interstate Johnson/Lane Corp. approved the arbitration of claims arising under just one of the several existing fair employment practice statutes, the rationale and result of Gilmer are likely to apply to claims brought under other fair employment practice statutes. This Article explores the potential impact of the post-Gilmer proliferation of these employer-employee agreements on the continued viability of the employment-at-will doctrine.

Combining existing limitations on the employment-at-will doctrine with employer-employee agreements to arbitrate statutory fair employment practice claims will produce results on two distinct levels. First, the authors identify those effects resulting directly from the interaction of the at-will doctrine with agreements to arbitrate—those flowing from the implied covenant of good faith doctrine, the implied-in-

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fact/enforceable promises doctrine, and the public policy exception to the employment-at-will doctrine.

The authors foresee a second level of interaction that may ultimately have a profound impact on the discretion of at-will employers. They posit that when arbitration of statutory fair employment practice claims becomes commonplace, employers will be obligated to arbitrate virtually all challenged discharges of traditional protected-group members under an emergent de facto just cause standard, a standard that will greatly constrain the at-will employer's right to discharge protected group members for reasons other than those proscribed by statute. Moreover, employers may also be compelled to arbitrate the discharges of nonprotected-group members. Thus, by agreeing to arbitrate employee statutory fair employment practice claims, employers may inadvertently limit or surrender their remaining discretion under the employment-at-will doctrine.

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I. INTRODUCTION

American employers are unique. Among the major developed countries, only the United States permits private sector nonunionized employers, not otherwise contractually constrained, to discharge employees for virtually any reason or for no reason at all.¹ Instead

1. The United States is the only major industrialized democracy in which employees do not enjoy some form of statutory workplace due process guarantee protecting them from unfair or arbitrary termination of their employment. See Benjamin Aaron, *Settlement of Disputes Over Rights*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* 260, 272-77 (R. Blanpain ed., 1982) (noting that "in the USA, unorganized workers have

of a single statute that prohibits unjust dismissals, American employers face a patchwork of statutory bars on certain types of conduct deemed unacceptable because it discriminates against various insular groups on the basis of race, color, national origin, gender, religious beliefs and practices, disability, age, or other status.²

The employment-at-will doctrine (EAWD), which provides the rationale for giving employers broad discretion to discharge employees, has served as the touchstone for the legal dimension of the American employer-employee relationship for some one hundred years. The thesis of this Article is that recent changes in the law of commercial arbitration, and the concomitant move toward the increased use of arbitration to resolve employer-employee disputes, may, over time, render hollow this once impregnable and indispensable doctrine. This thesis springs from two potentially significant, but previously unexplored, dimensions of the intersection between fair

less constitutional and statutory protection against economic risks and unfair treatment than [do] workers in most industrialized nations"); William B. Gould IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28, 29 (1988) (noting that while other industrialized countries have unfair dismissal legislation to provide a measure of job security to employees, dismissal of workers for principally disciplinary reasons remains a contentious issue in American industrial relations); Karen Paull, *Employment Termination Reform: What Should a Statute Require Before Termination?—Lessons from the French, British, and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619, 621 & n.7 (1991) (citing William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 408-09 (1987) (stating that the United States is the only major industrialized nation without legislation limiting employer discretion in dismissals)); Clyde W. Summers, *Individual Protection Against Unjust Discharge: Time for a Statute*, 62 VA. L. REV. 481, 483-84, 508-19 (1976) (comparing American workers' legal protections against unjust demands to remedies available in four Western European nations); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1948 n.112 (1983) (noting that "the United States is practically the only industrialized nation in the world that allows at will dismissals," whereas sixty-five other nations protect employees with a just cause standard). See generally WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION RIGHTS AND REMEDIES*, 252-55 (1985) (identifying judicial outrage at the injustice engendered by the employment-at-will doctrine as contributing to the development of a public policy exception to that doctrine).

2. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified as amended in scattered sections of 42 U.S.C.) makes it illegal for an employer to discriminate on the basis of a person's race, color, national origin, sex or religion. 42 U.S.C. § 2000e-2 (1988). The Age Discrimination in Employment Act of 1967 [ADEA], Pub. L. No. 90-202, 81 Stat. 607 (1967) (codified as amended in scattered sections of 29 U.S.C.), protects persons over 40 years of age against employment discrimination because of their age. 29 U.S.C. § 631 (1988). The Americans With Disabilities Act [ADA], Pub. L. No. 101-336, 104 Stat. 331 (1990) (codified as amended in scattered sections of 42 U.S.C.), prohibits discrimination against "qualified individual[s] with a disability." 42 U.S.C. § 12112(a) (1988).

employment practices (FEP) law and the EAWD as it arises within the context of employer-employee agreements to arbitrate employee statutory FEP claims.

The scholarly literature and management press are replete with references to employers' concerns about the ubiquitous threat of lawsuits filed by employees who believe their discharges, demotions, lack of career progress, or other unfavorable treatment are the result of illegal employment discrimination.³ The Civil Rights Act of 1991⁴ heightened these concerns by sanctioning the recovery of compensatory and punitive damages and guaranteeing the right to a jury trial for plaintiffs who claim intentional acts of employment discrimination.⁵

3. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 110 (1994) [hereinafter DUNLOP COMMISSION] ("During the two decades from 1971 to 1991, the annual rate of employee suits against employers was five times the number of twenty years earlier—and this was before the Americans With Disabilities Act of 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993 had come into effect."); Stuart H. Bompey & John D. Giansello, *The Civil Rights Act of 1991: An Analysis*, in THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION 87, 134 (PLI Litig. & Admin. Practice Course Handbook Series No. 429, 1992) ("[E]mployers face an indeterminate risk that pending litigation may become more complicated and expensive than originally anticipated and may involve added risks of damages and liability earlier ruled out."); Donald C. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 486 (1992) ("[T]he Rehnquist majority [in *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642] expressed its concern that a liberal interpretation of Title VII would lead employers to adopt racial quotas because of their fear of being haled into court to defend business practices in expensive litigation."); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 308 (1991) ("Employers are concerned that the addition of compensatory and/or punitive damages to Title VII would result in dramatic increases in both the volume of litigation and the size of awards."); see also JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 4 (1988) (arguing that the judicially created changes could, at the least, increase the volume of wrongful termination litigation); Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV., May-June 1994, at 120-30 (evaluating some of the successes and failures of the alternative dispute resolution process); David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 853 (1992) ("One widely anticipated consequence of the Civil Rights Act of 1991 is an increase in employment discrimination litigation under federal law."); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (arguing that among the changes in employment discrimination litigation is a dramatic increase in volume and a shift toward challenging discrimination in discharge rather than hiring).

4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

5. With respect to damages, see 42 U.S.C. §§ 1981a(a), (b) (Supp. IV 1992) (amending 42 U.S.C. § 1981 (1988)). Regarding the jury trial guarantee, see 42 U.S.C. §

Anxiety over the costs, complexity, and consternation associated with traditional civil litigation⁶ has propelled employers to search for alternatives to litigation to achieve prompt, cost-effective, and accurate resolutions of employees' statutory FEP claims.⁷ The use of alternative dispute resolution (ADR) methods, especially binding arbitration, significantly accelerated after the 1991 opinion of the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,⁸ which expressly approved employer-employee agreements to arbitrate statutory FEP claims.

Most commentary responding to *Gilmer* has concerned the increased use of arbitration to resolve statutory FEP claims.⁹ This

1981a(c) (Supp. IV 1992) (amending 42 U.S.C. § 1981 (1988)). Both the sanctions of compensatory damages and punitive damages, as well as the jury trial guarantee, are limited to plaintiffs in "disparate treatment" cases, wherein the employer is alleged to have engaged in an intentional act of discrimination against an individual person or persons. See also *infra* notes 229-30 and accompanying text.

6. See DUNLOP COMMISSION, *supra* note 3, at 108. The Commission observed: Handling and resolving disputes under [traditional] law enforcement vehicles requires considerable financial expenditures from employers, employees, and the public. A conservative estimate is that for every dollar transferred in litigation to a deserving claimant, another dollar must be expended on attorney fees and other costs of handling both meritorious and nonmeritorious claims under the legal program. Employers regularly spend much more than these direct costs of litigation to develop new personnel practices, operational procedures and equipment, and other measures to comply with the regulations.

Id. (citation omitted).

7. See Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution*, in C879 A.L.I.-A.B.A. COURSE OF STUDY: ARBITRATION, MEDIATION, AND OTHER ADR METHODS 49, 87-91 (1993) (discussing the growing acceptance of alternative dispute resolution for statutory claims); Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, in C874 A.L.I.-A.B.A. COURSE OF STUDY: ADVANCED EMPLOYMENT LAW AND LITIGATION 531, 534-35 (1993); Robert A. Shearer, *The Impact of Employment Arbitration Agreements on Sex Discrimination Claims: The Trend Toward Non-Judicial Resolution*, 18 EMPLOYEE REL. L.J. 479, 485-87 (1992-1993); Evan J. Spelfogel, *New Trends in the Arbitration of Employment Disputes*, ARB. J., Mar. 1993, at 6-7; Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, ARB. J., Dec. 1992, at 61.

8. 500 U.S. 20 (1991).

9. See generally DOUGLAS S. MCDOWELL, EMPLOYMENT POLICY FOUNDATION, *ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES: OPTIONS AND GUIDELINES TO MEET YOUR COMPANY'S NEEDS* (1993); Garry G. Mathiason & Nancy L. Ober, *Preparing the Workplace for the Twenty-First Century: Resolving Employment Discrimination Claims Through Arbitration Agreements and Enforcing Private Settlement Agreements*, in C780 A.L.I.-A.B.A. COURSE OF STUDY: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 909, 919-34 (1993) (urging employers to consult legal counsel before implementing an arbitration agreement and recommending use of arbitration procedures promulgated by nationally-recognized organizations); Jay W. Waks & Linda M. Gadsby, *Employment Rights and Discrimination--Gilmer: Where We Are and Where We Are Going*, in SECURITIES ARBITRATION 1993: PRODUCTS, PROC-

Article seeks to move the dialogue beyond such threshold issues. It addresses a critical question, not yet examined in the literature, that will become apparent only when the arbitration of statutory FEP claims becomes widespread among nonunionized employers: Can at-will employers secure the purported benefits of arbitrating statutory fair employment practices claims without inadvertently limiting—or completely surrendering—the discretion they presently enjoy under the EAWD? The answer lies in an evaluation of both the specific and broader effects resulting from the interaction between the EAWD and employer-employee agreements to arbitrate statutory FEP claims, as will be described immediately below and analyzed in later portions of this article.¹⁰

As a foundation for the analysis, this Article first surveys the changing law of employment arbitration and considers binding arbitration as an appropriate device for adjudicating statutory FEP claims.¹¹ Next, this Article explores the origins and application of the contemporary EAWD, with particular emphasis on the judicially fashioned exceptions to the doctrine.¹² The Article will then detail the specific, obvious effects of the interaction between the modern EAWD and employer-employee agreements to arbitrate statutory FEP claims,¹³ focusing on the interplay between the three primary limitations on the modern EAWD (the implied covenant of good faith, the implied-in-fact contract terms/enforceable promises doctrine,

DURES, AND CAUSES OF ACTION, *passim* (PLI Corp. Law & Practice Course Handbook Series No. 820) (1993) (collecting cases); AMERICAN ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES—A MANUAL ON DRAFTING PROCEDURES, 1993 WL 495884 (1993) (offering the increasing number of employers who would like to introduce alternative dispute resolution assistance in drafting appropriate procedures); Marshall W. Grate, *Binding Arbitration of Statutory Employment Discrimination Claims*, 70 U. DET. MERCY L. REV. 699 (1993) (exploring the *Gilmer* decision as a source of prospects for expanding binding arbitration to include the adjudication of statutorily created rights); Michael G. Holcomb, *The Demise of the FAA's "Contract of Employment" Exception?* *Gilmer v. Interstate/Johnson Lane Corp.*, 1992 J. DISP. RESOL. 213, 224-26 (arguing that the Federal Arbitration Act is expanding to include more and more statutory claims and that *Gilmer* undoubtedly will expand it into employment disputes); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993) (addressing the concerns, policies, and rationale behind the increase in employment arbitration); Frank C. Morris, Jr., *Arbitration After Gilmer*, 38 PRAC. LAW., June 1992, at 71, 72 (reviewing the arbitration process and offering advice on how to handle employment arbitration).

10. See *infra* notes 172-85 and accompanying text.

11. See *infra* part II.

12. See *infra* parts III & IV.

13. See *infra* part V.

and the public policy exception) and employer efforts to formulate and implement a binding arbitration device.

Subsequently, the Article discusses three broader results of the interaction between the EAWD and FEP arbitration.¹⁴ These results, which will be referred to as the "broad interaction effects," are particularly significant because their impact will become apparent only with the widespread use of arbitration as an alternative means for adjudicating employee statutory FEP claims. The Article illustrates how the EAWD/FEP interaction will, first, obligate at-will employers to arbitrate virtually all challenged discharges of members of traditionally protected groups;¹⁵ second, result in the imposition of a *de facto* just cause standard that will greatly constrain the discretion of at-will employers to discharge protected-group members for illegitimate reasons not proscribed by the various FEP statutes;¹⁶ and third, impede the ability of at-will employers to refuse to arbitrate the discharges of nonprotected-group members.¹⁷ The Article concludes with a look at the full scope of the ramifications for at-will employers inherent in the decision to arbitrate statutory FEP claims.¹⁸

II. GILMER AND THE CHANGING LAW OF EMPLOYMENT ARBITRATION

The central question in this inquiry was of little significance until the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁹ Prior to *Gilmer*, the conventional wisdom was that the federal judiciary would never deem arbitration a suitable surrogate for judicial enforcement of statutory bars on employment discrimination. That view was based on *Alexander v. Gardner-Denver Co.*,²⁰ a 1974 decision of the Supreme Court. In *Gardner-Denver*, the Court considered whether a discharged African-American employee, whose claim of illegal racial discrimination had been rejected under the contractual binding arbitration mechanism, agreed to by his employer and representative union,²¹ nevertheless had a right to a trial *de*

14. See *infra* part VI.

15. See *infra* notes 204-23 and accompanying text.

16. See *infra* notes 224-55 and accompanying text.

17. See *infra* notes 256-94 and accompanying text.

18. See *infra* part VII.

19. 500 U.S. 20, 27 (1991).

20. 415 U.S. 36 (1974).

21. *Id.* at 39-42. The arbitrator previously held that the plaintiff employee's discharge was for just cause. *Id.* at 42. The arbitration award made no reference to the employee's

novo under Title VII.²² Answering “yes” to that question,²³ the Supreme Court established a presumption that arbitration is not an appropriate device for the final and binding adjudication of statute-based FEP claims.

In so holding, the Supreme Court observed that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”²⁴ Citing a number of shortcomings in the arbitration process that it believed limited the substantive and procedural rights afforded the claimant employee, the Court characterized arbitration as “comparatively inferior to judicial processes in the protection of Title VII rights.”²⁵ The *Gardner-Denver* presumption that arbitration is an inferior and inappropriate method for resolving Title VII (and other statutory FEP) claims served as the touchstone for discussion of these matters for almost twenty years.

Gilmer may signal a departure from *Gardner-Denver*. Unlike *Gardner-Denver*, *Gilmer* involved an arbitration agreement between an individual employee and his employer.²⁶ Following his termination at age sixty-two, Robert Gilmer filed a charge with the Equal Employment Opportunity Commission alleging that his discharge violated the Age Discrimination in Employment Act (ADEA).²⁷ When Gilmer subsequently brought suit in federal court, the employer filed a motion to compel arbitration.²⁸ The district court, relying on *Gardner-Denver*, denied the employer’s motion.²⁹ In affirming the reversal of the district court by the Fourth Circuit Court of Appeals, the Supreme Court concluded that Gilmer “ha[d]

claim of racial discrimination. *Id.*

22. *Id.* at 45.

23. *Id.* at 59-60.

24. *Id.* at 52.

25. *Id.* at 56-59. Among the shortcomings cited by the Court were the lack of expertise of labor arbitrators with regard to statutory FEP matters, the less rigorous nature of the arbitral fact-finding process, the absence of any requirement that arbitrators articulate the reasons for their awards, and the informality of arbitral proceedings. *Id.*

26. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). The agreement to arbitrate was contained in a New York Stock Exchange registration application the plaintiff employee was required to execute as a condition of his employment. That arbitration agreement did not make specific reference to the arbitration of statutory FEP claims. *Id.* Instead, it effectively obligated Gilmer and Interstate to “arbitrate any dispute, claim or controversy” arising between them.

27. *Id.* at 23-24.

28. *Id.* at 24.

29. *Id.* at 35.

not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act."³⁰

Gilmore offers three reasons to doubt the viability of *Gardner-Denver*. First, the specific result reached in *Gilmer* provides the first reason for doubting the continued viability of the *Gardner-Denver* presumption. The Court expressly held that arbitration of claims of illegal age discrimination is not inconsistent with the ADEA,³¹ and it affirmed a lower court order directing a recalcitrant plaintiff-employee to proceed to final and binding arbitration of his statutory FEP claim.³² More significant, however, is the apparent change in the attitude of the Court regarding the general suitability of arbitration for adjudicating alleged violations of the statutory FEP rights of individual employees under the ADEA, Title VII, the Americans with Disabilities Act (ADA), and the remaining FEP statutes.

Second, the Court's commentary regarding *Gilmer's* challenges to the adequacy of the procedural and substantive dimensions of arbitration for adjudicating statutory FEP claims questions *Gardner-Denver*. The Court stated:

[I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."³³

The Court also observed that: " 'So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the [ADEA] will continue to serve both its remedial and deterrent function[s].' "³⁴

The third, arguably pivotal, dimension of *Gilmer* lies in the Court's rejection of the argument that *Gardner-Denver* and its progeny preclude final and binding arbitration of statutory FEP claims. The key to the Court's refusal to follow the *Gardner-Denver* result is in the distinction it drew between the arbitration of an

30. *Id.*

31. *Id.* at 27.

32. *Id.* at 35.

33. *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

34. *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

individual employee's statutory FEP claim under the terms of a collective bargaining agreement and the arbitration of the same under a separate contract between the employee and the employer, in which the parties agree to arbitrate employment-related disputes.³⁵ The *Gilmer* Court observed:

The Court in *Alexander v. Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."³⁶

Gilmer, therefore, signals a drastic shift in the Court's attitude toward the arbitration of statutory FEP claims.

The explanation for that change in attitude is the Court's tacit selection of the Federal Arbitration Act (FAA),³⁷ rather than national labor policy, as controlling the evaluation and enforcement of individual employer-employee agreements to arbitrate statutory FEP claims. By treating these as commercial arbitration agreements subject to the FAA, rather than to labor policy, the Court freed itself of the need to protect the interests of the individual employee whose representative union has chosen to arbitrate his or her discrimination-based employment claim under the collectively bargained arbitration mechanism. Thus, the Court has begun synthesizing and developing this dimension of employment dispute-resolution law as part of the evolving body of commercial arbitration jurisprudence.

In *Gilmer*, the Supreme Court built upon its 1985 opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,³⁸ its 1987 opinion in *Shearson/American Express, Inc. v. McMahon*,³⁹ and its 1989 opinion in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁴⁰ In those cases, the Court relied on the federal policy favoring

35. *Id.* at 33-35.

36. *Id.* at 34 n.5 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi*, 473 U.S. at 626-27 (citations omitted)).

37. *Id.* at 33; see Federal Arbitration Act, ch. 1, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1988)).

38. 473 U.S. 614 (1985)

39. 482 U.S. 220 (1987)

40. 490 U.S. 477 (1989); *Gilmer*, 500 U.S. at 26-35; see also *supra* notes 33-34, 36 and accompanying text.

arbitration, reflected in the FAA, to find enforceable contractual arbitration provisions in disputes involving alleged violations of the Sherman Act,⁴¹ the Racketeer Influenced and Corrupt Organizations (RICO) Act,⁴² and the 1933 and 1934 Securities Acts.⁴³ This body of case law reversed the Court's long-standing position—dating back to 1953—that arbitration was not an appropriate vehicle for resolving statutory claims because of concerns pertaining to the ability of arbitrators adequately to enforce complex statutory schemes.⁴⁴ The general rule regarding the enforcement of contractual agreements to arbitrate statutory claims that emerges from the *Mitsubishi* line of cases, as re-emphasized in the context of statutory FEP claims in *Gilmer*, is clear. Unless the party attempting to resist arbitration can prove Congress intended under the statute at issue to preclude potential complainants from waiving the judicial forum and agreeing to arbitrate their statutory claims, voluntary *a priori* agreements to that effect will be enforced by the federal courts.⁴⁵

Gilmer is a watershed case. Since it was handed down, four circuit courts of appeals have enforced contractual agreements between individual employees and their employers to compel the arbitration of an employee's Title VII charges.⁴⁶ In addition, the Ninth Circuit held that an employee's claim of an employer violation

41. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993)).

42. P.L. No. 91-45, Title IX, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)).

43. Securities Act of 1934, ch. 38, Title I, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-aa (1988 & Supp. V 1993)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-III (1988 & Supp. V 1993)).

44. See *Wilko v. Swan*, 346 U.S. 427, 434-38 (1953).

45. *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)); see also *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (quoting *McMahon*, 482 U.S. at 227); *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 105-06 (5th Cir. 1990), *vacated*, 500 U.S. 930, *remanded*, 939 F.2d 229 (5th Cir. 1991), *aff'd*, 975 F.2d 1161 (5th Cir. 1992). But see *Borenstein v. Tucker*, 757 F. Supp. 3 (D. Conn. 1991) (holding that an employee could not be bound to a contractual agreement with the employer to arbitrate ADEA and Title VII claims absent a showing that Congress intended to allow employees prospectively to waive their judicial remedies).

46. See *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Mago*, 956 F.2d at 932; *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991). *Alford* is particularly significant since it was the product of the Supreme Court's post-*Gilmer* reversal and remand of the Fifth Circuit's 1990 decision, *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 105-06, which had relied on *Gardner-Denver* to hold a Title VII dispute an improper subject for arbitration under a contractual arbitration agreement. See *Alford*, 975 F.2d at 1162.

of the Employee Polygraph Protection Act of 1990⁴⁷ was subject to arbitration under the same type of contractual agreement at issue in *Gilmer*.⁴⁸ Significantly, the D.C. Circuit recently held that nothing in the Civil Rights Act of 1991⁴⁹ suggests that Congress intended to modify or undermine the rule of *Gilmer*.⁵⁰

Given the resonant nature of the Supreme Court's endorsement of the arbitration of statutory FEP claims as articulated in *Gilmer*, there is every reason to believe that the above-framed general rule—that agreements to arbitrate statutory claims are enforceable, absent proof of contrary congressional intent—will also control in the sphere of employment dispute resolution.⁵¹ This inference is further supported by the congressional endorsement of arbitration and other ADR devices in the Civil Rights Act of 1991⁵² and the ADA,⁵³

47. The Employee Polygraph Protection Act (EPPA), 29 U.S.C. §§ 2001-2009 (1988).

48. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 882 (9th Cir.), cert. denied, 113 S. Ct. 494 (1992).

