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THE EMPLOYMENT-AT-WILL DOCTRINE AND NON-UNION AIRLINES: IMPACT ON BOTH EMPLOYEES AND EMPLOYERS

PERRY J. TARNOFSKY

I. INTRODUCTION

OVER TWO-THIRDS of the employees in the United States today are not members of labor unions. Before 1978 much of the airline industry was unionized, but in response to the deregulation of the airline industry and the current state of the economy, many new non-union airlines are entering the market. Further, some


2 See Upstart Airlines Are Stinging the Big Carriers, TIME, Dec. 12, 1983, at 50. [hereinafter referred to as TIME].

3 In 1978, Congress passed the Airline Deregulation Act, 49 U.S.C. §§ 1301-1552 (1982). The Airline Deregulation Act of 1978 removed most restrictions on airline domestic route systems. Jansonius & Broughton, Coping with Deregulation: Reduction of Labor Costs in the Airline Industry, 49 J. AIR L. & COM. 501 (1984). [hereinafter referred to as Jansonius]. Certified airlines are now free to begin service to new markets without extensive governmental control. Id. at n.2. Prior to 1978, the airline industry was governed by the Civil Aeronautics Act of 1938 and by the Federal Aviation Act of 1958. Id. Under this regulatory scheme, the Civil Aeronautics Board (CAB) exercised much control over carrier service on domestic routes. Id.

4 For example, recently in 1983, Frontier Holdings, Inc., the parent company of the unionized Frontier Airlines, formed Frontier-Horizon, a non-union subsidiary. TIME, supra note 2, at 50-51. Other non-union carriers include Muse Airlines (Dallas hub), People Express (Newark hub) and America-West (Phoenix hub). Delta Airlines is the only major non-union carrier that existed before deregulation in 1978. Id.
unionized airlines have been relieved of their union contracts in last-ditch efforts to stay in business.\(^5\) It thus appears that there is a clear trend away from unions in the airline industry.\(^6\)

Unionized employees, including those in the airline industry, are protected by collective bargaining agreements\(^7\) which often require an employer to have "just

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\(^5\) In mid-May of 1983, Braniff Airways filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1982) and also ceased all its operations. After filing for reorganization, Braniff rejected its union contracts. When Braniff began operating again in 1984 it had to deal with the unions that represented Braniff employees before bankruptcy. Braniff was free, however, to renegotiate much more favorable contracts with unions because it had a stronger bargaining position. Unions, in this context, are virtually forced into making concessions for fear of forcing the airline to liquidate. See generally, Countryman & Bordewieck, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 Am. Bankr. L.J. 293, 319 (1983). Since a union's major concern should be to secure employment for its members, it obviously does not want to force a source of employment into liquidation.

Continental Airlines has recently obtained similar relief, except, unlike Braniff, it has continued operating. Jansonius, *supra* note 3, at 502 n.5. The issue of using the Bankruptcy Code as a means to get out of union contracts was addressed recently by the United States Supreme Court in NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984). In *Bildisco*, a building supplies distributor filed a voluntary petition in bankruptcy for reorganization under Chapter 11 and as "debtor in possession" sought to reject a collective bargaining agreement it had with a labor union. *Id.* at 1192. The employer claimed that the rejection of the union contract would save its business over $100,000. *