49. Pub. L. No. 102-166, 105 Stat. 1071 (effective November 21, 1991) (codified in scattered sections of 42 U.S.C.).

50. *Benefits Communications Corp. v. Klieforth*, 65 Fair Empl. Prac. Cas. (BNA) 122, 126-27 (D.C. Cir. 1994) ("[T]he language of the statute in no way suggests that the rule of *Gilmer* should no longer apply.").

51. Because it is not central to the primary inquiry of this article, *Gilmer* will not be analyzed further. It should be noted, however, that there are two primary questions remaining as to *Gilmer*'s reach. The first goes to the scope of the § 1 FAA exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C. § 1 (1988). The second goes to the manner in which *Gilmer* will be reconciled with *Gardner-Denver*. See Stephen L. Hayford, *The Coming of the Third Era of Labor Arbitration*, ARB. J., Sept. 1993, at 12-15.

52. Section 118 of the Act provides:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [enacting section 1981a of Title 41, The Public Health and Welfare, and section 601 of Title 2, The Congress; amending sections 1981, 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111 and 12112 of Title 42, and section 626 of Title 29, Labor, and enacting provisions set out as notes under sections 1981, 2000e, and 2000e-4 of Title 42].

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified at 42 U.S.C. § 1981 (note) (Supp. IV 1992)).

53. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C. (Supp. IV 1992)). Section 513 states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter." Pub. L. No. 101-336, Title V, § 513, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12212 (Supp. IV 1992)).

which was enacted in 1990.⁵⁴

If, over time, *Gilmer* proves to be the harbinger of widespread arbitration of statutory FEP claims, the ramifications for at-will employers and their employees could be profound. Thorough analysis requires, initially, an exploration of the origins of the contemporary employment-at-will doctrine.

III. THE ORIGINS OF THE CONTEMPORARY EMPLOYMENT-AT-WILL DOCTRINE (EAWD)

To understand the nature of a modern employer's freedom to terminate employees at will, it is necessary to differentiate employer conduct that may be morally repugnant or unfair from that which is illegal and therefore subject to reversal. The EAWD provides the device for distinguishing between legal and illegal terminations in that area of the employment relationship which is not affected by the several statutory and Constitutional bars on employment discrimination. The remainder of this section reviews the origins and early evolution of the EAWD.

54. That the endorsement by Congress of the arbitration device may be less than unequivocal is indicated by the Older Workers Benefit Protection Act (OWBPA) amendment of § 7 of the Age Discrimination in Employment Act (ADEA). Older Workers Benefit Protection Act of 1990, [hereinafter OWBPA] Pub. L. No. 101-433, § 201(f)(1), 104 Stat. 978, 983-84 (1990) (codified as amended at 29 U.S.C. §§ 626(f) (Supp. IV 1992)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 604 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992)). The OWBPA amends § 7 of the ADEA by establishing that any waiver of a right or claim by an ADEA protected-group member must be "knowing and voluntary." OWBPA, § 201(f)(1), 104 Stat. at 983. It then sets down eight indicators of a "knowing and voluntary" waiver. OWBPA, § 201(f)(1), 104 Stat. at 983-84. Most significant is the stipulation that "the individual does not waive rights or claims that may arise after the date the waiver is executed." OWBPA, § 201(f)(1), 104 Stat. at 983.

Whether this final provision was intended by Congress to bar employer-employee agreements prospectively to arbitrate future ADEA claims remains to be determined. That the Supreme Court does not read the cited section of the OWBPA as a bar to the widespread arbitration of statutory FEP claims under otherwise valid employer-employee agreements to arbitrate is indicated by its discussion of § 201 of the Act in *Gilmer*, 500 U.S. at 28-29 n.3 ("[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))). Because it denied the attempt by the claimant employee in *Gilmer* to avoid arbitration, it can be inferred that the Court found no such basis for deduction in the text or the legislative history of the OWBPA.

A. *Wood's Rule—Lodestar of the Employment-At-Will Doctrine*

Most scholars credit the earliest formulation of the American EAWD to Horace Gray Wood. Wood's writing originated near the peak of the Industrial Revolution,⁵⁵ during an intense split between American and English jurisprudence over the basic legal character of the employer-employee relationship. In the British tradition, an employment contract lacking a fixed duration was presumed to be for one year.⁵⁶ In America, rapid industrialization and commercial expansion generated economic pressure for more flexibility in the employment relationship. The English one-year presumption came under fire in America, and a transatlantic controversy between legal scholars ensued.⁵⁷

Wood articulated a clear, uncomplicated rule, well suited to the needs of American industrialists, that also comported with the laissez faire school of thought that dominated American economic public policy during the late nineteenth century.⁵⁸ The legal scholarship that led to Wood's formulation of the American "rule" for the presumed duration of employment with no fixed term was long ago discredited.⁵⁹ Nevertheless, in nineteenth century America, Wood's Rule quickly gained widespread acceptance and soon supplanted the English presumption. Wood wrote:

55. 2 H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (2d ed. 1886).

56. Mary A. Bedikian, *Transforming At-Will Employment Disputes Into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RESOL. 113, 117.

57. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-19 (1976); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 91-111 (1982).

58. See CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 329, 393 (1954); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053 (1984); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 672 (1933); Arthur S. Miller, *Toward a Definition of "the" Constitution*, 8 U. DAYTON L. REV. 633, 647 (1983); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 490 n.367 (1993) (citing KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 291 (1990)).

59. For the proposition that Wood's Rule was based on defective or inferior legal scholarship, see Feinman, *supra* note 57, at 126; Murray Tabb, *Employee Innocence and the Privileges of Power: Reappraisal of Implied Contract Rights*, 52 MO. L. REV. 803, 804 n.2 (1987) (citing *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 886-87 & nn. 13-14 (Mich. 1980)); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-45 (1974).

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 specified, 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. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is terminable at the will of either party.⁶⁰

B. The Effect of Wood's Rule

By providing employers with a free hand in dealing with the labor component of the manufacturing process, uncomplicated by concerns of fair treatment and due process, Wood's Rule served well the imperatives of rapid industrialization and the fluctuating economic cycles that accompanied it. The Rule also enjoyed the advantage of harmony with a fundamental principle of contract law—mutuality of obligation.⁶¹ For example, because a cigar-maker was deemed, as a matter of law (though seldom true practically), free to walk away from his job at any time, for any or no reason, the cigar-maker's employer was also deemed, as a matter of law, free to discharge the employee at any time for any or no reason.⁶²

The flaw in Wood's Rule and in the mutuality of obligation corollary, which became more apparent as the Industrial Revolution matured, was the failure to account for the employer's increasingly superior economic strength. It is unlikely that at the turn of the century, the typical underpaid, low-skilled, unorganized worker found any substantial comfort in his freedom to walk off the job. In theory, the EAWD offered employers and employees bilateral flexibility. In reality, in an oversupplied labor market teeming with cheap immigrant labor, the EAWD dealt workers a generous helping of hardship, abuses, and exploitation.

60. WOOD, *supra* note 55, at 283.

61. This principle provides that unless both parties are bound to the contract, neither is. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 4-12(c)(2) (3d ed. 1987).

62. Bedikian, *supra* note 56, at 117 n.15 (reporting that the earliest expression of this mutuality theory in an American employment context came in *Hathaway v. Bennet*, 10 N.Y. 108 (1854)).

In 1908, the United States Supreme Court squarely endorsed the EAWD in *Adair v. United States*.⁶³ The Court upheld a constitutional challenge to a federal law that barred railroad employers from discharging employees because of union membership,⁶⁴ finding in the statute an impermissible interference with the "liberty to contract" protected by the Fifth Amendment to the United States Constitution.⁶⁵ Justice Harlan, writing for the Court, observed:

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 employ[ee] 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 employ[ee].⁶⁶

Though the Court eventually recognized the power of Congress to protect the right of employees to join, form, and organize labor unions,⁶⁷ it never has *per se* repudiated the EAWD.

The failure of Wood's Rule and the EAWD to account for the realities of the employer-employee relationship in an industrialized society eventually helped to propel Congress to restrike the power balance between employers and employees. More recently, the state courts in most jurisdictions have subjected the EAWD to a number of caveats.⁶⁸ Nevertheless, Wood's Rule remains at the core of American employment jurisprudence. Except in Montana, where the EAWD has been repudiated by statute,⁶⁹ it remains a valid, albeit evolving, legal principle throughout the United States. The evolution of Wood's one-dimensional rule into today's EAWD is the subject of the section below.

IV. THE MODERN EAWD RULE

The modern EAWD provides that, absent a legal rule to the contrary, either party to an employment relationship for an indefinite (unspecified) term can terminate the relationship at will, despite the employee's length of service, with or without cause or notice, and

63. 208 U.S. 161 (1908).

64. See Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898).

65. *Adair*, 208 U.S. at 175, 180.

66. *Id.* at 174-75.

67. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-32 (1937).

68. See *infra* notes 115-76 and accompanying text.

69. See MONT. CODE ANN. §§ 39-2-901 to -903 (1993).

without giving any explanation or reason, unless the freedom to terminate is constrained by contract.⁷⁰ Conversely, where employment is for a definite term based on a contract, an employer can terminate only for cause.⁷¹ This general conceptualization of the EAWD notwithstanding, the modern rule recognizes that the employer's freedom to terminate at will can be, and often is, restrained by statutory employment standards or limitations of the common law.

A. *Legislative Limitations on the Modern EAWD*

Successful legislative attempts to cabin the EAWD doctrine are a relatively recent phenomenon. Between the last half of the nineteenth century and the 1930s New Deal era, the Supreme Court was markedly hostile to efforts by state legislatures and Congress in this area.⁷² As one commentator observed, "the justices' special wrath was reserved for laws that interfered with employer-employee relationships."⁷³ The Court routinely held that statutes regulating employment unconstitutionally interfered with the freedom to contract and with economic liberty as then perceived to be strongly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.⁷⁴ These cases were decided by the Court as if there were an express article in the Constitution effectuating the *laissez-faire* concept, thereby precluding the legislative imposition of any form of restraint on the free labor market mechanism.⁷⁵

Three years before its endorsement of the EAWD in *Adair v. United States*,⁷⁶ the Supreme Court invalidated a state law limiting the maximum work hours of New York's bakers to sixty hours a week or ten hours a day.⁷⁷ In *Lochner v. New York*, the Court held that the law interfered with the "freedom of master and employee to contract with each other in relation to their employment" and violated the Fourteenth Amendment's guarantee of due process.⁷⁸ An

70. 30 C.J.S. *Employer-Employee Relationship* § 40 (1992).

71. See E. ALLEN FARNSWORTH, *CONTRACTS* § 8.15 (2d ed. 1990) (discussing how and when employee conduct constituting cause for discharge warrants termination of contractual relations).

72. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW*, §§ 11.2-11.3 (4th ed. 1991).

73. *Id.* § 4.6.

74. *Id.* § 11.3; see also *infra* notes 76-88 and accompanying text.

75. NOWAK ET AL., *supra* note 72, § 11.4.

76. 208 U.S. 161 (1908); see also *supra* notes 63-66 and accompanying text.

77. *Lochner v. New York*, 198 U.S. 45, 46-47 (1905).

78. *Id.* at 64.

exasperated Oliver Wendell Holmes noted in dissent that the Constitution did not command adherence to Herbert Spencer's (*laissez-faire*) economic theories.⁷⁹ It would be some time before the spirit of Holmes's observation took root.

In 1908, the same year *Adair* was decided, the Supreme Court began what would prove to be a pattern lasting more than two decades of applying the antitrust laws to enjoin strikes by employees and other forms of concerted union-related activity.⁸⁰ In 1915, in *Hammer v. Dagenhart*,⁸¹ the Court struck down a federal statute barring the interstate shipment of products from mining operations that employed child labor, holding that Congress had exceeded its authority under the Commerce Clause of the U.S. Constitution.⁸² In *Coppage v. Kansas*,⁸³ the Court affirmed a lower federal court decision striking down a Kansas statute⁸⁴ prohibiting employers from extracting from employees, as a condition of employment, an anti-union "yellow dog"⁸⁵ promise.⁸⁶ The Court reasoned that the

79. Justice Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Id. at 75 (Holmes, J., dissenting).

80. See *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the Danbury Hatters Case). The use by federal courts of the injunction and antitrust theory to frustrate organized labor led ultimately to a sweeping Congressional restriction on the jurisdiction of federal courts in labor disputes. See *Norris-LaGuardia Act* §§ 1-15, 29 U.S.C. §§ 101-115 (1988) (limiting federal judicial power to issue such injunctions).

81. 247 U.S. 251 (1918).

82. *Id.* at 276-77 (citing U.S. CONST. art. I, § 8).

83. 236 U.S. 1 (1915).

84. KAN. STAT. ANN. §§ 4674, 4675 (1909) (approved during 1903 as Chapter 222 of the Session Laws of that year).

85. A "yellow dog" agreement is a contract by which an employee promises not to join a union and agrees that discharge will result if he or she does. BLACK'S LAW DICTIONARY 1616 (6th ed. 1990).

statute infringed on property and liberty rights without due process of law, contrary to the Due Process Clause of the Fourteenth Amendment.⁸⁷ In 1923, in *Adkins v. Children's Hospital*⁸⁸ the Court invalidated a minimum wage law for women working in the District of Columbia, holding that "freedom to contract is . . . the general rule and restraint the exception."⁸⁹

Holmes's *Lochner* dissent, which argued that the Court had no business weighing the economic merits of legislative promulgations affecting commerce, slowly gained recognition. By the 1930s, the Supreme court, undoubtedly motivated by President Roosevelt's threat to "pack" the Court with Justices who would view his "New Deal" legislative agenda favorably,⁹⁰ began to abandon its hostility to legislative encroachments into the realm of commerce.

In 1934, in *Nebbia v. New York*, the Court upheld a state statute establishing certain standards for milk products.⁹¹ The decision heralded the Court's increased willingness to defer to legislative decisions in economic matters. In employment matters, the change in the Court's attitude first was signaled by *West Coast Hotel Co. v. Parrish*,⁹² in which it overruled *Adkins* by approving a state minimum wage law. The Court noted that "[t]he Constitution does not speak of freedom of contract,"⁹³ and flatly stated "regulation[s] which [are] reasonable in relation to [their] subject and . . . adopted in the interests of community" satisfy the requirements of due process.⁹⁴ Thus, by the late 1930s the "liberty to contract" bar to legislative limitation of the EAWD had lost its vitality, clearing the path to legislative action.

Still, the United States chose a legislative path different from other industrialized democracies. As noted earlier, the United States is the only major developed country in which employees do not enjoy some form of statutory workplace due process guarantee against unfair or arbitrary termination of their employment.⁹⁵ Instead, in recent years our legislators have chosen to enact a number of more

86. *Coppage*, 236 U.S. at 26.

87. *Id.*

88. 261 U.S. 525 (1923).

89. *Id.* at 546.

90. NOWAK, *supra* note 72, § 11.3.

91. 291 U.S. 502, 538-39 (1934).

92. 300 U.S. 379 (1937).

93. *Id.* at 391.

94. *Id.*

95. See *supra* note 1 and accompanying text.

narrowly drawn statutory bars to unequal treatment (including discharge) based on a person's race, color, sex, national origin, religion, age, disability, or union-related activity.

The first of those proscriptions was set forth in the National Labor Relations Act (NLRA),⁹⁶ enacted in 1935. Section 8(a)(3) of the NLRA bars private-sector employers from discriminating against employees (or applicants for employment) on the basis of their union activity or affiliation.⁹⁷ Section 8(a)(3) effectively prevents employers from exercising their EAWD prerogatives to discharge workers who seek to form, join, or assist unions.

The Court's approval of the NLRA in 1937⁹⁸ evidenced its newfound receptivity to legislative intervention in the employment relationship. Moreover, it demonstrated that the traditional EAWD was no longer immune to challenge or limitation. The Court and Congress still clash occasionally over the scope and content of employment regulations.⁹⁹ Nevertheless, for nearly sixty years the Court has been consistently willing to allow legislatures to tacitly reshape or restrict the EAWD in the pursuit of various social policy objectives.

Today, Title VII of the Civil Rights Act of 1964 effectively precludes at-will employers from terminating employees based on their race, color, national origin, sex, or religion.¹⁰⁰ The ADA,¹⁰¹

96. National Labor Relations Act of 1935 (Wagner Act), ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1988)).

97. 29 U.S.C. § 158(a)(3) (1988).

98. See *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 30 (1937).

99. Thus, for example, in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a group of salmon cannery workers brought a disparate impact, pattern, or practice of discrimination suit alleging employment discrimination on the basis of race. *Id.* at 646-48. The Supreme Court held that statistical evidence showing a high percentage of nonwhite workers in the cannery and a low percentage of nonwhites in the noncannery (mostly skilled) positions did not establish a prima facie case of disparate impact in violation of Title VII. *Id.* at 650-55. Congress believed that *Ward's Cove* had resulted in an improper alteration of the framework for analyzing Title VII disparate impact cases first articulated by the Court in *Griggs v. Duke Power*, 401 U.S. 424, 429-36 (1971). Consequently, it expressly reversed *Ward's Cove* by enacting section 105 of the Civil Rights Act of 1991, thereby restoring the *Griggs* framework for analyzing disparate impact claims. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-76 (codified at 42 U.S.C. §§ 1981, 2000e-2(k) to -2(n) (Supp. IV 1992)).

100. 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) (1988) prohibit discharge "because of such individual's race, color, religion, sex or national origin," or as retaliation for activities authorized by the Act, including filing charges, testifying, and opposing unfair practices. A presidential executive order redoubles the Title VII statutory bar on these types of employment discrimination for private sector firms who contract with the federal government. Exec. Order No. 11246, 3 C.F.R. 339 (1965), *reprinted as amended in* 42

in concert with the Vocational Rehabilitation Act,¹⁰² similarly protects qualified individuals with disabilities. The ADEA¹⁰³ effectively prohibits age-based discharges of workers age 40 and over.¹⁰⁴

In the same manner, the Fair Labor Standards Act,¹⁰⁵ which imposes minimum standards for wages and hours,¹⁰⁶ the Occupational Safety and Health Act of 1970,¹⁰⁷ which imposes standards for worker safety and protects workers from unreasonable risk of injury or death,¹⁰⁸ and the Equal Pay Act of 1963,¹⁰⁹ which proscribes gender-based wage discrimination,¹¹⁰ all prevent employers from discharging employees in retaliation for exercising or enforcing their statutory rights. Subject to limited exceptions, the Employee Polygraph Protection Act of 1988¹¹¹ protects employees from discharge for refusing to submit to a polygraph examination. Although not a substantive bar to termination, the Worker Adjustment and Retraining Notification Act¹¹² requires subject employers to give workers advance notice of plant closings and related layoffs before terminating the employment relationship.¹¹³ These congressional initiatives have incrementally restricted employers' discretion to terminate at will. State and municipal legislatures also have enacted an array of statutes and ordinances that parallel and supplement the protections provided by federal law.¹¹⁴

U.S.C. § 2000e (1988).

101. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

102. 29 U.S.C. §§ 701, 791-794 (1988 & Supp. V 1993).

103. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993).

104. *Id.* §§ 621, 623(a), (d) (1988 & Supp. V 1993).

105. *Id.* §§ 201-219 (1988 & Supp. V 1993).

106. *Id.* § 215(a)(3) (1988).

107. *Id.* §§ 651-678 (1988 & Supp. V 1993).

108. *Id.* § 660(c)(1) (1988).

109. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C.).

110. 29 U.S.C. § 206(d)(1) (1988).

111. *See supra* note 47. Under the EPPA, workers in the security industry and workers who manufacture, distribute or dispense drugs are exempted from the protection. 29 U.S.C. §§ 2002, 2006, 2007 (1988).

112. 29 U.S.C. §§ 2101-2109 (1988).

113. *Id.* § 2102(a) (1988).

114. *See, e.g.,* CAL. LABOR CODE §§ 1101, 1102 (West 1988 & Supp. 1994) (prohibiting discrimination on the basis of sexual orientation and perceived sexual orientation); N.Y. LABOR LAW § 201 (1993) (barring discrimination based on employees' political activity, lawful use of consumable products, and legal recreational activity); TOPEKA, KAN., CODE § 22-99 (1985) (physical handicap); *see also* *Faiveas v. Municipality of Anchorage*, 860 P.2d 1214 (Alaska 1993) (involving litigation over a city ordinance, ANCHORAGE MUNICIPAL ORDINANCE 92-116(S) (1993), that prohibited discrimination in public employment on the

B. *Judicially Created Exceptions and Caveats to the Modern EAWD*

Judges, sitting at common law without the benefit of specific statutory directives, have been as active as legislators in transforming the EAWD. In recent years, state courts have subjected Wood's Rule to a number of judicially created exceptions and caveats. American courts have used both contract and tort theory to confine the reach of the EAWD. Actions of this variety based on contract law center on two legal constructs: the implied covenant of good faith, and the implied-in-fact contract terms and enforceable promises doctrine. Both relate to implicit, mutual duties imposed on the parties by the employment relationship. The primary tort cause of action centers on terminations alleged to be contrary to public policy. Courts in forty-five states have utilized one or more of these three exceptions to limit the discretion of at-will employers to terminate employees.¹¹⁵

1. The Contract Theory-Based Exceptions to the EAWD

The EAWD notwithstanding, employers and employees remain free to contract, either expressly or impliedly, for a fixed term.¹¹⁶ Thus, an employer can contract with an employee for a fixed term, or stipulate contractually that the employee will be terminated only for just cause, thereby expressly surrendering its freedom to discharge at will.¹¹⁷ However, employers that hope to retain the freedom to

basis of an individual's sexual orientation); *Federated Rural Elec. Ins. Co. v. Kessler*, 388 N.W.2d 553, 553 n.1, 562 (Wis. 1986) (involving a Madison, Wisconsin city ordinance which provided in part that "[i]t shall be an unfair discrimination practice and unlawful and hereby prohibited . . . [f]or any person or employer . . . to discharge any individual . . . because of such individual's . . . marital status," where marital status "shall include being married, separated, divorced, widowed, or single" MADISON, WIS. GEN. ORDINANCES § 3.23 (1975)).

115. DUNLOP COMMISSION, *supra* note 3, at 107.

116. Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment At Will*, 30 AM. BUS. L.J. 441, 443 n.10 (1992) (citing Larry S. Larson, *Why We Should Not Abandon the Presumption That Employment is Terminable at Will*, 23 IDAHO L. REV. 219, 221-24 (1986-87)); *see also* *Hodge v. Evans Fin. Corp.*, 823 F.2d 559, 562 (D.C. Cir. 1987) (holding that oral contract for permanent employment was not unenforceable under the District of Columbia's statute of frauds); *Paolucci v. Adult Retardates Ctr., Inc.*, 582 N.Y.S.2d 452, 453 (1992) (holding that a contractual limitation on an employer's right to terminate an at-will employee will not be inferred absent an express agreement to that effect relied on by employee).

117. *See, e.g., Pine River State Bank v. Mettille*, 333 N.W.2d 622, 628 (Minn. 1983) (opining that the converse to the employment-at-will rule is that when a contract of employment states a definite duration, dismissal only for cause is presumed); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App. 1988) (holding that cause of

discharge employees at will, either by refusing to enter into fixed-term or just-cause contracts or by conditioning their agreement to a fixed-term employment contract on the omission of any terms limiting their at-will discretion, can be frustrated in that effort.

a. Implied-in-Law Contract Theory: The Covenant of Good Faith

In certain circumstances, courts in some states are willing to read an implied covenant (or duty) of good faith and fair dealing into employment contracts—whether express or implied, written or oral—that on their face appear to preserve the employer's at-will authority.¹¹⁸ Those courts award damages to employees terminated in breach of the implied covenant, despite the express or apparent

action for breach of an employment contract requires the plaintiff to show the existence of a written contract specifically and directly limiting the employer's right to terminate at will); *see also* *Newfield v. Insurance Co. of the West*, 203 Cal. Rptr. 9, 12-13 (Cal. Ct. App. 1984) (finding no wrongful discharge because employee failed to show an express or implied contract for permanent employment, so general rule that employment contract is terminable at will applies); *Konitzer v. Carpenter*, No. C.A. 92C-07-067, LEXIS 458, at *22-24 (Del. Super. App. Div. Dec. 29, 1993) (holding that, in spite of employee's at-will status, an employer may be estopped from firing the employee if employee has detrimentally relied upon employer's promises of permanent employment); *cf.* *Vajda v. Arthur Anderson & Co.*, 624 N.E.2d 1343, 1347 (Ill. App. 1993) (observing that the at-will rule imports a presumption that a hiring without a fixed term is a hiring at will) (citations omitted); *Speece v. Universal Pensions, Inc.*, No. 62444, LEXIS 2624, at *5 (Ohio Ct. App. May 20, 1993) (ruling that in the absence of an employment agreement for a fixed term, the employment relationship is considered at-will; the employee may leave the employer and the employer may discharge the employee at any time without cause) (citing *Rogers v. Target Telemarketing Servs.*, 591 N.E.2d 1332 (Ohio Ct. App. 1990)).

118. *See, e.g., Walker v. Blue Cross of Cal.*, 6 Cal. Rptr. 2d 184, 189 (Cal. Ct. App. 1992) (determining, in suit against former employer for alleged breach of contract and breach of the implied covenant of good faith and fair dealing, that a triable issue of fact existed as to whether there was an implied-in-fact promise not to terminate except for good cause); *Mannix v. Butte Water Co.*, 854 P.2d 834, 845-46 (Mont. 1993) (stating that whether the covenant of good faith and fair dealing "is implied in a particular case depends upon the objective manifestations by the employer giving rise to an employee's reasonable belief that he or she has job security and will be treated fairly" (citing *Dare v. Montana Petroleum Mktg. Co.*, 687 P.2d 1015, 1020 (Mont. 1984))); *Somers v. Somers*, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992) (holding that the duty to perform contractual obligations in good faith applies to employment contract of at-will employee); *Hooks v. Gibson*, 842 S.W.2d 625, 628 (Tenn. Ct. App. 1992) (applying duty of good faith and fair dealing to employment contracts); *Goodyear Tire & Rubber Co. v. Portilla*, 836 S.W.2d 664 (Tex. Ct. App. 1992). In *Goodyear*, the court considered testimony from the plaintiff's managers and supervisors that they had assured plaintiff during her 22-year tenure that she would have a job as long as she was doing good work. *Id.* at 669. The court found this was evidence of more than mere compliments; it created a jury question as to whether the employer modified the at-will employment contract by agreeing that the plaintiff would not be discharged except for good cause. *Id.*

terms of the employment contract permitting termination at will.¹¹⁹ Thus, the covenant of good faith is said to be "implied-in-law."¹²⁰ It is a condition grafted onto the relationship between an employer and employee by force of reason or judicial doctrine in order to prevent a termination resulting from perceived untoward or unfair conduct or oppression by the employer.

The implied covenant of good faith is a product of section 205 of the Restatement (Second) of Contracts, which states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."¹²¹ The covenant obligates each party to a contract to avoid maliciously harming the other, or compromising the other's receipt of the benefit of the contract.¹²² By requiring the employer to adhere to basic precepts of procedural and substantive due process, the implied covenant of good faith interjects a tacit term into the employment relationship that effectively bars at least certain types of overtly pernicious employer conduct (including discharge) that offends general notions of fair play and

119. At times a breach of this covenant has been viewed as warranting the recovery of tort damages as well as contract damages. *See, e.g.,* *Clearly v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980). The clear trend is away from this duty. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988) (abolishing the tort cause of action and returning the breach of the implied covenant of good faith and fair dealing to the realm of contract law). In *Foley*, the court held that only contract damages were available to plaintiffs proving breach. *Id.* The court observed further that "the clear majority of jurisdictions have either expressly rejected the notion of tort damages for breach of the implied covenant [of good faith] in employment cases or [have] impliedly done so by rejecting any application of the covenant in such a context." *Id.* at 391; *accord* *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551-52 (N.H. 1974); *cf. K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987) (ruling that only in the "rare and exceptional cases" where there exists a "special relationship" between the plaintiff employee and the employer is the contractual relationship of a nature to give rise to a duty warranting tort damages) (*quoted in* *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 221 (Wyo. 1994) which held that "[t]he special relationship necessary to permit recovery [of tort damages] is not established merely by the employer-employee relationship. A showing is required that a special relationship of trust and reliance exists between the particular employee seeking recovery and the employer.").

120. *Caplan v. St. Joseph's Hosp.*, 233 Cal. Rptr. 901, 905 (Cal. Ct. App. 1987).

121. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

122. *See Clearly*, 168 Cal. Rptr. at 729 (holding that termination of employment without legal cause after the employee completed 18 years of apparently satisfactory performance violated implied good faith covenant inherent in all contracts, including employment contracts, and thus, a duty accrued to the employer to do nothing that would deprive the employee of the benefits of the employment bargain). *Clearly* is a pre-*Foley* case. Compare *id.* with *Foley*, 765 P.2d 373 (Cal. 1988); see also *supra* note 119.

ethical conduct.¹²³ It "does not create a duty for the employer to terminate . . . employee[s] only for good cause,"¹²⁴ nor does it "mandat[e] that every termination must be for a 'fair and honest reason.'"¹²⁵ Instead, it most accurately can be viewed as "serv[ing] to balance the inherently unequal relationship between an employer and an employee."¹²⁶

Thus, for example, the covenant has been applied to the termination of an employee for refusing to date a supervisor.¹²⁷ It has been held to apply to an implied-in-fact contract governing the terms and procedures for the layoff of employees.¹²⁸ The covenant also has been utilized to invalidate the discharge of an at-will sales employee whose discharge occurred shortly after he completed a large sale, but before his commission payment was due.¹²⁹ To prevent an unfair result on these types of egregious facts, courts embracing the implied covenant of good faith will probe the employer's motives and, if they are deemed to have been untoward, "find" in the underlying (express or implied) employment contract an implied good faith promise.

Though often pled, the implied covenant of good faith is not universally accepted¹³⁰ and is the least significant common law exception to the EAWD. Fewer than one in four states clearly recognize it in the wrongful dismissal context.¹³¹ The much more widely used implied-in-fact contract terms/enforceable promise doctrine is the subject of the section below.

123. See Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233 (1992); Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683 (1990); Michael T. Zoretic, *Baldwin v. Sisters of Providence: Washington Gives at Will Employees a Gun with No Ammunition to Fight Against Unjust Dismissal*, 14 U. PUGET SOUND L. REV. 709 (1991).

124. *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985) (cited in *Wilder v. Cody County Chamber of Commerce*, 868 P.2d 211, 221 (Wyo. 1994)); accord *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 750 (Idaho 1989), modified sub nom. *Sorenson v. Comm Tek Inc.*, 799 P.2d 70, 75 (Idaho 1990).

125. *Wilder*, 868 P.2d at 221 (quoting *Coombs v. Gamer Shoe Co.*, 778 P.2d 885, 887 (Mont. 1989)).

126. *Id.* (citing *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 858 (Wyo. 1990)).

127. *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551-52 (N.H. 1979).

128. *Kerr v. Rose*, 265 Cal. Rptr. 597, 603 (Cal. Ct. App. 1990).

129. See *Fortune v. National Cash Register*, 364 N.E.2d 1251, 1255 (Mass. 1977); *RLM Assocs. v. Carter Mfg. Corp.*, 248 N.E.2d 646, 646 (Mass. 1969).

130. *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984); *Wilder*, 868 P.2d at 221 (citing *Parnar v. Americana Hotels, Inc.*, 625 P.2d 615, 629 (Haw. 1982)).

131. Phillips, *supra* note 116, at 448.

b. Implied-In-Fact Contract Terms and Enforceable Promises

As discussed above, the implied covenant of good faith is grafted onto the employer-employee relationship by force of reason or judicial doctrine (i.e., as a matter of law) to prevent a termination due to untoward or unfair conduct by the employer.¹³² In contrast, the limitations falling into the second category of contract theory-based exceptions to the EAWD are described as being "implied-in-fact."¹³³ In further contrast to the implied covenant of good faith, courts do not invoke these exceptions as a response to the perniciousness or repugnancy of the employer's conduct.

Instead, the implied-in-fact contract terms/enforceable promises doctrine is recognized where some characteristic of the employment relationship established by employer policy or practice is found to constitute either an implied contract or contract term (which may be bilateral or unilateral), or an enforceable tacit promise by the employer, that employees will be terminated only for just or good cause.¹³⁴ The mutual intent of the employer and employee determines the existence of an implied contract term.¹³⁵ In divining that intent with regard to an implied just cause contractual term, or an enforceable promise to that effect, the courts will look, *inter alia*, to the "[p]ersonnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employer is engaged."¹³⁶

The key to judicial recognition of this exception to the EAWD is evidence that the plaintiff employee had a reasonable expectation of continued employment that would be terminated only for good cause.¹³⁷ Thus, a long-term employee is more likely to reach the exception than an employee with short-term service.¹³⁸ Similarly, a

132. See *supra* notes 120-29 and accompanying text.

133. See sources cited *infra* notes 138-49.

134. See sources cited *infra* notes 138-49.

135. *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 971 (9th Cir. 1994).

136. *Id.*; see also Phillips, *supra* note 116, at 449 (describing factors courts consider in determining the existence of implied-in-fact agreements between employer and employee).

137. See *infra* notes 138-40 and accompanying text.

138. See, e.g., *Soules v. Cadam Inc.*, 3 Cal. Rptr. 2d 6, 11 (Cal. Ct. App. 1991) (ruling that the length of the former employee's service, her promotions, salary increases, and superior performance ratings were relevant to determining the existence of implied employment agreement); *Knights v. Hewlett Packard*, 281 Cal. Rptr. 295, 297 (Cal. Ct. App. 1991) (holding that an employer's promise not to terminate employee except for good cause may be implied from the employee's longevity of service, employer's

course of conduct between the employer and the employee, or customs and practices in a particular trade or industry¹³⁹ that give rise to a reasonable expectation of continued employment, can also have that result.¹⁴⁰

Personnel manuals and employee handbooks that enumerate particular types of employee conduct that will result in discipline or discharge, or that detail disciplinary procedures, are particularly susceptible to a finding of an implied employment contract or contract term, or an enforceable promise that limits the employer's unfettered discretion.¹⁴¹ These employer promulgations are sometimes said to

assurances of continued employment, unwritten policy routinely followed, and common industry practices).

139. See 30 C.J.S. *Employer-Employee Relationship* § 42(a) (1992); see also *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 780 (N.M. 1993) (holding that a promise or offer that supports an implied employment contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct; when a contract term that restricts the employer's power to discharge is implied from such representations or conduct, a contract is implied in fact), *cert. denied*, 114 S. Ct. 1068 (1994); *Kelly v. Georgia-Pacific Corp.*, 545 N.E.2d 1244, 1249-50 (Ohio 1989) (ruling that the facts and circumstances surrounding an oral employment-at-will relationship, including the character of the employment, customs, course of dealing between parties, company policy, or any other facts that illuminate the question, can be considered by the trier of fact to determine the explicit and implicit terms concerning discharge); *Gilmore v. Salt Lake Area Community Action Program*, 775 P.2d 940 (Utah Ct. App. 1989) (holding that an employee can rebut the presumption of at-will employment by providing, *inter alia*, evidence pertaining to the conduct of the employer and employee and the practices of the particular trade or industry), *cert. denied*, 789 P.2d 33 (Utah 1990); *accord Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 154 (Ohio 1985).

140. See, e.g., *Hartbarger*, 857 P.2d at 783, in which the court stated:

To create an implied contract, the offer or promise must be sufficiently explicit to give rise to reasonable expectations. The at-will presumption that the employee has no reasonable expectation of continued employment applies only to a single term of an employment relationship—that of the employer's unabridged right to terminate the employee.

Id.; see also *Sheets v. Knight*, 779 P.2d 1000, 1008 n.13 (Or. 1989) (holding that an at-will employee is one who has no reasonable expectation of continued employment); *cf. Phillips v. Butterball Farms Co., Inc.*, 506 N.W.2d 606, 609 (Mich. Ct. App. 1993) (ruling that an at-will employee cannot show a reasonable expectation of continued employment) (citing *Sepanske v. Bendix Corp.*, 384 N.W.2d 54, 59 (Mich. Ct. App. 1985)).

141. In *Hoffmann-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), for example, an employee handbook contained provisions regarding the procedures necessary to terminate permanent employees. *Id.* at 735-37. The court found that a unilateral contract had been created by the handbook and by the employee's decision to continue his employment after becoming aware of the handbook's provisions. *Id.* at 737. Similarly, in *Melicharek v. Carson Pirie Scott & Co.*, 576 N.E.2d 99 (Ill. App. Ct. 1991), the employer distributed a handbook containing provisions regarding salaries, benefits, probation, and termination. *Id.* at 100. Based on the content of the handbook and its use in the employment relationship, the court held that an enforceable contract had been established: the employee reasonably believed an offer had been made and the employee accepted that

"contain" an implied just cause term, by operation of the legal axiom *inclusio unius est exclusio alterius* (inclusion of one thing suggests exclusion of another). Under this rubric, an employee handbook provision that specifies particular employee conduct or circumstances that will trigger discharge is interpreted to constitute a contractual commitment by the employer not to terminate the employee for reasons other than the specified types of conduct or circumstance.¹⁴² Employee reliance on such representations of specific treatment in specific circumstances heightens the probability that a court will deem them enforceable.¹⁴³

offer by continuing to work for the employer after learning of the handbook's contents. *Id.* at 101; *see also* Vajda v. Arthur Andersen & Co., 624 N.E.2d 1343, 1349 (Ill. App. Ct. 1993) (concluding that explication of dismissal procedures in employer manual created an enforceable promise); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984) (holding that employers may be obligated to act in accordance with policies announced in employee handbooks); Hogue v. Cecil I. Walker Mach. Co., 431 S.E.2d 687, 689 (W. Va. 1993) (finding a handbook's promises of job security and an employee's decision to continue to work for that employer sufficient to create a unilateral contract); Clay v. Horton Mfg. Co., 493 N.W.2d 379, 381 (Wis. Ct. App. 1992) (finding that while employment is generally terminable at will by either party without cause, an employee handbook may modify at-will employment contracts). *Contra* Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 317 (6th Cir. 1989) (interpreting Ohio law as rejecting the argument that the listing of examples of employee conduct that "may" cause termination precludes the discharge of an at-will employee for a reason not listed).

142. *See, e.g.,* Cook v. Heck's Inc., 342 S.E.2d 453, 459 (W. Va. 1986). Cook considered an employee handbook which specified the discipline associated with violations of particular rules. *Id.* This information was accompanied by a statement that the disciplinary rules constituted a complete list. *Id.* The court found this to be prima facie evidence of an offer for a unilateral contract of employment that modified the right of the employer to discharge without cause. *Id.* It held that a jury question was presented as to whether a unilateral contract existed. *Id.*

In a similar fashion, the court in Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991) held:

[W]hen it is plain that a manual or bulletin does not limit the right to discharge at will, the case need not go to a jury. Here there are arguable issues as to just what the terms of the manual were intended to accomplish. The manual sets forth a number of different types of conduct that may result in discharge . . . [On these facts] a legitimate issue arises as to whether all the offenses listed are intended to constitute the exclusive grounds for discharge. If not, a factual issue may exist regarding Nordstrom's course of conduct in construing its rules. In any event, the manual purports to have some binding effect with respect to employees.

Id. at 56 (citations omitted). *Contra* Lilly v. Overnite Transp. Co., 995 F.2d 521, 523 (1993) (holding that while the handbook listed examples of misconduct which will not be tolerated, the employee presented no evidence the list was intended to be exclusive).

143. *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 943 (Wash. 1994) (citing *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980); *Thompson*, 685 P.2d at 1088; *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 669 (Wash. 1992)).

Viewed more broadly, this category of implied-in-fact exceptions to the EAWD reflects a judicial belief that at-will employers should be bound by the representations or promises made to employees in employee handbooks or personnel policy manuals. Because employers expect and require their employees to abide by the policies expressed therein, they are held to have created an atmosphere in which employees justifiably rely on the expressed policies and, thus, justifiably expect that the employers will do the same. If an employee is induced to remain on the job and forego search for other employment by an employer's representations or promises (express or implied) that in specific circumstances employees will be accorded specific treatment, those representations or promises are viewed as enforceable components of the employment relationship.¹⁴⁴ In much the same manner, when presented with a detailed description of disciplinary procedures in an employee handbook, courts may infer the employer's commitment to follow the stated procedures in terminating an employee.¹⁴⁵

Prominent disclaimers of any express or implied agreement to modify the EAWD's basic premise can, however, immunize handbooks and manuals against judicial findings of an implied just cause or procedural due process obligation.¹⁴⁶ The employer can disclaim

144. See *supra* note 143; see also *Neihaus v. Delaware Valley Medical Ctr.*, 631 A.2d 1314 (Pa. Super. Ct. 1993). In *Neihaus*, an employee who was refused reinstatement at the conclusion of an approved leave of absence sued her employer. *Id.* The court noted that the employer had the option to refuse the original leave request or to make clear that there was no guarantee of reinstatement at the leave's end. *Id.* at 1318. Since it failed to do either, it was held to an implied promise to reinstate the plaintiff, enforceable under principles of promissory estoppel. *Id.* at 1315, 1318.

145. 30 C.J.S. *Employer-Employee Relationship* § 42(a) (1992); see also *Campbell v. Leaseway Customized Transp., Inc.*, 484 N.W.2d 41, 45 (Minn. Ct. App. 1992) (holding that despite indefinite employee handbook language defining violations that warrant discipline, a contract may be formed if the procedures for finding a violation are described with adequate definiteness); *Federal Express Corp. v. Deutschmann*, 838 S.W.2d 804, 808 (Tex. Ct. App. 1992), *aff'd in part, rev'd in part*, 848 S.W.2d 282 (Tex. 1993) (upholding a jury finding that in spite of a disclaimer, a statement contained in an employee handbook section titled "Guaranteed Fair Treatment Policy" declaring that the company would provide a fair internal grievance process to "all Federal Express employees and ex-employees" created an implied contract obligating the employer to provide fair procedures).

146. See, e.g., *Wooley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (ruling that a clear and prominent disclaimer forecloses the theory of an implied just cause term); *Swanson*, 826 P.2d at 672 (opining that it is generally recognized that an employer can disclaim what might otherwise appear to be enforceable promises in handbooks, manuals, or similar documents); cf. *Hicks v. Methodist Medical Ctr.*, 593 N.E.2d 119, 121 (Ill. App. Ct. 1992) (ruling that disclaimer contained in an employee handbook was insufficient to negate the handbook's promises where it was

by clearly stating in the employee handbook either (i) that the handbook's terms can be modified at will,¹⁴⁷ (ii) that the enumerated list of actionable conduct is not exclusive or exhaustive,¹⁴⁸ or (iii)

not conspicuous, but rather was located on 38th page of 39-page manual; was not entitled "Disclaimer," but was located in a section headed "Revisions"; and was not highlighted, printed in capital letters, or in any way prominently displayed); *Kumpf v. United Tel. Co. of Carolinas, Inc.*, 429 S.E.2d 869, 872 (S.C. Ct. App. 1993) (holding that the language in the employer's handbook disclaiming any alteration of employee's at-will status was inconspicuous and ineffective where the disclaimer was located on page 38 of a 39-page document under the heading "CONCLUSION" and the disclaimer was not capitalized, bolded, set apart with a distinctive border, or in contrasting type or color).

147. See, e.g., *Habighurst v. Edlong Corp.*, 568 N.E.2d 226, 228-29 (Ill. App. Ct. 1991); *Milroy v. K-G Retail Stores, Inc.*, 819 F. Supp. 857, 859 (D. Neb. 1993). In *Milroy*, an employee handbook stated that it was not an employment contract and advised that related procedures could be bypassed at the company's discretion. *Id.* The handbook specifically reserved to the employer the right to discharge employees for conduct not listed in the book. *Id.* The court held that the handbook did not create any contractual restrictions on employer's right to discharge. *Id.* at 861; accord *Harris v. Duke Power Co.*, 349 S.E.2d 394, 396 (N.C. Ct. App. 1986), *aff'd*, 356 S.E.2d 357 (N.C. 1987); *Rupinsky v. Miller Brewing Co.*, 627 F. Supp. 1181, 1188 (W.D. Pa. 1986) (applying North Carolina law); see also *Wooley* at 1271. The *Wooley* court stated:

All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Id. Similarly, in refusing to find an implied employment contract, a Pennsylvania court noted:

The vagueness and the generalities [of the handbook's language] coupled with the employer's reservation of power to unilaterally alter the handbook's terms would lead a reasonable at-will employee to interpret its distribution as an informational guideline, and not as the exclusive enumeration of the entire panoply of rights and duties existing between employer and employee which served to displace the at-will contract that already existed between employee and employer.

Martin v. Capital Cities Media, Inc., 511 A.2d 830, 839 (Pa. Super. Ct. 1986), *appeal denied*, 523 A.2d 1132 (Pa. 1987).

148. See, e.g., *Toombs v. City of Champaign*, 615 N.E.2d 50 (Ill. App. Ct. 1993). The court stated:

We hold that this manual did not contain a clear promise. At two crucial places, the manual uses terms that indicate that the lists of the types of termination and dismissal were not exhaustive. In particular, using the term 'includes' when introducing the list of the types of termination indicates that other types of termination might exist. Further, the manual also clearly stated that the employee 'may' be dismissed for certain enumerated reasons, which similarly does not specifically preclude dismissal for any number of other reasons.

Id. at 52. In *Suter v. Harsco Corp.*, 403 S.E.2d 751 (W. Va. 1991), the court held that "[a]n employer may protect itself from being bound by statements made in an employee handbook by having each prospective employee acknowledge in his employment application that the employment is for no definite period and by providing in the

that the specification of procedures and policies does not constitute a waiver of management's power summarily to terminate at will.¹⁴⁹

Despite the arguable safe harbor provided by a carefully worded, sufficiently prominent and clear disclaimer, cases invoking the implied-in-fact contract term/enforceable promises doctrine continue to proliferate. Most states recognize this exception to the general EAWD rule,¹⁵⁰ especially in cases involving employee handbook language. In the section below, the analysis turns to the tort-theory-based exception to the EAWD rule.

2. The Public Policy, Tort-Theory-Based Exception to the EAWD

The only widely embraced tort cause of action¹⁵¹ that significantly limits the EAWD freedom of employers to discharge employees is based on the proposition that the common law will not tolerate employer termination actions that contradict or violate a clear public policy founded on the Constitution, statutory law, government rule or regulation, or the common law.¹⁵² Across jurisdictions there is

employment handbook that the handbook's provisions are not exclusive." *Id.* at 752. For further discussion, see Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L. J. 326, 348-57 (1991-92) (discussing the design of effective disclaimers and limitations on disclaimer enforcement); Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 382 n.132 (1989) (citing *Dell v. Montgomery Ward & Co.*, 811 F.2d 970, 972 (6th Cir. 1987), wherein the court gave effect to a disclaimer in the employer's discipline reference guide that a statement that the document could be modified by the employer at its discretion and to an assertion that the document's list of actionable conduct was not exhaustive); Kenneth J. Kelly, *Workplace Litigation*, in 22ND ANNUAL INSTITUTE ON EMPLOYMENT LAW at 7, 28-29 (PLI Litig. & Admin. Practice Course Handbook Series No. 476, 1993); *accord Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 793 (Md. Ct. Spec. App. 1986), *cert. denied*, 523 A.2d 1013 (Md. 1987).

149. See, e.g., *Arnold v. Diet Ctr., Inc.*, 746 P.2d 1040, 1041 n.1 (Idaho Ct. App. 1987) (finding that a disclaimer in an employee handbook which provided that "[t]his handbook is not an employment contract, and an employee can be terminated at any time" was clear and effective); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987) (holding that the plaintiff dischargee's claim fails because the employment agreement stated that the employer did not intend to waive its right to terminate employees unilaterally by promulgating policy handbooks); see also *supra* note 119.

150. Phillips, *supra* note 116, at 448 n.42.

151. 30 C.J.S. *Employer-Employee Relationship* § 81 (1992). Other collateral tort remedies for wrongful discharge include fraud and deceit, interference with contractual relations, infliction of emotional distress and defamation. See, e.g., Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy and Tort Claims* in 22ND ANNUAL INSTITUTE ON EMPLOYMENT LAW AT 195, § III (PLI Litig. and Admin. Practice Course Handbook Series No. 476 (1993)).

152. See, e.g., *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988) (holding that an employer may be liable in tort for the retaliatory discharge of an employee when the discharge violates a clearly expressed state public policy); *Pilcher v.*

broad recognition of several categories of employee terminations that fall outside of the shield of the EAWD rule because they contravene public policy.¹⁵³

"Whistle blowers"—employees who expose, report, or protest an employer's illegal activity—are often protected by courts against retaliatory discharge.¹⁵⁴ Similarly, an employer that terminates an

Board of Wyandotte County Comm'rs, 787 P.2d 1204, 1208 (Kan. Ct. App. 1990) (stating that relief for the tort of retaliatory discharge is available where the discharge contravenes a clear public policy); *Krajsa v. Key Punch, Inc.*, 622 A.2d 355, 358-60 (Pa. Super. Ct. 1993) (holding that there is no common-law cause of action for the discharge of an at-will employee, and no cause of action for the wrongful discharge of an at-will employee based on employer's specific intent to harm the employee, as the only exception to the EAWD arises from discharges that violate the clear mandates of public policy).

153. See Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 131, 136-37 (1983). The author observed:

Although the public policy exception is still evolving, courts have so far found it to apply to discharges involving three broad categories of motives. 1. Refusing to Commit an Unlawful Act. - The most typical cases are those of employees fired for refusing to give false testimony at a trial or administrative hearing. 2. Performing an Important Public Obligation. - Several states have recognized a cause of action for employees fired for serving jury duty, for blowing the whistle on illegal conduct by their employers, or for refusing to violate a professional code of ethics. 3. Exercising a Statutory Right or Privilege. - A third category of cases involves employees fired for filing workers' compensation claims or refusing to take polygraph tests.

Id. (citations omitted).

154. See, e.g., *McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21, 24 (Or. Ct. App. 1984) ("We therefore hold that an employee is protected from discharge for good faith reporting of what the employee believes to be patient mistreatment to an appropriate authority."); *Texas Dep't. of Human Servs. v. Green*, 855 S.W.2d 136, 146 (Tex. Ct. App. 1993) (granting reinstatement, actual damages, exemplary damages, attorney's fees, plus pre- and post-judgment interest to an architect who had been discharged in retaliation for calling attention to fraud and corruption in construction contracts); cf. *Mistishen v. Falcone Piano Co., Inc.*, 630 N.E.2d 294, 296 (Mass. App. Ct. 1994) (ruling that employee who was discharged for reporting to her supervisor what she believed to be the employer's unfair and deceptive warranty practices did not engage in "whistleblowing" sufficient to trigger the protection of the public policy exception).

Several state legislatures have enacted statutes protecting employees who engage in certain acts of whistleblowing from discharge and other forms of retaliatory employer action. See, e.g., HAW. REV. STAT. §§ 378-61 to -69 (1988); N.H. REV. STAT. ANN. § 275-E (Supp. 1991); N.J. STAT. ANN. § 34:19-1 to -8 (1988); see also, e.g., *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239, 2251 (1994) (holding that airline mechanic allegedly discharged for refusing to sign an inaccurate maintenance certification document and subsequently notifying the Federal Aviation Administration of the impropriety was not preempted from pursuing a wrongful discharge cause of action under a state whistleblower statute by the arbitration discharge appeals procedure provided by the Railway Labor Act.); *Appeal of Bio Energy Corp.*, 607 A.2d 606, 608-10 (N.H. 1992) (ruling that employee was not required to report employer's alleged violation of law to a third party in order to come within the state's whistleblowers' act, and that award of back pay was proper and necessary to vindicate important public rights); *Abbamont v. Piscataway Township Bd. of Educ.*, 634

otherwise at-will employee for refusing to commit an unlawful act at the employer's behest is not shielded by the EAWD.¹⁵⁵ In a number of states, at-will discharges that violate a state or federal anti-discrimination statute also give rise to a separate cause of action for wrongful discharge in tort, under the public policy rubric, independent of the related statutory remedy.¹⁵⁶ In the same manner, at-will

A.2d 538, 543-45 (N.J. Super. Ct. App. Div. 1993), *cert. granted*, 641 A.2d 1039 (N.J. 1994) (holding that industrial arts teacher who alleged he was not rehired in retaliation for his complaints about inadequate ventilation in his shop proved violations of New Jersey's "Conscientious Employee Protection Act," N.J.S.A. 34:19-3(a) (1988)).

155. See, e.g., *Sides v. Duke Univ. Hosp.*, 328 S.E.2d 818, 825 (N.C. App. 1985) (holding that a nurse who was terminated after she refused to commit perjury on behalf of her employer stated a claim for wrongful discharge because the termination contravened public policy), *review denied*, 333 S.E.2d 490 (N.C. 1985), *review denied*, 335 S.E.2d 13 (N.C. 1985); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336-37 (Cal. 1980) (holding 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," and that "[a]n employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer"); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984) (ruling that an employee who resists her supervisor's sexual advances cannot be terminated at will for refusing to commit an act of prostitution); cf. *Carter v. GC Elecs.*, 599 N.E.2d 11, 15 (Ill. App. Ct. 1992) (refusing to permit employee to reach the public policy-based exception to the EAWD when employee waited until after his discharge to notify corporate superiors of his refusal to comply with an order to conceal an improper disbursement during course of corporate reorganization); *Hamann v. Gates Chevrolet, Inc.*, 723 F. Supp. 63, 65 (N.D. Ind. 1989) (holding that employee who had refused for two years previously to perform illegal automobile title work did not prove causal link between that refusal and her discharge for assisting another employee who was processing a questionable title; because the discharge did not result from the plaintiff employee's refusal to perform an illegal act, she could not reach the public policy exception to the EAWD), *aff'd*, 910 F.2d 1417 (7th Cir. 1990).

156. See, e.g., *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992), in which the court held that a racially motivated discharge or retaliation for filing a racial discrimination complaint offends public policy and thus is a tortious breach of a contractual obligation compensable in damages. *Id.* at 1225. Ruling that the state anti-discrimination statute does not provide an exclusive remedy for racial discrimination in employment, the court found that it therefore does not abrogate the employee's common-law claim for tortious breach of contractual obligations. *Id.* See also, e.g., *Broomfield v. Lundell*, 767 P.2d 697, 703 (Ariz. Ct. App. 1988) (holding that state law barring sex-based employment discrimination did not preempt employee's common-law tort action for wrongful discharge allegedly due to pregnancy); *Erickson v. Marsh & McLennan Co., Inc.*, 545 A.2d 812, 815 (N.J. Super. Ct. App. Div. 1988) (ruling that New Jersey's employment discrimination statute did not preempt common-law claim for wrongful discharge based on sex discrimination), *modified on other grounds* 569 A.2d 793, 804 (N.J. 1990); cf. *Tonack v. Montana Bank of Billings*, 854 P.2d 326, 331 (Mont. 1993) (permitting concurrent filing of claims under state Wrongful Discharge Act and other state or federal statutes, but holding state Act is not applicable if the claim is affirmatively determined under another statute);

discharges arising from an employee's exercise of a statutory right, such as the filing of a worker's compensation claim,¹⁵⁷ or an employment discrimination claim under a state FEP law,¹⁵⁸ or reporting a safety violation¹⁵⁹ often will be deemed unlawful. Such "retaliatory discharges" generally require proof that the termination was undertaken in reprisal for activities protected by a clearly mandated public policy¹⁶⁰ that is rooted in established Constitutional precepts, legislative enactments, legislatively approved administrative regulations, or judicial opinions.¹⁶¹

Aside from these broadly recognized public policy exceptions, the case law reflects significant variation among the states. Thus, some states have held that the public policy exception protects an employee's refusal to contribute to an employer-supported political action committee,¹⁶² refusal to participate in lobbying encouraged by a

Gandy v. Wal-Mart Stores, Inc., 872 P.2d 859, 861-62 (N.M. 1994) (holding that an employee allegedly terminated for filing a discrimination complaint against her employer under a state FEP statute may also bring an independent tort claim for retaliatory discharge); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 919-20 (Pa. 1989) (interpreting the Pennsylvania Human Relations Act, 43 PA. STAT. ANN. tit. 42, § 951-63 (1991), as permitting employee's wrongful termination suit if, one year after filing a complaint under the Act, the enforcing administrative agency dismisses the complaint or fails to enter into a conciliation agreement to resolve it).

157. See, e.g., *Niesent v. Homestake Mining Co. of California*, 505 N.W.2d 781, 784 (S.D. 1993) (holding that the public policy exception includes a cause of action for wrongful discharge if the dismissal is in retaliation for filing a workers' compensation claim); *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 522 (Tex. Ct. App. 1993) (ruling that an employee fired for filing a workers' compensation claim had a wrongful discharge cause of action).

158. See *Gandy*, 872 P.2d at 861-62.

159. See, e.g., *Sorge v. Wright's Knitwear Corp.*, 832 F. Supp. 118, 120-21 (E.D. Pa. 1993) (holding that a former employee's allegations of retaliatory discharge as the result of his reporting workplace safety violations came within the public policy exception to at-will employment doctrine); *Bleich v. Florence Crittenton Servs. of Baltimore, Inc.*, 632 A.2d 463, 469-70 (Md. Ct. Spec. App. 1993) (ruling that retaliation against a teacher who reported alleged safety violations at licensed residential child care facility violated public policy found in various child abuse and neglect statutes and regulations).

160. See *Lilly v. Overnite Transp. Co.*, 995 F.2d 521, 524 (4th Cir. 1993) (holding that driver's discharge for refusing to operate a delivery truck with defective brakes violated public policy and gave rise to claim for wrongful discharge); *Paskarnis v. Darien-Woodridge Fire Protection Dist.*, 623 N.E.2d 383, 385 (Ill. App. Ct. 1993) (ruling that allegations that a fire chief was discharged in retaliation for his speaking out against his employer's failure to properly train part-time firefighters stated a retaliatory discharge claim).

161. *Bowe v. Charleston Area Medical Ctr., Inc.*, 428 S.E.2d 773, 777 (W. Va. 1993) (per curiam).

162. *Culler v. Blue Ridge Elec. Coop., Inc.*, 422 S.E.2d 91, 93 (S.C. 1992).

public employer,¹⁶³ refusal to violate federal highway safety regulations,¹⁶⁴ exercise of the right to petition for redress of grievances and seek access to the courts,¹⁶⁵ exercise of shareholder rights,¹⁶⁶ refusal to give false information to federal government investigators,¹⁶⁷ and performance of "important public deeds."¹⁶⁸ In contrast, courts in other jurisdictions have permitted the EAWD to shield terminations triggered by employees exercising the freedom of association,¹⁶⁹ the right to free speech,¹⁷⁰ and the right to marry the person of one's choice.¹⁷¹

Among the jurisdictions that recognize the public policy exception there is substantial disagreement about the propriety of looking beyond clear pronouncements by the legislative body to identify actionable public policy. The apparent majority view reflects a belief that the reach of the public policy exception is properly restricted to the explications of statutes and state constitutions. Thus, the California Supreme Court has asserted that courts "may not declare public policy without a basis in either the constitution or statutory provisions."¹⁷² Under this view, "the [public] policy also

163. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983) (applying Pennsylvania law).

164. *Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 447-48 (N.C. 1989).

165. *McClung v. Marion County Comm'n*, 360 S.E.2d 221, 227 (W. Va. 1987).

166. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 800-01 (Va. 1985).

167. *Hanson v. Gichner Sys. Group, Inc.*, 831 F. Supp. 403, 407 (M.D. Pa. 1993).

168. *Mistishen v. Falcone Piano Co.*, 630 N.E.2d 294, 296 (Mass. App. Ct. 1994); *see also supra* note 130; *infra* note 176 and accompanying text.

169. *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118, 120 (W.D. Pa. 1985) (mem.).

170. *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 842-43 (Pa. Super. Ct. 1986), *appeal denied*, 523 A.2d 1132 (Pa. 1987); *cf. Connick v. Myers*, 461 U.S. 138, 145 (1983) (holding that public employees may not be discharged for speech going to matters of public concern.); *McAuliff v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) (denying relief to a policeman discharged for exercising his right to free speech because "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

171. *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1409 (D.N.M. 1986); *McCluskey v. Clark Oil & Ref. Corp.*, 498 N.E.2d 559, 561 (Ill. App. Ct. 1986).

172. *Gantt v. Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992); *see also Parada v. City of Colton*, 29 Cal. Rptr. 2d 309, 312 (Cal. Ct. App. 1994) ("The public policy must involve a subject which affects the public at large rather than a purely personal or proprietary interest of the plaintiff or employer."). That even this apparent restrictive view of the sources of public policy is subject to some interpretation is indicated by *Sequoia Ins. Co. v. Superior Court*, 16 Cal. Rptr. 2d 888, 892-94 (Cal. Ct. App. 1993), which held that the employer's precise act need not be specifically prohibited if the constitutional or statutory provision at issue describes the type of prohibited conduct sufficiently to put the employer on notice regarding the public policy at issue.

must be fundamental, substantial and well-established.”¹⁷³ Jurisdictions that embrace this position¹⁷⁴ generally reject expansive theories of legislative purpose or nebulous “implied” legislative intent—arguments not based in express statutory or constitutional language that are invoked in an effort to extend the public policy exception to the EAWD.

In contrast, courts in other states impose public policy limits on the EAWD based on nonstatutory sources, including judicial decisions, administrative regulations or decisions, professional codes of ethics, or previously undeclared policy.¹⁷⁵ In the middle of these two extreme views of the appropriate sources of public policy, courts in some jurisdictions fill perceived gaps in existing statutory frameworks by actively identifying and fusing the public policies and purposes that underlie legislative pronouncements. These courts have been willing to reverse discharges on the basis of public policy ideas,

173. *Parada*, 29 Cal. Rptr. 2d at 312 (citing *Gantt*, 824 P.2d at 684).

174. See, for example, *Harris v. Atlantic Richfield Co.*, 17 Cal. Rptr. 2d 649, 652 (Cal. App. Ct. 1993), in which the court stated that, in order for a former employee to maintain action for wrongful discharge on grounds that the discharge contravenes a fundamental public policy, that policy must be grounded in either a constitutional or statutory provision. Similarly, in *Selof v. Island Foods, Inc.*, 623 N.E.2d 386, 387 (Ill. App. Ct. 1993), the court explained that to establish a prima facie case of retaliatory discharge in violation of public policy, plaintiff must show that she exercised a statutory or constitutional right, she was discharged in retaliation for her activity, and that the defendant-employer's conduct was motivated by an unlawful consideration. See also, e.g., *Blair v. Physicians Mut. Ins.*, 496 N.W.2d 483, 486 (Neb. 1993) (holding that, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason and not be liable for its actions); *Krajsa v. Key Punch, Inc.*, 622 A.2d 355, 360 (Pa. Super. Ct. 1993) (holding that the only exception to the employment-at-will doctrine is for discharges which violate a clear mandate of public policy); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (“The public policy must be evidenced by a constitutional or statutory provision.”).

175. 30 C.J.S. *Employer-Employee Relationship* § 68(b) (1992); see also *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980). In *Pierce*, the New Jersey Supreme Court stated:

We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient.

Id. at 512.

meanings, and objectives that are not expressly articulated in legislative or constitutional provisions.¹⁷⁶

Notwithstanding the more expansive views of the appropriate sources of public policy, case law confirms that courts are most apt to invoke the public policy exception when plaintiff employees rely on administrative codes, regulations, statutes, constitutional provisions, or common-law principles that bear directly on the challenged termination. Judicial intervention also is more probable when the operative public policy is grounded in a clear legislative or constitutional pronouncement or writing. Thus, it can be reliably inferred that where employment termination disputes involve problems or issues unanticipated and unaddressed by legislation, the Constitution, or established common-law doctrine, employers seldom run afoul of the public policy exception.

V. THE INTERACTION BETWEEN THE EAWD AND EMPLOYER-EMPLOYEE AGREEMENTS TO ARBITRATE STATUTORY FAIR EMPLOYMENT PRACTICES CLAIMS

The analysis now returns to the central question posited at the outset of this article: Can at-will employers secure the purported benefits of arbitrating statutory fair employment practices claims without inadvertently limiting, or completely surrendering, the remaining discretion to terminate employees presently enjoyed under the modern EAWD?¹⁷⁷ The answer to this question lies in the effect of the interaction between employer-employee agreements to arbitrate statutory FEP claims and the EAWD. The commentary immediately below describes the first category of those interaction

176. See, e.g., *Mistishen v. Falcone Piano Co.*, 630 N.E.2d 294, 296 (Mass. App. Ct. 1994) ("While the importance of a public deed is not determined on the sole basis of whether the law absolutely requires its performance, such a mandate would bespeak a legislative determination of the importance of the act to the public." (citation omitted)). The New Hampshire Supreme Court likewise applies a more liberal test for public policy-based discharges, holding that public policy is contravened when an employer terminates an employee for performing an act which public policy would encourage, or for refusing to perform an act which public policy would condemn. *Short v. School Admin. Unit No. 16*, 612 A.2d 364, 370 (N.H. 1992); see also *Bravo v. Dolsen Cos.*, 862 P.2d 623, 629 (Wash. Ct. App. 1993) (ruling that a wrongful discharge tort action exists if the discharge contravenes a clear mandate of public policy, including legislatively recognized public policies).

177. An important collateral question also examined below, see *infra* notes 180-202 and accompanying text, centers on the manner in which the existing EAWD case law will affect the implementation of contractual agreements to arbitrate.

effects, those specifically indicated by the previously examined modern EAWD case law.

Of the two categories of limitations imposed on the EAWD during the course of the last sixty years—legislative and judicially fashioned—those imposed by the judiciary without the benefit of explicit legislative direction are the grist of this analysis. As demonstrated above, it is easy to ascertain the result of the interaction between the EAWD and the substantive protections of the several FEP statutes when statutory FEP claims are submitted to arbitration. The EAWD simply does not shield discharges by at-will employers that abrogate the statutorily guaranteed FEP rights of terminated protected-group members. The statutory FEP protections trump the EAWD.

Uncertainty arises, however, when the focus shifts to the likely effects of the interaction between the several judicially fashioned exceptions to the EAWD and employer-employee agreements to arbitrate statutory FEP claims. Skilled lawyers can certainly draft arbitration agreements that, by their unequivocal terms, purport to obligate the employee and employer to arbitrate statutory FEP claims while preserving the employer's at-will freedom.¹⁷⁸ It is less clear that when courts scrutinize the manner in which those agreements are implemented they will consistently be given that effect. The potential impact of the three common-law doctrines used by judges to constrain the EAWD—the implied covenant of good faith, the implied-in-fact contract terms/enforceable promises doctrine, and the public policy exception—is uncertain when the doctrines are applied within the milieu of contractual agreements to arbitrate statutory FEP claims. Each of the probable specific interaction effects will be examined in turn.¹⁷⁹

178. See Mathiason & Ober, *supra* note 9, at 909; Christopher H. Mills, *Drafting Employment Agreements: Practical and Legal Considerations*, in *HANDLING CORPORATE EMPLOYMENT PROBLEMS 1991*, at 470 (PLI Litig. & Admin. Practice Course Handbook Series No. 410 (1991)).

179. The authors' research reveals no reported cases to date precisely addressing the possible effects of the interaction between the EAWD and employer-employee agreements to arbitrate statutory FEP claims. Consequently, what follows is by necessity a largely heuristic evaluation, based on extrapolation from the existing EAWD case law, of the likely interaction between the EAWD and the emerging phenomenon signaled by *Gilmer* and its progeny.

A. *Arbitration Agreements and the Implied Covenant of Good Faith*

By agreeing with its employees to arbitrate unresolved statutory FEP claims, an employer introduces a contract into an otherwise contract-free employment relationship. In doing so, the employer raises the possibility that the arbitration agreement will form the basis for a judicial attribution to both parties of an implied, enforceable obligation to deal with one another fairly and in good faith within the context of the agreement to arbitrate. Disclaimers, either general in nature or specifically directed toward the implied covenant of good faith, may not be an effective barrier to invocation of the covenant, because the usual rule is that the obligation to conduct contractual relations in good faith cannot be waived.¹⁸⁰

Because this exception is a creature of judicial conscience that has not been embraced by a majority of the states,¹⁸¹ its use within the context of employer-employee agreements to arbitrate statutory FEP claims seems likely to vary widely across jurisdictions. Despite the prospect of uneven application, it would be a mistake to infer that the implied covenant of good faith cannot have a significant impact. The interests at issue in contractual agreements to arbitrate statutory FEP claims implicate significant constitutional and statutory rights. Consequently, they are of great interest to the public and raise important public policy concerns. Courts are certain to be highly predisposed to read into them a good faith obligation.

At bottom, the implied covenant of good faith requires the employer to "shoot straight" and to "do the right thing." In the context of arbitration of statutory FEP claims, where the covenant is recognized, it will be applied to ensure that employers respect the

180. For cases holding that the duty of good faith cannot be waived, see, for example, *Brazell v. First Nat'l Bank and Trust Co.*, No. 86C20244, 1990 WL 304281, at *7 (N.D. Ill. June 7, 1990); *Centerbank v. Dowcom, Inc.*, No. 111626, LEXIS 3024, at *4 (Conn. Super. Ct. Nov. 17, 1993); *Rhode Island Hosp. Trust v. Martin Trust*, No. 700674, LEXIS 420, at *7-8 (Conn. Super. Ct. Feb. 3, 1992); *Perling v. Citizens and Southern Nat'l Bank*, 300 S.E.2d 649, 652 (Ga. 1983); *New Amsterdam Casualty Co. v. Lundquist*, 198 N.W.2d 543, 549 n.4 (Minn. 1972); *Tennessee Gas Pipeline Co. v. Lenape Resources Corp.*, 870 S.W.2d 286, 293 (Tex. Ct. App. 1993). Also, see U.C.C. § 1-203 (1976), which states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-102(3) (1990) makes this duty nonwaivable.

181. 2 MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW*, § 9.6 (1994) (noting that "[a] little more than one-fifth of the states have permitted the use of the implied-in-law covenant of good faith and fair dealing to challenge discharges or other employer actions in certain limited situations").

express terms of the arbitration agreements they enter into with their employees. Thus, employers will have to comply with the provisions of the arbitration procedure that control the types of claims that can be raised (substantive arbitrability), timeliness and other procedural matters (procedural arbitrability), arbitrator selection and compensation, finality of the arbitrator's award, and the like. Furthermore, employers will be expected to implement the remedial orders of arbitrators in an expeditious and forthright manner, without obfuscation.¹⁸² Finally, the courts will use the implied covenant of good faith to police any other untoward employer conduct that harms the employee who has chosen to arbitrate a statutory claim or that seriously diminishes the value of the procedural and substantive protections the arbitration mechanism was intended to provide.

It is unclear what remedies courts would deem appropriate if they determined that the employer had breached the covenant. The breach at issue would go not to the decision to discharge, but to the employer's conduct with regard to an alternative dispute resolution procedure serving as a surrogate for litigation in court. Therefore, it is difficult to discern under what conditions a court, finding a breach of the implied covenant of good faith, might be willing to reverse the underlying discharge. A conception of this dimension of the impact of the implied covenant of good faith is illustrated by Figure I below, in which the bipolar axis of the continuum measures the degree to which a court might interfere with the employer's at-will freedom to terminate employees for reasons not proscribed by statute.

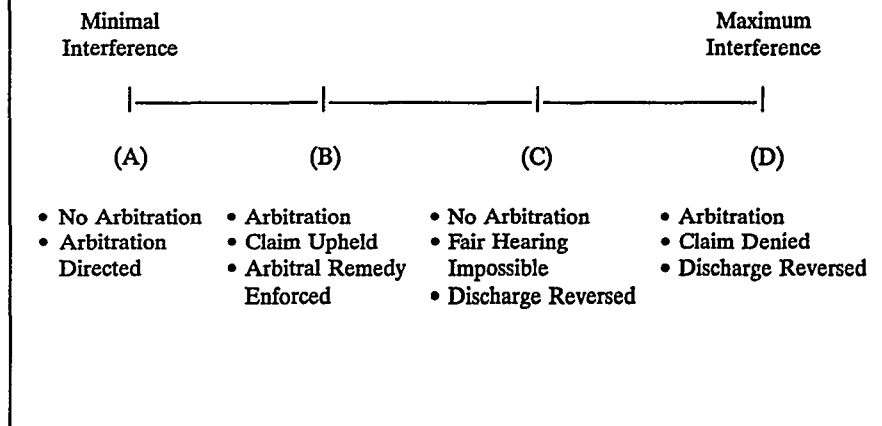
At one end of this continuum (point (A)), when a reviewing court finds the employer in breach of the covenant due to its refusal to arbitrate or due to other conduct that prevented arbitration of the employee's statutory FEP claim, a remand to arbitration is the likely outcome. At the opposite continuum pole (point (D)), when the employee's claim has been denied in arbitration but a reviewing court concludes that the result was achieved in whole or in part through extreme bad faith conduct by the employer,¹⁸³ it is quite possible that a discharge otherwise consistent with law¹⁸⁴ will be reversed.

182. Remedial orders may include reinstatement, back or front pay, compensatory and/or punitive damages. See MARVIN F. HILL & ANTHONY SINICROPI, BUREAU OF NAT. AFFAIRS, REMEDIES IN ARBITRATION 135-284 (2d ed. 1991).

183. An example of such bad faith conduct might be introducing falsified documents at the hearing that are then relied upon by the arbitrator.

184. This would occur through a finding of no violation of the FEP statute(s) at issue in the arbitration.

FIGURE 1



The middle range nearest the first scenario (point (B)), represents the situation when, at the conclusion of arbitration, the arbitrator upholds the employee's claim and the employer, in breach of the covenant, refuses to implement the remedy ordered. It is likely that a court would merely enforce the arbitration award and attendant remedy order.¹⁸⁵ A second midrange point (point (C)) is nearer in character to the right-hand continuum pole. In this scenario, no arbitration has been conducted, but a court ascertains that the employer's conduct in breach of the covenant was so egregious or was otherwise of such a nature that a fair arbitration no longer can be held.¹⁸⁶ In this situation, reversal of the discharge appears certain.

In all of these circumstances, particularly troublesome employer behavior during the course of the arbitration procedure that is inconsistent with the implied covenant of good faith would raise the possibility of compensatory (contract) damages independent of the discharge action. Of more concern to employers accustomed to exercising unfettered discretion to discharge employees for any reason

185. The results at points (A) and (B) of the continuum could also be achieved through an action brought under section 4 of the Federal Arbitration Act seeking either an order compelling a recalcitrant employer to arbitrate (A), or an order enforcing the arbitrator's award (B). See 9 U.S.C. §§ 2, 3, 4, 13 (1988); see also *supra* part VI.

186. An example might be threatening employees called to testify on the claimant employee's behalf with retaliation if they did so.

not otherwise barred by law is that employees who were judged to have been terminated for lawful reasons under the particular FEP statute and under the EAWD, or who probably would have been so judged, could nevertheless be reinstated, perhaps with a monetary remedy. This situation is symbolized by the right-hand range of the continuum above (points (C) and (D)).

Confronting this reality will be a new and sobering experience for at-will employers accustomed to a free hand in termination matters. Although application of the implied covenant of good faith in this context would not establish a *de facto* just cause guarantee,¹⁸⁷ it would diminish, indirectly but significantly, the EAWD shield. That prospect is a weighty consideration for at-will employers in deciding whether to use arbitration as an alternative device for adjudicating the statutory FEP claims of their employees.

B. Arbitration Agreements and the Implied-In-Fact Exceptions to the EAWD

Unlike the implied covenant of good faith, the interaction between employer-employee agreements to arbitrate statutory FEP claims and the implied-in-fact exceptions to the EAWD will not be triggered by repugnant or pernicious employer conduct toward employees. Rather, it will arise where a court finds that the manner in which the employer promulgates, articulates, and implements the arbitration procedure for statutory FEP claims constitutes an implied contract or contract term, or an enforceable tacit promise, to terminate employees only for just cause. Here, the critical tasks for employers will be careful drafting of the arbitration agreement and consistent application and implementation of its terms.

For employers desiring to arbitrate only statutory FEP claims, while retaining the freedom to discharge employees at-will for any reason(s) not in violation of those statutes, the first step will be careful crafting of the arbitration agreement and any employee handbook provisions addressing the arbitration procedure. The key will be a clear definition of the scope of the arbitration mechanism and an equally clear disclaimer of any intention to arbitrate nonstatutory matters, including discharge, that fall outside its reach. The most reliable way to articulate the procedure's scope would be an enumera-

187. See *supra* notes 124-26 and accompanying text.

tion of the specific statutes within its reach.¹⁸⁸ Title VII, the ADEA, the ADA, section 1981 of the Civil Rights Act of 1866,¹⁸⁹ the Equal Pay Act, and the new Family and Medical Leave Act.¹⁹⁰ That statement, along with a prominent disclaimer of any express or implied agreement or intention to embrace nonstatutory claims or to modify the EAWD's basic premise, should effectively restrict the arbitration procedure to claimed violations of the cited FEP statutes.

The next step toward avoiding a breach of the EAWD shield involves the implementation and administration of the arbitration mechanism. This step will be much more difficult for at-will employers to handle competently. The implied-in-fact case law reveals a number of recurring scenarios, or "trip wires," that can furnish a court with the basis for inferring a contract, a contract term, or an enforceable promise that obligates the employer to arbitrate matters other than claimed statutory FEP violations.

In explaining the arbitration agreement to employees, employers must describe clearly the limited scope of the appeals procedure it creates. They must avoid speaking in broad terms of guarantees of "fairness," "workplace justice," and "workplace due process." Forthrightness and accuracy is critical. Employees must not be given any reasonable basis to believe that they are agreeing to anything more

188. A major question for the employer in this regard is whether to open the scope of the arbitration mechanism to claims beyond the FEP statutes cited by embracing other employment rights statutes like the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1988 & Supp. IV 1992); the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201-219 (1988 & Supp. IV 1992); the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (1988 & Supp. IV 1992); state worker compensation statutes; and the like. Extending the range of arbitral issues beyond the basic fair employment statutes is probably ill-advised. The types of disputes most amenable to resolution through an expedited, simplified proceeding like arbitration are those involving individual employees' claims centering on matters of discharge, promotion, layoff and other discrete, routine personnel actions. It is the authors' belief that these individual claims are the predominant types of cases that are adjudicated under Title VII and the other FEP statutes. In contrast, statutory schemes like OSHA, ERISA, FLSA, WARN, and worker compensation statutes more often than not involve highly specialized adjudications based on extensive administrative agency rules, adjudications, and related case law. Moreover, these statutes typically have highly developed administrative enforcement schemes that likely would not comport well with arbitration. *See, e.g.*, Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 659-666 (1988) (establishing the Occupational Safety and Health Review Commission and the scheme for enforcing OSHA). The administrative rules that implement the enforcement scheme are provided at 29 C.F.R. § 2200 (1993).

189. 42 U.S.C. § 1981 (1988 & Supp. IV 1992).

190. 29 U.S.C.A. §§ 2601-2654 (West Supp. 1994).

than a procedure for arbitrating employer actions claimed to be in violation of the explicit protections and rights secured to them by the FEP statutes expressly embraced by the arbitration procedure. Employers should avoid overselling the attributes and scope of the arbitration agreement.¹⁹¹

Further caution should be exercised if, as frequently is the case, the arbitration mechanism is linked to a prearbitration grievance procedure or mediation step. An implied contract term or enforceable promise may be created by any statement, action, or representation by a front-line supervisor, higher level manager, or employee relations official which implies that disputes, other than those linked directly to a *bona fide* claim of a statutory FEP violation, will be arbitrated. Thus, when an employee attempts to join a statutory FEP claim with collateral matters not within the reach of the arbitration procedure, the employer must make clear that only the facts and circumstances pertinent to the statutory FEP claim will be arbitrated. In the same manner, it may be necessary before entering into a pre-arbitration mediation effort for the employer to secure a stipulation from the employee (and employee's counsel) that the entire mediation is off the record and will not be cited in any other proceeding, either judicial or arbitral.

191. Through their conduct, remarks and writings, employers can unwittingly oversell the scope of a contractual arbitration mechanism. In *Clay v. Horton Mfg. Co., Inc.*, 493 N.W.2d 379, 380-82 (Wis. Ct. App. 1992), for example, the employer's handbook contained a prominent disclaimer: "This handbook is intended for informational purposes only and neither it, company practices, nor other communications create an employment contract or term. . . . [T]he policies . . . outlined in this handbook are subject to . . . change by management at any time." *Id.* at 380. The plaintiff employee asserted that, notwithstanding the handbook's disclaimer, its provisions became a part of his employment contract because of the repeated oral assurances by management personnel that those provisions would be followed. *Id.* at 380-81. He alleged he was told to "obey the employee handbook. We obey it, you obey it." *Id.* at 381. When the employee had questions, he was referred to the handbook, and was repeatedly told that if he obeyed the rules in the handbook he would keep his job. *Id.* The court viewed the question of whether the handbook constituted a contract as turning on the parties' mutual intent as to the handbook's provisions. *Id.* It deemed the disclaimer inconclusive, and concluded that an employer can modify an employment contract through words and conduct, notwithstanding a disclaimer. *Id.* at 382.

In *Hodgson v. Bunzl Utah, Inc.*, 844 P.2d 331, 334 (Utah 1992), the court ruled that evidence of conduct and oral statements can establish an implied-in-fact contract of employment even without support of written policies, bulletins, or handbooks, if that evidence is strong enough to overcome the presumption of at-will employment and any inconsistent written policies and disclaimers. See also *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 668 (Wash. 1992) (holding that an employer's inconsistent representations and conduct may negate or override a disclaimer).

One of the primary pitfalls to which employers must remain alert will arise if the arbitration procedure proves to be an efficient method for expeditiously achieving satisfactory resolutions to statutory-based disputes. If it does, there will be substantial temptation to utilize the arbitration mechanism to resolve other, nonstatutory employer-employee disputes that the employer does not want to litigate in court. If the employer succumbs to that temptation routinely, or even occasionally, the implied-in-fact doctrine will materialize to furnish a court with a sound basis for inferring an employer commitment to arbitrate all employment disputes. This danger will be most discernible in tough, high-stakes discharge cases that normally would fall within the purview of the EAWD.

When the employer enters into agreements with its employees to arbitrate their statutory FEP claims, it explicitly acknowledges the substantial statutory limitations on its freedom to terminate employees embraced by the arbitration procedure. It must avoid allowing that explicit congressional diminution of its authority to blossom into an unknowing surrender of its remaining at-will discretion through the *de facto* imposition of a just cause standard for discharge. If the employer is to avail itself of the advantages of arbitration without opening the door to judicial usurpation of the residual at-will authority, it must monitor carefully the actions and words of its management and supervisory officials. Any management conduct that can trigger a reasonable belief by employees that they will be discharged only for just cause, or that they will be permitted to challenge all terminations through the arbitration mechanism, invites judicial intervention.¹⁹²

C. *Arbitration Agreements and the Public Policy Exception to the EAWD*

There are two dimensions to the interface between employer-employee agreements to arbitrate statutory FEP claims and the public policy exception to the EAWD. First, the previously discussed premise of the public policy exception establishes that otherwise permissible at-will terminations of employees running afoul of a clear public policy are not shielded by the EAWD.¹⁹³ The second dimen-

192. Maintaining at-will discretion in the face of agreements to arbitrate statutory employment rights claims will require extensive training of front-line supervisors, managers, and human resources officials, as well as careful monitoring of the operation of the arbitration procedure.

193. See *supra* notes 152-76 and accompanying text.

sion is the rule of *Gilmer* that, as a separate public policy pertaining to the arbitration of statutory FEP claims under the FAA, arbitration is a suitable surrogate for litigation only if the arbitration procedure itself provides adequate procedural and substantive due process safeguards.¹⁹⁴

Few public policies relating to the employer-employee relationship are more significant or far reaching than the two identified above. In evaluating the conduct of employers in the administration and implementation of these arbitration procedures, the courts undoubtedly will act quickly to remedy employer conduct found to have abridged the right of claimant employees to have their statutory FEP claims arbitrated fairly. The signal sent to employers by the intersection of these two public policies is unmistakable. If employers want arbitration to function as a substitute for traditional litigation, they must ensure that it is a truly fair procedure providing employees with a full opportunity to challenge discharges and other personnel actions on a level playing field.

The critical elements of a full and fair arbitration procedure will center on matters of substantive and procedural due process.¹⁹⁵ Thus, in designing the arbitration mechanism at-will employers must ensure the right of employees to be represented by counsel or by other persons of their choice. The procedure must provide for adequate prehearing discovery and employers must permit reasonable access to employee personnel records and other information or evidence that is solely in their possession and control. The procedure for choosing the arbitrator must ensure the mutual selection of an

194. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991).

195. See *Mathews v. Eldridge*, 424 U.S. 319, 321-49 (1976). The Supreme Court held that " 'due process' . . . is not a technical conception with a fixed content unrelated to time, place and circumstances[; rather, it] is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 333. To identify the specific dictates of due process it is generally necessary to consider three factors: the nature of the private interest that will be affected by the official action; the risk of the erroneous deprivation of the private interest through the procedures used, and probable value, if any, of requiring additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Id.* at 334-35; see also DUNLOP COMMISSION, *supra* note 3, at 115-17 (discussing the "key safeguards" that must be built into an effective employer-employee arbitration procedure).

individual of established neutrality and competence.¹⁹⁶ Employers must avoid any type of conduct, by supervisors or others, that limits the ability of claimant employees to call fellow employees, supervisors, or managers as witnesses on their behalf. Further, there can be no retaliation against the individuals who so testify.

At all times during the progression of employee claims through the arbitration procedure, at-will employers must avoid any actions intended to delay the process or to make it more difficult for employees to achieve a fair hearing of their claims. After the award has issued, employers must move quickly and forthrightly to implement any remedy ordered by the arbitrator and must resist the temptation to delay implementation by mounting vexatious appeals that offer little real hope that a court will vacate or modify the award.

As with many of the other aspects of the arbitration of statutory FEP employment rights claims, at-will employers will have to make a conscious effort to learn to play this new game. It will be a difficult step to open routinely employment-related decisions that formerly were challengeable only through court action to the scrutiny of an outsider who is given the authority to reverse or modify those actions. Stated simply, those employers must adopt a new view of the dispute-resolution process, at least with regard to the statutory FEP claims that will be pursued under the arbitration procedure. Under that view, employers place primary value on resolving employment-related disputes accurately, fairly, expeditiously, and in a cost-effective manner. In this context, it is important for at-will employers to realize that the license granted to the courts by the public policy exception (and where it is recognized, the implied covenant of good

196. See *Republic Indus., Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628, 639-40 (4th Cir. 1983) (identifying impartiality and objectivity of the arbitrator as critical elements of an arbitration procedure with sufficient due process guarantees), *cert. denied*, 467 U.S. 1259 (1984). That arbitrator neutrality and competence are vital concerns is indicated by the recent study by the Government Accounting Office of the arbitration of employee statutory FEP claims in the securities industry under the auspices of the arbitration mechanisms administered by the New York Stock Exchange and the National Association of Securities Dealers. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-94-17, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (1994). The March 1994 GAO Report expressed significant reservation regarding the competency, neutrality and the demographic characteristics of the arbitrators assigned to arbitrate these statutory FEP matters in the securities industry. *Id.* at 12. Related information can be found in Margaret A. Jacobs, *Required Job-Bias Arbitration Stirs Critics*, WALL ST. J., June 22, 1994, at B5; Margaret A. Jacobs, *Riding Crop and Slurs: How Wall St. Dealt With a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1; Steven A. Holmes, *Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, April 5, 1994, late ed., at 86.

faith), in concert with the Federal Arbitration Act¹⁹⁷—to oversee employer behavior pertaining to the arbitration of statutory FEP claims—is far-reaching. Any employer conduct that manifests either a reluctance to deal with employees on an equal footing or an unwillingness to accept unfavorable outcomes would contravene both the substantive protections of the relevant FEP statute(s) and the public policy favoring arbitration that is reflected in the FAA. Consequently, such behavior by employers would beg judicial intervention under the imprimatur of the public policy exception.

The remedies imposed by a court for this type of employer conduct presumably will vary according to the circumstances.¹⁹⁸ In a manner similar to the remedy-related dimensions of the implied covenant of good faith, egregious employer actions that prevent a full and fair initial arbitration, or readjudication on remand to arbitration, almost certainly would result in a judicial order reversing the underlying personnel action. The claimant employee would be restored to the *status quo* that existed before the underlying controversy arose, and when appropriate, would be awarded some form of monetary remedy. Less serious actions by the employer that nevertheless contaminate the arbitration tribunal would result in a remand to a new arbitration proceeding or, where the employee has secured a favorable award in arbitration, an order enforcing that award.

All of the above ramifications flowing from the decision to arbitrate statutory FEP claims will apply to employee discharges. The one area where some uncertainty exists in the interface between the EAWD public policy exception and the arbitration of statutory FEP claims is that of employee challenges to discharges alleged to be in violation of public policy but that do not violate express statutory provisions.¹⁹⁹ An employee's effort to arbitrate claims that a termination was, for example, motivated by an act of "whistle blowing" not protected by statute, or that the termination was in retaliation for refusing to perform or overlook an illegal act, will present difficult questions of substantive arbitrability that have not yet been addressed by the courts within the context of a narrowly drawn agreement to arbitrate only statutory FEP claims.²⁰⁰

197. 9 U.S.C. §§ 1-16 (1988 & Supp. IV 1992).

198. See *supra* Figure 1.

199. See *supra* notes 172-76 and accompanying text.

200. This dimension of the EAWD-arbitration interaction further illustrates the importance of carefully crafting the arbitration agreement language that defines the scope of the procedure and disclaims those matters not expressly embraced therein. Thus, a reference to "rights guaranteed employees under law" would almost surely embrace these

A hint as to the Supreme Court's likely attitude toward this question is found in the body of case law pertaining to the arbitration of labor disputes under collective bargaining agreements. In recent years, the Court has fashioned an exception to the general rule insulating labor arbitration awards from judicial review on their merits. The exception permits the federal courts to refuse to enforce arbitration awards where enforcement would violate an explicit public policy that is "well defined and dominant, and ascertainable by reference to the laws and legal precedents."²⁰¹ In the future, courts may draw upon this component of the law of labor arbitration, appending it to the law of commercial arbitration under the FAA to justify hearing challenges to, and vacating awards under, employer-employee arbitration agreements that uphold discharge decisions arguably made in violation of public policies other than those set forth in the various FEP statutes.²⁰²

A similar dilemma for the employer that involves the decision of whether to arbitrate is presented when a challenge to a termination action presents both an allegation of a statutory violation (e.g., a Title VII race claim) and a nonstatutory public policy claim (e.g., based on an asserted act of whistle blowing). In that circumstance, the employer must exercise caution in order to separate the statutory claim from the nonstatutory claim and arbitrate only the former.

For the at-will employer, the lesson from the public policy element of the EAWD-arbitration interface is straightforward: Courts will not tolerate any employer action that appears or is intended to limit the full value of the arbitration mechanism to discharged employees, or that in any way restricts the vitality and reach of the statutory protections that are the focus of that procedure. This is a lesson many at-will employers may find difficult to grasp.

The obvious interaction effects between the EAWD and arbitration of statutory FEP claims discussed above are an important

nonstatutory public policy-based claims. A procedure expressly limited to claimed violations of specified FEP statutes would not.

201. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)); see also *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (holding that an arbitration award may be vacated if enforcement is contrary to public policy); Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP. RES. 1, 1-38 (1993) (discussing the public policy basis for judicial vacation of labor arbitration awards).

202. *Misco*, 484 U.S. at 42; see also *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (refusing to set aside arbitration award as against statutory or judicially created public policy exceptions).

factor guiding the response of at-will employers that want to preserve what remains of the EAWD shield but also want to take advantage of the benefits of employer-employee agreements to arbitrate. That fact notwithstanding, the authors' research and related reflections on this matter have led them to discern three broader, potentially more important implications of the move toward the arbitration of statutory FEP claims. None of these three broader, more complex interaction effects has been addressed in the existing case law or the relevant literature. Nevertheless, the authors submit that they could subsume all of the matters discussed above. This second dimension of the EAWD-arbitration interaction is the subject of the final substantive section of this analysis.

VI. THE BROAD INTERACTION EFFECTS: THE COMPULSION TO ARBITRATE; THE *DE FACTO* JUST CAUSE STANDARD; AND DIFFERENTIAL TREATMENT OF NONPROTECTED-GROUP MEMBERS

The three broad EAWD-arbitration interaction effects discussed here will manifest themselves only with the maturation and widespread use of employer-employee agreements to arbitrate statutory FEP claims. All three are tied to the manner in which discharged at-will employees will attempt to prove that their terminations were the result of illegal discrimination, and are linked with a difficulty that employers and the courts will encounter at the pre-arbitration stage. That difficulty lies in separating defensible, minimally colorable claims of illegal discrimination from those circumstances in which there is no palpable basis to suspect that a violation of FEP law has occurred.

The first broad effect, the compulsion of at-will employers to arbitrate virtually all challenged discharges of protected-group members, will result from applying the substantive arbitrability dimension of the law of commercial arbitration. The second effect, the emergence of a *de facto* just cause standard for protected-group members, will arise from the constraints that the disparate treatment order and allocation of proof paradigm places on the discretion of at-will employers to terminate traditionally protected-group members for reasons other than their race, color, national origin, sex, religion, age, or disability. The third broad interaction effect relates to the first and second; it concerns the difficulty at-will employers may experience in refusing to arbitrate the discharges of nonmembers of the traditionally protected groups.

Examination of these broad phenomena is best accomplished by contrasting the circumstances faced by traditional protected-group members who attempt to challenge alleged wrongful discharges with

those that will confront nonprotected-group members who wish to do the same. The analysis that follows is fashioned accordingly.²⁰³

A. *At-Will Discharges of Protected-Group Members: The Employer's Compulsion to Arbitrate*

Thoughtful appraisal of the scenario under which individual statutory FEP claims will be arbitrated suggests a sobering revelation for at-will employers. By agreeing to arbitrate statutory claims of illegal employment discrimination, at-will employers will create an adjudicatory process that employees will find much easier to initiate and pursue than a traditional lawsuit. Consequently, those at-will employers, over time, almost certainly will be confronted with demands to arbitrate virtually all challenged terminations of the members of the groups whose interests are protected under the various FEP statutes. Protected-group members who are discharged for what they believe to be illegitimate reasons regularly will seek arbitral review by alleging that the reasons cited by the employer for termination were only a pretext for illegal employment discrimination.

When at-will employers believe that discharges of protected-group members are based on sound business-related reasons and are not motivated by illegal discriminatory intent, they will resist arbitration by contending that the arbitration mechanism was intended to embrace only legitimate claims of illegal employment discrimination. In the vernacular of commercial arbitration, this employer recalcitrance would take the form of a substantive arbitrability argument that specious, frivolous claims of employment discrimination are not proper subjects for arbitration under employer-employee agreements to arbitrate statutory FEP claims. At-will employers that take this position will force discharged protected-group members who wish to arbitrate to resort to an appropriate judicial forum to obtain enforcement of the agreement to arbitrate. It is at this point that the law of commercial arbitration pertaining to substantive arbitrability becomes relevant.

203. The authors' research reveals no analysis or commentary in the literature, nor any case law, that directly identifies or addresses any of these three broader dimensions of the relationship between employer-employee agreements to arbitrate individual statutory FEP claims and the EAWD. Therefore, as was true with the discussion pertaining to the specific EAWD-arbitration interaction effects, the analysis below is necessarily heuristic in nature and based on extrapolation from the existing case law.

1. The Relevant Law of Substantive Arbitrability

The previously discussed opinions of the United States Supreme Court in *Mitsubishi Motors Corp.*,²⁰⁴ *McMahon*,²⁰⁵ *Rodriguez de Quijas*,²⁰⁶ and *Gilmer*²⁰⁷ make clear that the Court considers arbitration of statutory claims (FEP and otherwise) to be a matter of commercial arbitration governed by the Federal Arbitration Act.²⁰⁸ Section 2 of the FAA makes contractual agreements to arbitrate valid, irrevocable, and enforceable.²⁰⁹ Section 4 of the FAA expressly authorizes a party seeking to enforce an arbitration agreement to petition a federal district court for an order directing that arbitration proceed in the manner called for in the contractual agreement.²¹⁰ Under the FAA, substantive arbitrability is a question for the courts,

204. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614 (1985).

205. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

206. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

207. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

208. Hayford, *supra* note 51, at 13. Although the bulk of employment arbitration law is founded in the national labor policy springing from section 301 of the Labor Management Relations Act [LMRA], 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (1988)), the case law pertinent to that portion of the national labor policy is of only collateral relevance here. Similarly, *Gilmer* and its progeny are not precisely on point with regard to the substantive arbitrability dimension of employer-employee agreements to arbitrate: The *Gilmer* line of cases does not speak to employer refusals to arbitrate under contractual arbitration agreements. Rather, it is concerned with employee efforts to resist the arbitration of statutory FEP claims. Despite the fact that it does not speak directly to the substantive arbitrability issue, *Gilmer* is significant to this portion of the analysis to the extent that it reflects a ringing endorsement of the use of arbitration as the vehicle for resolving statutory FEP claims. See *supra* part II.

209. Section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1988).

210. 9 U.S.C. § 4 (1988). Section 4 states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

Id.

not employers or arbitrators, to decide.²¹¹ The party resisting arbitration bears the burden of proving that it is not obligated to arbitrate.²¹²

The relevant FAA case law establishes that when disposing of a discharged protected-group member's petition to compel an employer to arbitrate, a court will be presented with two questions: (i) Is there a valid agreement to arbitrate between the employer and employee? (ii) Do the claims asserted by the petitioner employee fall within the scope of the arbitration mechanism?²¹³ In making these two determinations, a court is generally deemed to lack authority to examine or evaluate the merits of the underlying dispute.²¹⁴ Thus, assuming that the employer-employee agreement to arbitrate is valid,²¹⁵ the

211. See *Dean Witter Reynolds v. McCoy*, 995 F.2d 649, 650 (6th Cir. 1993) (per curiam); *Stotter Div. of Graduate Plastics Co. v. District 65, UAW*, 991 F.2d 997, 1000-01 (2d Cir. 1993); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 853-54 (11th Cir. 1992); see also *Contracting Northwest, Inc. v. City of Fredericksburg, Iowa*, 713 F.2d 382, 386 (8th Cir. 1983) (holding that, although procedural arbitrability may be determined by the arbitrator, substantive arbitrability is a matter for the courts); cf. *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 398 (8th Cir. 1986) (holding that matters of procedural arbitrability are proper subjects for resolution by an arbitrator).

212. See *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 64 (2d Cir. 1983); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998, 1003 (N.Y. 1993), cert. denied, 114 S. Ct. 554 (1994).

213. *Mercury Constr. Corp. v. Moses H. Cone Memorial Hosp.*, 656 F.2d 933, 938-39 (4th Cir. 1981), aff'd, 460 U.S. 1 (1983); see also *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993) (stating that arbitration will be compelled where the parties have agreed to arbitrate and the agreement covers the asserted claims). A second variation on this framework for analysis requires a district court which has found a valid arbitration agreement to ascertain whether the particular claim in dispute is barred from arbitration by federal or state law or policy. See *R.M. Perez & Assocs. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 628-30 (1985)).

214. See, e.g., *Paine Webber, Inc. v. Hoffmann*, 984 F.2d 1372, 1377 (3d Cir. 1993) (citing *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 649 (1986)); *Kelly v. Merrill Lynch*, 985 F.2d 1067, 1069 (11th Cir. 1993), cert. denied, 114 S. Ct. 600 (1994); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991), cert. denied, 112 S. Ct. 1294 (1992); *Paine Webber v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990); see also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (holding that the merits of a claim found to be arbitrable are to be decided by the arbitrator), cited in *AT&T Technologies*, 475 U.S. at 648-50; *Concourse Village v. Local 32E Serv. Employees Int'l Union*, 822 F.2d 302, 305 (2d Cir. 1987).

215. On the question of the validity and enforceability of such agreements, see John-Edward Alley & Angela S. Oehler, *The Arbitration of Age Discrimination Cases: Will Clauses in Employment Contracts Be Enforced?*, 65 FLA. B.J. 29 (Dec. 1991); Jennifer R. Dowd, *Enforcing Arbitration Agreements in Age Discrimination Suits: Gilmer v. Interstate/Johnson Lane Corp.*, 33 B.C. L. REV. 435 (1992); B. Scott Silverman, *Enforceability of Releases and Arbitration Agreements in Individual Employment Discrimination Cases*, in C742 A.L.I.-A.B.A. COURSE OF STUDY: EMPLOYMENT DISCRIMINATION AND CIVIL

question that remains is whether an arguably frivolous claim of illegal employment discrimination brought by a protected-group member is within the scope of an arbitration mechanism intended to embrace only employee statutory FEP claims. The relevant law of substantive arbitrability leaves no doubt that the answer to this question is "Yes."²¹⁶

2. The Law of Substantive Arbitrability Applied

The substantive arbitrability case law arising under the FAA (and at times borrowed from the law of labor arbitration arising under the Labor Management Relations Act) is replete with admonitions to the trial courts that they are not to look to the merits of the controversy underlying a petition to compel arbitration, even when the claim itself appears to be frivolous.²¹⁷ In deciding a petition to compel arbitration "the court is limited to ascertaining 'whether the party seeking arbitration is making a claim which on its face is governed by the contract [to arbitrate]. . . . The courts . . . have no business weighing the merits of the [dispute].'"²¹⁸ This decision rule produces "a presumption of arbitrability in the sense that 'an order to arbitrate a particular [claim] should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"²¹⁹ The presump-

RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 1091 (1992); Note, *Gilmer v. Interstate/Johnson Lane Corporation: When Is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement?*, 27 NEW ENG. L. REV. 791 (1993).

216. See *supra* notes 209-15; *infra* notes 217-22 and accompanying text.

217. *Hoffmann*, 984 F.2d at 1377 ("In resolving the arbitrability of particular claims, however, 'a court is not to rule on the potential merits of the underlying claims,' no matter how frivolous the claims may appear to the court." (quoting *AT&T Technologies*, 475 U.S. at 649); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967); *Merrill Lynch*, 985 F.2d at 1069 (11th Cir. 1993) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

218. *Bristol Farmers Mkt. & Auction Co. v. Arlen Realty*, 589 F.2d 1214, 1217 (3d Cir. 1978) (quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)); see also *International Ass'n of Machinists v. Aloha Airlines*, 790 F.2d 727, 731 (9th Cir.) ("When faced with a petition to compel arbitration, a court's role is limited to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." (internal citations omitted)), *cert. denied*, 479 U.S. 931 (1986).

219. *Hoffmann*, 984 F.2d at 1377 (quoting *AT&T Technologies*, 475 U.S. at 649, (internal citation omitted)); see also *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1524 (7th Cir. 1993) (stating as a presumption that arbitration is preferred unless the court can state with "positive assurance" that the claim falls outside the scope of the agreement) (citing *International Ass'n of Machinists v. Fansteel, Inc.*, 900 F.2d 1005, 1010 (7th Cir.), *cert. denied*, 498 U.S. 851 (1990)); *Paine Webber v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990) ("The sole issue is whether it may be said with 'positive assurance' that the

tion of arbitrability is a strong one that can be "overcome only by a definitive showing that the dispute in question is outside the coverage of the arbitration clause."²²⁰ If there is doubt as to the scope of arbitrable issues under an agreement to arbitrate, those doubts "should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself, or an allegation of waiver, delay or a like defense to arbitrability."²²¹ Thus, the cases make clear that the "federal substantive law of arbitrability counsels 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'"²²²

Because of their status as members of a protected class under the statutes that are the subject of the arbitration mechanism, even dubious assertions by the protected-group members that their statutory FEP rights have been abridged are matters that, on their face, must be deemed within the scope of agreements to arbitrate statutory FEP claims. The determination that such claims are frivolous can be made only if the courts look to the merits of the underlying controversies. Given the unequivocal judicial statements as to the inappropriateness of judicial inquiry beyond the face of the claim in arbitration, courts would be hard pressed to deny the petitions of discharged protected-group members to compel arbitration on the basis of contentions by their employers that the underlying discharges were in fact justified. Instead, judicial orders directing employers to arbitrate would seem inevitable.

The prevailing law of commercial arbitration pertaining to substantive arbitrability makes clear that, as the arbitration of statutory FEP claims becomes commonplace, at-will employers entering into arbitration agreements with their employees will find that they are effectively compelled to arbitrate all claims of illegal

[particular] dispute falls outside the scope of the agreement [to arbitrate].").

220. *Costle v. Fremont Indemnity Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993) (citing *Associated Brick Mason Contractors, Inc. v. Harrington*, 820 F.2d 31, 35 (2d Cir. 1987)).

221. *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 48 (2d Cir. 1993); *accord Mitsubishi Motors Corp. v. Solier Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Mercury Construction Corp. v. Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24-25 (1983); *see also Hoffmann*, 984 F.2d at 1377 (stating that arbitrability is presumed "unless it can be said with positive assurance" that the arbitration clause does not cover the dispute (quoting *AT&T Technologies*, 475 U.S. at 650)); *Ritzel Communications v. Mid-American Cellular Tel. Co.*, 989 F.2d 966, 968-69 (8th Cir. 1993) (stating that "any doubts concerning waiver of arbitrability should be resolved in favor of arbitration").

222. *Progressive Casualty Ins.*, 991 F.2d at 48 (quoting *Mitsubishi Motors Corp. v. Solier Chrysler Plymouth*, 473 U.S. 614, 626 (1985)).

employment discrimination, whether frivolous or not, that are brought by discharged protected-group members.²²³

B. At-Will Discharges of Protected-Group Members: Claims of Pretext and the Emergence of a Discernable De Facto Just Cause Standard

Because discharges claimed to be in violation of Title VII, the ADEA, or the ADA will involve alleged acts of discrimination against individual claimants, proper arbitral analysis of these discharges is almost certain to comport with the disparate treatment order and allocation of proof paradigm²²⁴ as articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*,²²⁵ *Texas Department of Community Affairs v. Burdine*²²⁶ and *St. Mary's Honor Center v. Hicks*.²²⁷ As demonstrated below, the advent of routine arbitral application of the *McDonnell Douglas-Burdine-Hicks* paradigm will have a significantly deleterious effect on the discretion of at-will employers to terminate protected-group members for reasons not proscribed by the FEP statutes. Today, in the judicial forum, at-will employers face the same obligation to defend challenged discharges

223. See Dean Witter Reynolds v. McCoy, 995 F.2d 649, 650 (6th Cir. 1993) (per curiam) ("Where the parties agree to submit any conflicts, breaches or other grievances arising under a contract to an arbitrator, they are, naturally enough, bound by that agreement. . .").

224. The cases cited in this sentence establish the Title VII disparate treatment framework. The disparate treatment proof scheme under the Age Discrimination in Employment Act is the same as the Title VII framework. See *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) ("Although the burden shifting set forth in *McDonnell Douglas* arose and was refined in the context of employment discrimination under Title VII, we have utilized the same methodology in the ADEA context.") (citations omitted); see also *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170-71 (2d Cir. 1993) (discussing the application of the Title VII disparate treatment framework in an ADEA case); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312-13 (6th Cir. 1989) (applying the *McDonnell Douglas-Burdine* disparate treatment paradigm in an ADEA case); *Gemmell v. Fairchild Space & Defense Corp.*, 813 F. Supp. 1152 (D. Md. 1993). The *Gemmell* court stated:

The proof scheme in Title VII cases, which has been adopted in ADEA litigation, is well established. A plaintiff must first prove a prima facie case; the defendant must then articulate a legitimate non-discriminatory reason for the challenged action; and plaintiff must then prove that the reason articulated by the defendant is pretextual.

Id. at 1156. The clear focus of the ADA proscription of discrimination against qualified individuals with disabilities is on the disparate treatment plane. Therefore, it seems likely that the Title VII/ADEA scheme will also be adopted under the ADA.

225. 411 U.S. 792 (1973).

226. 450 U.S. 248 (1981).

227. 113 S. Ct. 2742 (1993).

of protected-group members that they will confront when a discharged employee brings a claim in arbitration asserting that her statutory FEP rights have been abridged. However, at present the true impact of the *McDonnell Douglas-Burdine-Hicks* standard is blunted because only a relatively small number of potential statutory FEP claims reach trial and advance to judgment.

It seems certain that when discharged protected-group members are provided with an adjudicatory option like arbitration—which involves less cost, complexity, and a much shorter time to judgment than a traditional lawsuit—many more of them will challenge terminations they believe to be unfair.²²⁸ Thus, the full effect of the disparate treatment order and allocation of proof paradigm on the discretion of at-will employers to terminate protected-group members for reasons not proscribed by statute will become apparent only with the widespread adjudication of statutory FEP claims through arbitration. The rationale for that contention is set forth below.

An examination of the manner in which the *McDonnell Douglas* framework will be applied in arbitration best illustrates the broad effects anticipated. Consider, for example, an African-American male who challenges his discharge by an at-will employer, claiming he was terminated because of his race and color in violation of the Title VII bar on employment discrimination.²²⁹ Under the disparate treatment paradigm, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”²³⁰ Thus, in arbitration our hypothetical, the claimant first must establish a prima facie case of disparate treatment by proving by a preponderance of the evidence: (i) that he is a protected-group member (here a nonwhite or non-Caucasian); (ii) that he was qualified for the job he held at the time of his discharge; (iii) that despite his qualifications, he was discharged;

228. Besides the surge in arbitration of statutory fair employment practice claims expected from protected-group members pursuing a more efficient means to vindicate their rights, companies are increasingly demanding mandatory arbitration of discrimination claims. See, e.g., Margaret A. Jacobs, *Woman Claims Arbiters of Bias Are Biased*, WALL ST. J., Sept. 19, 1994, at B1 (noting that “[f]ollowing [*Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991)], at least 100 large corporations have required employees to sign mandatory arbitration clauses”).

229. There exists also, of course, the prospect of meritorious employee claims based on Section 1981 of the Civil Rights Act of 1866. The authors defer specifically addressing such claims at this point in the Article to preserve our focus on Title VII, but will briefly return to Section 1981 near the conclusion of the substantive analysis. See *infra* notes 287-94 and accompanying text.

230. *Burdine*, 450 U.S. 248, 253 (1981).

and (iv) that after he was discharged, the job he formerly held remained open (i.e., his job was not eliminated).²³¹

The burden placed on the disparate treatment plaintiff at the prima facie step is "not onerous."²³² Presuming he was qualified for the job he held at the time of his termination, our hypothetical African-American dischargee would have little difficulty meeting the prima facie case threshold. If the prima facie case is made out by the claimant employee, the burden of moving forward with the evidence shifts to the defendant-employer.²³³

The employer's burden at the next stage "is to rebut the presumption of discrimination [raised by the prima facie case] by producing evidence that the [claimant's termination] . . . was for a legitimate, nondiscriminatory reason."²³⁴ Because the ultimate burden of persuasion remains with the claimant-employee, the employer need not convince the arbitrator that the challenged termination was actually motivated by the reason(s) it proffers.²³⁵ Nevertheless, the relative ease with which our hypothetical African-American dischargee can make out a prima facie case of employment discrimination crystallizes a very important dimension of the second broad interaction effect.

At-will employers that discharge protected-group members and are subsequently called to task in the arbitral forum invariably will be required to step forward and articulate, and offer evidence to support, legitimate nondiscriminatory reasons for those discharges. The reason(s) for discharge articulated by the employer at step two will frame the remainder of the arbitrator's analysis by providing the starting point for the claimant's pretext proof at step three of the disparate treatment framework.²³⁶ Therefore, "the employer's explanation must be 'clear and specific.'"²³⁷

231. See *id.* at 254 n.6 (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

232. *Id.* at 253.

233. *Id.*

234. *Id.* at 254.

235. *Id.*

236. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994) ("In *Burdine*, the Supreme Court noted that the employer's explanations serve to 'frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.' " (quoting *Burdine*, 450 U.S. at 255-56)).

237. *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) (quoting *Meiri v. Dacon*, 759 F.2d 989, 996-97 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985)). The *Dister* court stated:

[T]he [employer's] burden of production frames the factual issue with sufficient clarity to afford the employee a full and fair opportunity to demonstrate pretext.

If the employer in our hypothetical is unable to produce credible evidence that the challenged discharge was for a legitimate, nondiscriminatory reason, the presumption of illegal discrimination raised by the claimant employee's prima facie case will stand and the employer will be found in violation of Title VII. If the employer does articulate and offer credible evidence to support a legitimate nondiscriminatory reason for the challenged discharge, the employee can prevail only if he convinces the arbitrator that the reason(s) proffered by the employer for his discharge is unworthy of belief (i.e., is a pretext) and that a discriminatory reason more likely than not motivated the employer.²³⁸

Even if the employer is able to articulate and offer evidence of a legitimate nondiscriminatory reason for the challenged discharge, the claimant-employee is almost certain to allege that the proffered reason for discharge was a pretext for illegal discrimination. If that occurs, the arbitrator will be obliged to move to the third step of the *McDonnell Douglas* paradigm and weigh the reasons cited by the employer against the claimant's pretext proof and any evidence the claimant may offer as to the employer's intent to discriminate. It is at this point that the *de facto* just cause inquiry inherent in the disparate treatment framework will ensue.

The inquiry that takes place at the third step of the disparate treatment paradigm in Title VII/ADEA discharge cases differs only in degree from the arbitral analysis in discharge cases governed by collective bargaining agreements that require terminations to be for just or proper cause. As applied in the labor arbitration forum, the just cause standard requires employers to convince the arbitrator that a challenged termination was prompted by good business reasons

To this end, the employer's explanation of its reasons must be clear and specific. Were vague or conclusory averments of good faith sufficient to satisfy the employer's burden, Title VII employees seeking to demonstrate pretext would be unfairly handicapped.

Id. at 1115 (citations omitted).

typically linked to the employee's workplace conduct.²³⁹ It precludes discharge based on illegitimate reasons or for "mere whim or caprice."²⁴⁰

But for the 1993 opinion of the Supreme Court in *Saint Mary's Honor Center v. Hicks*, the arbitrator's rejection of the employer's proffered reason for discharge (and the inference of pretext that conclusion raises) would routinely result in a reversal of the discharge. Even under the post-*Hicks* disparate treatment order and allocation of proof regime, which now requires at the third step a finding of an illegal discriminatory motive independent of the pretext inference,²⁴¹ acceptance of the claimant employee's pretext claim will, at the very least, open the door to an inference of illegal discrimination. *Hicks* teaches that the prima facie case, plus proof that the employer's articulated reasons for discharge were false, provide the evidentiary basis for "a suspicion of mendacity" by the arbitrator that permits the inference of illegal discrimination.²⁴²

239. See generally FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 650-707 (BNA 4th ed. 1985) (discussing labor arbitrator's application of the just cause standard); FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 1985-89 at 170-204 (BNA Cum. Supp. 1991) (same).

240. ELKOURI & ELKOURI, *supra* note 239, at 652-53 (quoting *Worthington Corp. v. United Elec., Radio, & Mach. Workers of America*, Local 259, 24 Lab. Arb. Rep. (BNA) 1, 6-7 (1955)).

241. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), the Court stated:

The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against him" because of his race. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the court of appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required." But the court of appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

Id. at 2749 (citations omitted); see also Neely, *supra* note 238, at 7153 (asserting that *Hicks* still permits, but does not mandate, a finding of discrimination based on a finding of pretext alone).

242. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (citing *Hicks*, 113 S.Ct. at 2749); see also *Armbruster v. Unisys Corp.*, 65 Fair Empl. Prac. Cas. (BNA) 828, 839 (3d Cir. 1994). The *Armbruster* court stated:

"[t]he factfinder's disbelief of [the employer's explanation] may, together with the elements of the prima facie case, suffice to show intentional discrimination" because it allows the trier of fact to infer the ultimate fact of intentional

Certainly, as the employer's articulated defense of its actions moves further away from demonstrably legitimate work- or performance-related bases, the probability that the arbitrator will find the employer's explanation of the challenged discharge unworthy of belief increases, making more likely the inference of an intentional act of discrimination.²⁴³ Thus, the rationality of the employer's proffered reason(s) for discharge is probative of the question of whether those reasons are a pretext for illegal discrimination.²⁴⁴ Idiosyncratic or questionable explanations of the reason for discharge make it easier for the plaintiff to prove pretext.²⁴⁵ Convincing arguments by the claimant employee that the reason for discharge proffered by the employer is "implausible, absurd or unwise,"²⁴⁶ or "so riddled with error that the [employer] could not honestly have relied on it,"²⁴⁷ will propel the arbitrator substantially toward a finding of illegal discrimination.

In the end, arbitral inquiry will focus on whether the employee's work performance met his employer's legitimate expectations.²⁴⁸ If the claimant-dischargee proves that those legitimate expectations were reasonably met, or that the employer's expectations were illegitimate, arbitrary or unreasonable,²⁴⁹ it becomes more difficult for the arbitrator to conclude that the employer's decision to discharge was

discrimination. After [*Hicks*] it seems clear, however, that the trier of fact cannot find for the plaintiff merely because it disbelieves the [employer's] proffered explanation; it must also be persuaded that the employment decision was the result of the bias that can be inferred from the falsity of the defendant's explanation.

Id. (quoting *Hicks*, 113 S.Ct at 2749).

243. See, e.g., *Bishopp v. District of Columbia*, 788 F.2d 781, 787, 789 (D.C. Cir. 1986) ("[A] defendant[] [employer's] reliance on subjective as opposed to objective factors requires a court to employ heightened scrutiny. . . . [A] blatantly pretextual defense carries the seeds of its own destruction."); *Lanphear v. Prokop*, 703 F.2d 1311, 1317 (D.C. Cir. 1983) (holding, pre-*Hicks*, that an unsubstantiated employer claim that a discharge was for poor performance, rebutted by plaintiff's proof to the contrary, warranted reversal of a district court judgment in favor of the employer, without need for remand); see also *Neely*, *supra* note 238, at 7152-53 (arguing that the showing of pretext can suffice to prove discrimination if it persuades the finder of fact that discrimination was the real reason for the decision to discharge).

244. *Meiri v. Dacon*, 759 F.2d 989, 997, n.13 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)).

245. *Loeb*, 600 F.2d at 1012 n.6.

246. *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993).

247. *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980).

248. *Huhn v. Koehring Co.*, 718 F.2d 239, 244 (7th Cir. 1983); accord *Meiri*, 759 F.2d at 995.

249. See *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980) (discussing the plaintiff's obligation at the third step of the disparate treatment paradigm).

nonetheless not a product of illegal discrimination. Arguably, the showing of pretext frequently will be sufficient to make out a Title VII violation because it will persuade the arbitrator that discrimination was the real reason for the challenged discharge.²⁵⁰

Thus, an arbitral finding that the articulated reason for discharge is not worthy of belief will place the employer's case in great peril. Because the three steps of the disparate treatment paradigm are interdependent,²⁵¹ a suspect reason advanced by the employer at step two that is effectively discredited by the claimant employee at step three will lead many arbitrators to conclude that, in light of the claimant's prima facie proof at step one, the employer's decision to discharge was motivated by an illegal discriminatory intent. As a result, in many cases where the employer is not able to identify a legitimate, nondiscriminatory reason for a challenged discharge, application of the three-step disparate treatment paradigm will result in a reversal of the discharge. This is the same outcome reached in conventional labor arbitration under a collective bargaining agreement when an arbitrator finds no just cause for a challenged discharge.²⁵² Thus, over time, employer-employee agreements to arbitrate statutory FEP claims will bring to the fore the *de facto* just cause standard inherent in the *McDonnell Douglas-Burdine-Hicks* disparate treatment paradigm, thereby effectively granting protected-group members some

250. See Neely, *supra* note 238, at 7152-53. Because the modification in the disparate treatment paradigm worked by *Hicks* is of substantial nuance, it is also possible that some arbitrators (and juries) will find it difficult to fully grasp and may therefore place undue emphasis on the pretext analysis.

251. *Meiri*, 759 F.2d at 997 n.12. The Second Circuit cautioned: "Although the courts have fashioned a tripartite construct to evaluate Title VII claims, we must withstand the temptation to treat each stage as an independent inquiry. Indeed, the efficacy of employment discrimination law depends upon the interdependence of the prima facie case, the employer's rebuttal and proof of pretext." *Id.* (citing *Lieberman v. Gant*, 630 F.2d 60, 66-67 (2d Cir. 1980)).

252. There is one significant difference between the just cause analysis that transpires in labor arbitration and the *de facto* just cause analysis under the *McDonnell Douglas-Burdine-Hicks* disparate treatment paradigm. Pursuant to a long-standing principle of labor arbitration, the employer bears the burden of proving that a challenged discharge is for just cause in cases arbitrated under collective bargaining agreements. See FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 194-95 (Ray J. Schoonhoven ed., 3d ed. 1991) ("In a discharge case, it is usually assumed that the Company has the burden of proving a reasonable cause for the discharge under the contract. . . ." (quoting *American Maize Prods. Co., v. Oil, Chem., & Atomic workers, Int'l Union*, Local 7-210, 39 Lab. Arb. Rep. 1165, 1168 (McGury 1963))); see also MARVIN HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 13 (BNA 1980) ("As a general practice, . . . in disciplinary cases the burden is on management both to proceed first with its evidence and to prove employee guilt or wrongdoing.").

measure of insulation from discharge for nonmeritorious reasons not in violation of FEP law.

Because it is inherent in the disparate treatment framework, this *de facto* just cause protection for protected-group members can be said to exist today under the various FEP statutes. However, that fact is apparent only to the trained legal mind and cannot easily be ascertained from a jury verdict.²⁵³ In contrast, when arbitration of the challenged discharges of protected-group members becomes a routine event those frequent adjudications will reveal a workplace principle, discernible to all employees, whereby only terminations supported by just cause—legitimate, credible, business-related reason(s)—will be sustained.²⁵⁴ That pattern, and the phenomenon underlying it, will create in the minds of protected-group members the same type of reasonable expectation of fair treatment in discharge matters that is generally deemed to constitute an enforceable implied-in-fact term of employment.²⁵⁵

Having to explain and defend large numbers of termination actions to neutral third-party arbitrators will be a new experience for at-will employers. In many cases that are advanced to arbitration, at-will employers that cannot demonstrate the existence of sound, business-related reasons for the challenged terminations of protected-group members will find their at-will discretion eviscerated. As a result of this phenomenon, the *de facto* just cause guarantee accruing to protected-group members will manifest itself.

The discussion of the third category of broad interaction effects, those pertaining to nonprotected-group members, is more speculative in nature. Nevertheless, it could prove to be the most significant result

253. In this regard, the authors note that their review of the relevant literature reveals no previous identification of the *de facto* just cause construct.

254. This phenomenon is particularly likely to occur if arbitrators, following the practice of labor arbitrators in disputes arising under collective bargaining agreements, articulate the rationale for their awards in written, substantive arbitration awards.

255. Though it is not the subject of this inquiry, it seems clear that, through operation of the disparate treatment paradigm, members of the traditional FEP protected groups also would be afforded a form of *de facto* protection against demotion, denial of promotion, transfer, layoff, and other adverse personnel actions for which the employer was unable to demonstrate sound business justification. The incremental interference in the discretion presently enjoyed by at-will employers in personnel-related matters worked by this phenomenon will be considerable. It is an important additional factor for at-will employers to weigh in deciding whether to enter into agreements with employees to arbitrate statutory FEP claims. The third broad interaction identified and discussed below addresses the question of whether this implied-in-fact employment term can be limited to protected-group members. See *infra* notes 256-94 and accompanying text.

of the interaction between the EAWD and employer-employee agreements to arbitrate statutory FEP claims.

C. *At-Will Discharges of Ostensively Nonprotected Group Members: When the Employer Refuses to Arbitrate*

A troubling concern will arise if implementation of employer-employee agreements to arbitrate statutory FEP claims does indeed afford individuals who are clearly protected-class members²⁵⁶ the right to challenge all discharges through arbitration under a *de facto* just cause standard. Under this scenario, only those individuals falling outside the traditional protected groups—nondisabled Caucasian males under forty years of age—will be denied the opportunity to take issue with terminations they believe to have been unfair.

This potential exclusion of Caucasian males from an employment right accorded all other individuals is ironic indeed. However, it is the natural result of the public policy decision, alluded to at the outset of this article, to forego statutorily protecting all employees against unjust discharge and instead to guarantee equal employment opportunity to certain insular groups who in the past have been denied equal treatment. This public policy decision, coupled with a disparate treatment paradigm that permits the inference of illegal discriminatory discharge to be based in substantial part, or even entirely, on the absence of evidence of a legitimate, nondiscriminatory reason for termination, transforms the statutory protection against unequal treatment into a *de facto* just cause guarantee that is extended only to protected-group members. Thus, a public policy founded on a desire to protect insular, traditionally disfavored groups eventually will lead to a circumstance in which only the members of the formerly “favored” composite group (hereinafter for simplicity, “Caucasian males”) are excluded from just cause protection and the right to challenge their discharges.

At-will employers cannot ignore the potential ramifications of a workplace due process regime that draws so clear a distinction between the discharge appeals rights of protected-group members and their nonprotected-group member peers. The question for contemplation is whether at-will employers will be able to continue to discharge nonprotected-group members for any reason and then refuse to arbi-

256. Those protected classes include nonwhites, non-Caucasians, women, the members of ethnic or religious minority groups, persons over 40 years of age, and qualified individuals with a disability. See *supra* note 2.

trate their challenges to termination, when they are obligated to arbitrate under a *de facto* just cause standard virtually all challenged discharges of protected-group members.

This question will arise in two contexts. First, there is the more narrowly drawn issue of whether ostensibly nonprotected-group members can compel their at-will employers to arbitrate challenged discharges by claiming that those terminations were the result of illegal discrimination. The second issue is more fundamental in nature: Is it permissible under Title VII disparate treatment theory and disparate impact theory, as well as under section 1981 of the Civil Rights Act of 1866, for at-will employers to implement an employment policy that effectively extends to traditionally protected-group members the right to arbitrate virtually all challenged discharges and other adverse employment actions when that same right is not afforded nonprotected-group members? Each issue is addressed in turn below.

1. The Ability of Nonprotected-Group Members to Compel the Arbitration of Their Wrongful Discharge Claims

At-will employers that agree to arbitrate statutory FEP claims should not be surprised if substantial numbers of nonprotected-group members who believe they have been unfairly discharged attempt to emulate their protected-group member peers by filing claims under the arbitration mechanism, alleging they have been subjected to illegal employment discrimination. At-will employers are certain to resist such efforts. Employers can be expected to assert that nonprotected members are without "standing" under employer-employee agreements to arbitrate statutory FEP claims because their interests are not embraced by the various equal employment opportunity statutes, and that their claims of illegal discrimination therefore are patently frivolous and substantively nonarbitrable. When that assertion is made by at-will employers, nonprotected-group members will be obliged to petition an appropriate court for enforcement of the agreement to arbitrate.

In a manner similar to that described earlier with regard to protected-group members,²⁵⁷ a Caucasian male petitioning for judicial enforcement of an employer-employee agreement to arbitrate statutory FEP claims will be required to demonstrate that the challenge he brings is within the scope of the arbitration agreement.

257. See *supra* notes 208-23 and accompanying text.

As with the claim brought by the African-American male in the first hypothetical posited above,²⁵⁸ the key to securing "standing" under the arbitration mechanism for our Caucasian male dischargee would be proving his status as a protected-group member under the FEP statutes that are the subject of the procedure. Despite the apparent futility of an attempt by an ostensibly nonprotected-group member to prove that his termination was in violation of FEP law, at-will employers nevertheless will be obliged to convince the petitioned court that the challenged discharge is not a proper subject for arbitration. The relevant case law indicates two schools of thought in this regard.

a. The Literal Reading of *McDonald*

The first, most direct approach relies squarely on the admonition by the Supreme Court in *McDonald v. Santa Fe Trail Transportation Company*²⁵⁹ that the racial discrimination claims of whites and blacks are to be evaluated "upon the same standards."²⁶⁰ *McDonald* can be read to establish that a Caucasian male dischargee could demonstrate his standing to bring a claim of illegal discrimination under the arbitration mechanism merely by asserting that, because he has a color, a race, a gender, a national origin, or a religion, he should be deemed a protected-group member under Title VII.²⁶¹ If this literal view of the first element of the *prima facie* case eventually were to become the norm, terminated Caucasian males would always be able to achieve arbitral review of their discharges merely by alleging illegal discrimination.

b. The "Prima Facie Plus" Standard

The second approach to evaluating the protected-group status of a Caucasian male claimant is best exemplified by several opinions of

258. See *supra* notes 228-56 and accompanying text.

259. 427 U.S. 273 (1976).

260. *Id.* at 280.

261. *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991) (applying the *McDonnell Douglas* test of a *prima facie* case, which "requires a reverse discrimination plaintiff to prove: (1) that he belongs to a class; (2) that he applied for and was qualified for a job; (3) that he was rejected for the job; and (4) that the job was filled by a minority group member or a woman."); *Lucas v. Dole*, 835 F.2d 532, 534 n.9 (4th Cir. 1987) ("Title VII prohibits discrimination in employment against whites and 'the same standards are applicable in both instances.' " (citing *Butta v. Anne Arundel County*, 473 F. Supp. 83, 86 (D. Md. 1979))); *Daye v. Harris*, 655 F.2d 258, 262 n.11 (D.C. Cir. 1981) ("That [the plaintiff] is white is no impediment to this suit; white employees are protected by Title VII." (citing *McDonald*, 427 U.S. at 280)).

the United States Court of Appeals for the District of Columbia Circuit. In evaluating the *prima facie* case of Caucasian male plaintiffs, the D.C. Circuit requires incremental proof of protected-group status beyond that called for by the *McDonnell Douglas* disparate treatment paradigm. For example, the court has required evidence of

background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority. In other words, to repeat the *Burdine* formulation, [the Caucasian male plaintiff] must show that he "was rejected under circumstances which [despite his majority status] give rise to an inference of unlawful discrimination."²⁶²

In another case, the D.C. Circuit stated that "white males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race or sex, that suggests some reason why an employer might discriminate against them."²⁶³

In applying this standard, the D.C. Circuit has looked to a number of factors. The use of subjective instead of objective criteria in arriving at a personnel action decision;²⁶⁴ evidence of pressure to favor, or irregular acts of favoritism towards minority employees;²⁶⁵ unlawful employer conduct in the past;²⁶⁶ and practices inconsistent with normal, customary procedure²⁶⁷ all have been deemed to satisfy the additional burden imposed by the D.C. Circuit on the atypical Title VII plaintiff.

If confronted with the "prima facie case plus" standard utilized by the D.C. Circuit, a Caucasian male dischargee would not be able to access the arbitration procedure merely by asserting that because he has a color, race, and gender he is a protected-group member under Title VII. Instead, he would be required to adduce reliable evidence to establish that his discharge was likely the result of what

262. *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (restating the *McDonnell Douglas* standard for a *prima facie* case) (internal citations omitted); see also *Lucas*, 835 F.2d at 534 n.9 (describing the D.C. Circuit's stricter burden of proof in reverse discrimination cases); *Daye*, 655 F.2d at 263 (rejecting racial discrimination claim of white plaintiff for failure to satisfy heightened standard of proof).

263. *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986), cited in *Lucas*, 835 F.2d at 534 n.9.

264. *Lanphear*, 703 F.2d at 1315.

265. *Id.*; see also *Machakos v. Meese*, 647 F. Supp. 1253, 1262 (D.D.C. 1986).

266. *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1018 (D.C. Cir. 1981).

267. *Id.* at 1017.

is commonly dubbed "reverse discrimination"—an assertion that he was terminated when similarly situated, traditional Title VII protected-group members who committed the same act(s) were not, or a claim that his discharge was effected to facilitate hiring or advancing an African-American, a woman, or other protected-group member.²⁶⁸

It is the understandable desire of at-will employers to avoid arbitrating frivolous claims of illegal employment discrimination brought by discharged nonprotected-group members that makes the D.C. Circuit's augmented *prima facie* case threshold for nonprotected-group members attractive. That a nonprotected-group member who succeeds in reaching arbitration with a truly vacuous claim of illegal discrimination is almost certain to have his claim rejected by the arbitrator further supports this approach to limiting access to the arbitral forum.

Despite its attractiveness, there is a problem with using the D.C. Circuit's standard as a device for winnowing out frivolous claims by nonprotected-group members through substantive arbitrability challenges. That problem lies in the fact that applying the D.C. Circuit's construct would require a court at least to glance at and evaluate the factual allegations underlying the claimant's discrimination charge in order to ascertain if there are "background circumstances" or "particularized evidence" indicating that despite his majority status, there is reason to infer that an illegal act of discrimination has occurred. As shown earlier, however, the prevailing law of commercial arbitration pertaining to substantive arbitrability determinations precludes such an examination of the facts of the underlying dispute.²⁶⁹

The lack of a device under existing commercial arbitration law for precluding nonmembers of the traditional protected groups from forcing arbitration of frivolous, clearly baseless claims of illegal

268. The Sixth and Tenth Circuits also apply a type of "prima facie plus" standard. See *Notari v. Denver Water Dept.*, 971 F.2d 585, 589 (10th Cir. 1992) ("[A] Title VII disparate treatment plaintiff who pursues a reverse discrimination claim . . . must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority."); *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("[I]n [disparate] impact cases, . . . a member of a favored group must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination."); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

269. See *supra* notes 217-23 and accompanying text.

employment discrimination is likely to propel the federal judiciary to revisit the existing standards for deciding issues of substantive arbitrability within this narrow, esoteric context. To prevent the wholesale and largely futile arbitration of specious claims, a limited fine tuning of the law of commercial arbitration pertaining to substantive arbitrability consistent with the approach of the D.C. Circuit would be warranted.

Regardless of whether the law of substantive arbitrability is refined in this manner, Caucasian male discharges who are not in fact the subjects of illegal reverse discrimination will find no satisfaction in the arbitral forum. The discretion of the at-will employer to discharge nonprotected-group members will remain intact. For that reason, over time only ostensibly nonprotected-group members who advance colorable claims of reverse discrimination will be able to challenge effectively their discharges under agreements to arbitrate statutory FEP claims.

Thus, it is probable that with the maturation and institutionalization of the arbitration of statutory FEP claims, employees falling outside of the traditional FEP protected groups will be largely excluded from the right to challenge their discharges in arbitration under a *de facto* just cause standard. This analysis now turns to the potential legal implications of that prospective state of affairs.

2. The Legality of a Bifurcated Discharge Appeals Regime

Because of the manner in which the protected groups under the ADEA and the ADA are defined, refusals by at-will employers to arbitrate the discharges of nondisabled persons under forty years of age should not raise meaningful questions of violations of either statute. The protection of the ADEA extends only to persons forty years of age or older. The statute does not afford protection to persons under forty years of age.²⁷⁰ Similarly, the ADA shields only qualified individuals with a disability.²⁷¹ The statute does not afford

270. The ADEA protects "individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (1988).

271. The ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (Supp. V 1993). The ADA further defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

protection to persons who are not disabled. Accordingly, discharged employees who are nonprotected-group members under the ADEA and the ADA cannot assert that disparate treatment based on their youth or their physical and mental fitness is inconsistent with those statutory schemes.

In contrast, the manner in which the five Title VII protected groups are defined results in the statutory protection cutting in two directions (e.g., non-Caucasian/Caucasian, black/white, female/male, etc.). Accordingly, there always exists a possibility that any course of employer conduct that distinguishes employment-related rights on the basis of the employee's race, color, sex, national origin, or religion ("majority" or "minority" group status) will be deemed illegal.²⁷² The dual nature of the Title VII discrimination bars gives rise to the possibility that at-will employers choosing to arbitrate the statutory FEP claims of Title VII protected-group members, but refusing to arbitrate the challenged discharges of Title VII nonprotected-group members, may run afoul of the statute.²⁷³

In *McDonald*, the Supreme Court emphasized the "Congressional mandate [to the Equal Employment Opportunity Commission] to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."²⁷⁴ The *McDonald* Court went on to note the "uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans.'"²⁷⁵ Accordingly, examination of the disparate treatment and disparate impact paradigms is warranted to determine whether a bifurcated arbitration mechanism that gives one category of at-will employees—those within the traditional Title VII protected groups—the right

272. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986). The court, in a sex discrimination (sexual harassment) case, stated: "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 455 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

273. See *supra* notes 180-81 and accompanying text.

274. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976); see also *Meritor*, 477 U.S. at 66-67 (finding that sexual harassment falls within the ambit of Title VII's protection against hostile work environments).

275. *McDonald*, 427 U.S. at 280. In holding that Title VII affords the same protection against racial discrimination to whites that it provides to blacks, the *McDonald* Court found a claim of racial discrimination by two discharged white employees to be "indistinguishable from [the claim of racial discrimination brought in] *McDonnell Douglas*." *Id.*

to arbitrate all challenged discharges under a *de facto* just cause standard, while denying the same to the remaining employees—Caucasian males—constitutes a “practice[] which operate[s] to disadvantage” that latter group in violation of Title VII.²⁷⁶

a. The Title VII Disparate Treatment Analysis

The key to a disparate treatment claim is proof of the employer's discriminatory motive. While the claimant dischargee must prove discriminatory intent by the employer, such intent “can in some situations be inferred from the mere fact of differences in treatment.”²⁷⁷

It is unlikely that the Caucasian male dischargee in our earlier hypothetical, who brings a suit alleging a Title VII violation arising from his employer's refusal to arbitrate his discrimination claim, would be able to prove, through direct evidence, that the employer's refusal was motivated by an intent to disadvantage the dischargee personally, or persons of his color, race, and gender generally.

Regardless, since the plaintiff in a Title VII case is not required to adduce direct proof of discrimination,²⁷⁸ and needs to establish by circumstantial or other evidence only that “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin,”²⁷⁹ the specter of a finding of illegal disparate treatment cannot be lightly dismissed. A convincing argument can be made that effectively allocating the right to challenge discharge actions through arbitration along race, color and gender lines constitutes “treat[ing] some people less favorably than others because of their race, color . . . [or] sex.”²⁸⁰

276. In order to simplify this portion of the analysis, we will discuss only differential treatment of white males on the basis of race and sex.

277. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (cited in *Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1204 (7th Cir. 1987); *Donoghue v. County of Orange*, 828 F.2d 1432, 1438-39 (9th Cir. 1987); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 91-92 (2d Cir. 1984); *Davis v. Califano*, 613 F.2d 957, 961-62 (D.C. Cir. 1980)).

278. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); see also *Lucas v. Dole*, 835 F.2d 532, 533 (4th Cir. 1987) (stating that a Title VII plaintiff's *prima facie* case may be established by direct or indirect evidence of discrimination); *Lynch v. Freeman*, 817 F.2d 380, 382 (6th Cir. 1987) (stating that direct evidence of discriminatory intent is not required to establish a Title VII claim); *Zahorik*, 729 F.2d at 91-92 (stating that discriminatory motive may be established by circumstantial evidence); cf. *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir. 1990) (applying principle that plaintiff need not adduce direct proof of discrimination to ADEA case).

279. *Teamsters*, 431 U.S. at 335 n.15.

280. *Id.*

The outcome here will turn on the application of the *McDonnell Douglas-Burdine-Hicks* disparate treatment framework, including the gloss added by *McDonald* and its progeny. *McDonald* makes clear that a Caucasian male, who is otherwise qualified for the job he held at the time of his termination, would be able to clear the "prima facie case" hurdle by claiming that his employment opportunities (here the right to seek arbitral review of his discharge) have been limited because of his race, color, or gender.²⁸¹ Thus, the critical analysis will occur at the second and third steps of the disparate treatment paradigm.

An obvious legitimate, nondiscriminatory reason the employer could advance at step two of the disparate treatment paradigm is that the arbitration mechanism is beyond the reach of Caucasian males because it is intended only to provide a means for resolving claims of illegal employment discrimination by "minorities"—those traditionally viewed as falling within the five Title VII protected groups. Assuming that such an assertion would be sufficient to shift the focus to step three of the disparate treatment paradigm, the question becomes whether the finder of fact could be persuaded that the true reason for the employer's refusal to arbitrate the Caucasian male plaintiff's challenge to his discharge was a desire to deny him the same *de facto* just cause guarantee and right to appeal his discharge to a neutral third party afforded traditional protected-group members. If that inference of pretext were drawn, it would take no great leap of judicial logic to find that by knowingly denying the Caucasian male plaintiff the same just cause protection and discharge appeals right afforded traditional protected-group members, the employer intended to discriminate against him because of his race, color, and gender.

The uncertainty caused by the lack of specific guidance in the Title VII case law with regard to this matter should give at-will employers pause. It seems probable that an employer policy, even a *de facto* one, that establishes two discharge-related due process regimes as widely divergent as those described above—one for obvious Title VII protected-group members and a second for Caucasian males—would be viewed by the courts with suspicion. Even more reason for concern, and perhaps also a more certain answer to the legality of such a bifurcated discharge appeals regime, is found when this scenario is evaluated within the context of the

281. See *supra* note 261 and accompanying text.

framework for analyzing Title VII disparate impact claims set forth in the Civil Rights Act of 1991.

b. The Title VII Disparate Impact Analysis

In Title VII disparate impact cases—those involving a claim that one or more of the employer's employment practices has resulted in a pattern or practice of discrimination against protected-group members—the plaintiff need not prove an intent to discriminate. Instead, pursuant to the framework for analyzing disparate impact cases set forth by the language of section 703(k)(1)(A)(i) of Title VII,²⁸² as amended by section 105 of the Civil Rights Act of 1991,²⁸³ a violation of Title VII is made out when the plaintiff "demonstrates that the [employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position and consistent with business necessity."²⁸⁴ It seems likely that the term "employment practice" is elastic enough to embrace an employer-initiated procedure for arbitrating statutory FEP claims. If it is, the employer's predicament is quickly revealed.

In this context, a Caucasian male would face no difficulty in making out a disparate impact *prima facie* case. That could be achieved by establishing that members of his composite class are

282. 42 U.S.C. § 2000e-2 (Supp. IV 1992).

283. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-76 (codified at 42 U.S.C. § 2000e-2(k) to -2(n) (Supp. IV 1992)).

284. *Id.* § 1074. The Civil Rights Act of 1991 restored the law of disparate impact to its pre-*Ward's Cove* state. See § 105, 105 Stat. at 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (Supp. IV 1992)). Section 105 amended 42 U.S.C. § 2000e-2 by adding a new subsection, § 2000e-2(k)(1)(A)(i), containing the quoted language. See *id.* The legislative history pertaining to § 105 states in relevant part that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Ward's Cove Packing Co. v. Atonio*." 137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth) (citations omitted). For further discussion of the Act, see *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (9th Cir. 1993) in which the Court stated:

'[C]laims that stress "disparate impact" [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.'

Id. at 1705 (quoting *Teamsters*, 431 U.S. at 335 n.15); see also *Atonio v. Ward's Cove Packing Co.*, 10 F.3d 1485, 1491 (1993) ("[T]he business necessity defense . . . places on the employer the burden of proving that a practice causing a disparate impact is 'job related for the position in question and consistent with business necessity.' ").

disproportionately (in fact, entirely) excluded from securing arbitral review of challenged discharges under the *de facto* just cause standard, while traditional protected-group members are uniformly accorded that important due process right. Once the prima facie case is made out, the burden shifts to the employer to prove that the practice of denying the benefit of this implied-in-fact employment term to those who fall outside the conventional Title VII protected groups is warranted as a matter of business necessity.²⁸⁵

Such proof would be problematic for the at-will employer. It is difficult to divine a legitimate reason, rising to the level of a business necessity, for an at-will employer to refuse to arbitrate the discharge cases of Caucasian males under a *de facto* just cause standard when at the same time it is willing to arbitrate the discharges of nonwhites, women, and ethnic and religious minorities under that same implied standard. Simple assertion of a desire to retain the common law discretion to terminate employees at-will, while rational, is not likely to be deemed warranted as a matter of business necessity.

A court rationally could conclude that there is no defensible justification for an employer knowingly to permit the discharges of Caucasian males to be governed by the EAWD, denying them the right to challenge those terminations, while Title VII protected-group members are terminated only for just cause and afforded the right to arbitrate discharges they believe unfair. If this were to become the dominant judicial view, Caucasian males denied the opportunity to arbitrate their discharges would be able to prove a Title VII violation and secure a judicial order that the employer arbitrate all contested discharges. Even in the event of a finding that the disparate impact worked by an employer policy was warranted as a matter of business necessity, Caucasian male plaintiffs could still prevail by convincing the finder of fact that permitting all employees access to the arbitration procedure constitutes an "alternative employment practice"²⁸⁶

285. The subject disparate impact claim would not focus on any particular job classification(s) or qualification standard(s). Rather, it would center on the arbitration procedure itself. It is difficult to characterize an arbitration mechanism as job-related or non-job-related. Accordingly, it appears that the key inquiry at the second step of the Title VII disparate impact analysis would be on the requirement that employment practices with a demonstrated adverse impact be justified by business necessity.

286. Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011 (1993). Professor Alito notes:

Before enactment of the 1991 Act, a disparate impact plaintiff was permitted to rebut a successful business necessity defense by showing that there was an alternative employment practice available which the employer refused to adopt. A plaintiff would also have to show that the alternative practice would fulfill the

with a less discriminatory impact (on Caucasian males) as contemplated by section 703(k)(1)(A)(ii) of Title VII.

c. A Final Concern—Section 1981

Because the preceding analysis reveals a significant potential conflict with the Title VII bar on race and color discrimination, a parallel concern arises with regard to section 1981 of the Civil Rights Act of 1866.²⁸⁷ As with the probability of a Title VII claim discussed earlier, an at-will employer that routinely arbitrates the challenged discharges of traditional protected-group members should not be surprised if Caucasian male employees who are denied the opportunity to arbitrate their discharges bring actions under section 1981, asserting that their statutorily guaranteed equal right to contract has been abridged.

In the previously discussed landmark reverse-discrimination opinion in *McDonald*,²⁸⁸ the Supreme Court held that section 1981 "is applicable to racial discrimination in private employment against white persons."²⁸⁹ Thus, *McDonald* establishes that a Caucasian does have standing to assert a race or color-based discrimination claim under section 1981. As amended by the Civil Rights Act of 1991, section 1981 now provides:

employer's business needs as well as the current practice but caused less of a disparate impact. The employer's refusal to adopt the alternative under these circumstances was considered as evidence that the business necessity advanced was a pretext for discrimination.

The 1991 Act on its face appears to make this rebuttal evidence proof in and of itself of unlawful disparate impact discrimination. It provides that a violation is proved if a plaintiff makes a demonstration, in accordance with the pre-*Ward's Cove* decisions, with respect to an alternative employment practice that the defendant refuses to adopt. The intent of this provision is entirely unclear.

Id. at 1036-37; see also Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1625-36 (1993) (discussing the business-necessity standard and arguing that courts should not accept cost-based defenses to the "less discriminatory alternative" requirement).

287. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982 (1988))).

288. See *supra* notes 259-61 and accompanying text.

289. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976) (relying on an extensive analysis of the legislative history of section 1981); see also *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989) ("Section 1981 prohibits private racial discrimination against white person as well as against nonwhites."); *Al-Kahazraji v. Saint Francis College*, 784 F.2d 505, 515-18 (3d Cir. 1986) (holding that an ethnic Arab, although taxonomically Caucasian, was nevertheless protected by section 1981 against race-motivated employment discrimination), *aff'd*, 481 U.S. 604 (1987).

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment: The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.²⁹⁰

The 1991 amendment was prompted by the Supreme Court's opinion in *Patterson v. McClean Credit Union*,²⁹¹ in which the Court held that the section 1981 guarantee set forth in subsection (a) applied only to the formation and enforcement of contracts, not to postformation conduct.²⁹² On its face, subsection (b) nullifies *Patterson*²⁹³ and extends the protection of section 1981 to all aspects of the implementation and administration of contracts, including contracts between employers and employees.

Applied within the context of employer-employee agreements to arbitrate statutory FEP claims, section 1981, as amended, must be read to require that employers ensure that the "making, performance, modification and termination" of those contracts is race neutral and that each employee with whom it so contracts equally enjoys "all benefits, privileges, terms, and conditions of the contractual relationship." If, by contracting with their at-will employers to arbitrate statutory FEP claims, nonwhite protected-group members also are afforded the right to challenge all discharges under a *de facto* just cause standard, it seems certain that a denial of that same collateral right to Caucasians would give rise to potential section 1981 liability

290. 42 U.S.C. §§ 1981(a)-(c) (Supp. V 1993).

291. 491 U.S. 164 (1989).

292. *Id.* at 175-85.

293. See *Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1310 (3d Cir. 1994); see also *Rodriguez v. General Motors Corp.*, 27 F.3d 396, 397 (9th Cir. 1994) ("Section 101 of the [1991 Civil Rights] Act, codified at 42 U.S.C. § 1981(b), explicitly rejected *Patterson's* restrictive reading of § 1981.").

for the employer. The absence of a business necessity defense under section 1981 makes even more probable the finding of a violation of the statute's mandate that all persons who enter into the same contract with their employer enjoy equally its benefits.

3. Summary of the Broad Interaction Effects

The analysis above prompts the inference that at-will employers that refuse to arbitrate the wrongful discharge claims of Caucasian male employees, while at the same time routinely arbitrating wrongful discharge claims brought by members of the traditional Title VII protected groups, may run afoul of the Title VII bar on race-, color-, and sex-based employment discrimination and the section 1981 guarantee of the equal right to contract. Thus, although at-will employers stand a good chance of avoiding compulsion to arbitrate specious (nonreverse discrimination) FEP claims by Caucasian males, that victory may prove to be pyrrhic.

Although the legal theory remains speculative at this point, there is substantial reason to believe that the legal dimensions of the third broad interaction effect described above eventually may preclude at-will employers from distinguishing between the discharge appeal rights afforded traditional protected-group members and those falling outside protected groups. It is the prospect that the decision to arbitrate statutory FEP claims may transmute into an obligation to arbitrate all challenged discharges under a *de facto* just cause standard that creates the dilemma for at-will employers. That dilemma, the ultimate subject of this Article, is addressed below.

VII. CONCLUSION: ARBITRATION OR THE EAWD—A HOBSON'S CHOICE FOR AT-WILL EMPLOYERS

The analysis above demonstrates that at-will employers that desire to continue exercising their current wide discretion to terminate employees, while at the same time arbitrating the statutory FEP claims of their employees, may face several unanticipated legal consequences. Those legal consequences are of two types and significance. First, there are the obvious "trip wires" awaiting the unwary at-will employer. These are the specific interaction effects between the three primary exceptions to the modern EAWD and employer-employee agreements to arbitrate statutory FEP claims. The implied covenant of good faith, the implied-in-fact contract terms/enforceable promises doctrine, and the public policy exception demand substantial caution

and care in both the drafting and implementation of employer-employee agreements to arbitrate.

At-will employers that wish to take advantage of the benefits of arbitrating FEP claims must do so with a clear understanding of the rigor and good faith that will be required to avoid inadvertently piercing the EAWD shield through either imprecise framing of the arbitration mechanism, or inept or untoward administration of its terms. Despite these substantial risks, properly motivated at-will employers guided by competent counsel and represented by an adequately trained supervisory and management corps have little reason to fear that these first-level, specific interaction effects will inadvertently expand the scope of the contemplated arbitration procedure beyond the reach of employee statutory FEP claims. The broader, more complex interaction effects are farther reaching and present a more sobering proposition for at-will employers. Since these three broad interaction effects will arise as a matter of law and not as the result of any careless or pernicious management conduct, at-will employers that choose to arbitrate employee statutory FEP claims will have little control over their impact. Thus, an implied obligation to arbitrate all challenged discharges of traditional protected-group members will inevitably emerge, over time, from application of the law of commercial arbitration pertaining to matters of substantive arbitrability. This implied obligation, and the *de facto* just cause standard for protected-group members inherent in the disparate treatment order and allocation of proof paradigm, will become apparent to at-will employers (and their employees) who regularly arbitrate statutory FEP claims.

The impact of the third category of broad interaction effects, those arising when at-will employers refuse to arbitrate the discharge of Caucasian males, is less certain, but of significantly greater potential consequence. If at-will employers that desire to arbitrate statutory FEP claims in fact find themselves effectively obliged to arbitrate and justify all challenged terminations of non-Caucasians, women, ethnic and religious minority group members, the disabled, and those over forty years of age, only Caucasian males will be left within the effective reach of the EAWD. They alone will be without just cause protection.

Setting aside the not insubstantial question of whether Caucasian males would tolerate being denied the same *de facto* just cause guarantee and right to challenge unfair discharges afforded their

fellow employees,²⁹⁴ there is substantial reason to doubt the legality under Title VII and section 1981 of an employment policy that draws such a distinction in employment conditions on the basis of employees' race, color, national origin, and gender. Of the three possible lines of legal analysis that eventually could preclude at-will employers from refusing to arbitrate challenges to discharge brought by terminated Caucasian males—Title VII disparate treatment theory, Title VII disparate impact theory, and section 1981 of the Civil Rights Act of 1866—the Title VII disparate impact and section 1981 theories are the most plausible. The danger of violating Title VII and section 1981 can be disregarded only if one accepts the premise that the protections of those two statutes are not sufficiently elastic to embrace the discrimination claims of discharged Caucasian males denied the right to challenge their terminations through arbitration. At-will employers cannot rely upon this dubious proposition.

The message for at-will employers is clear. The price for securing the benefits of arbitrating statutory FEP claims may prove to be a partial or total surrender of the EAWD shield. At-will employers that adopt the binding arbitration device as the vehicle for adjudicating the statutory FEP claims of their employees must do so with full knowledge of the risk inherent in taking that step. At the very least, at-will employers that choose to arbitrate statutory FEP claims will be compelled to arbitrate and defend, under a *de facto* just cause standard, all challenged discharges of traditional FEP protected-group members. If the third category of broad interaction effects conceptualized by the authors materializes, at-will employers will be forced to arbitrate and defend the challenged discharges of all employees, protected and nonprotected-group members alike, thereby eviscerating the EAWD completely. Therefore, at-will employers choosing to arbitrate statutory FEP claims must be at least implicitly

294. Even though this analysis is focused on the legal dimensions of arbitrating statutory FEP claims, the most serious impediment to at-will employers refusing to arbitrate only the challenged discharges of nonprotected-group members may well be illegal. It emerges from the strong likelihood that Caucasian males under the age of 40 who are not disabled simply will not tolerate being left subject to the employer's unbridled discretion to discharge them for any reason or no reason when their protected-group peers are not. The potential for serious workplace turmoil presented by the perceived unfairness of such a bifurcated due process regime are so apparent as not to require elucidation. The prospect of that disruption and its impact on worker morale and productivity may, in itself, be sufficient motivation for at-will employers that desire to arbitrate statutory FEP claims to forego any attempt to limit the reach of the *de facto* just cause guarantee and the arbitration mechanism only to protected-group members.

willing to relinquish the remaining vestiges of the EAWD and embrace a just cause standard that applies to all of their employees.

This phenomenon, the voluntary closing of the circle of fair employment rights by extending just cause protection to Caucasian males, is the logical, unsurprising end result of the tacit decision by Congress not to legislate fair treatment in the workplace for all, but instead only to protect the equal employment opportunity rights of certain insular groups. If the increasing diversity of the American work force has not already led to the establishment of a recognizable *de facto* guarantee of just cause for the majority of American workers pursuant to the disparate treatment order and allocation of proof paradigm, it soon will. That reality, and the problematic nature of an employment policy that in operation denies only Caucasian males just cause protection and the right to challenge their discharges through arbitration might motivate at-will employers to reevaluate the true residual utility of the EAWD. Undoubtedly, moving away from the long-coveted discretion granted them by Wood's Rule would prove a difficult task for many at-will employers. Nevertheless, at-will employers might conclude that the downside of surrendering what remains of the EAWD is actually outweighed by the gains to be realized by arbitrating statutory FEP and non-FEP wrongful discharge claims.

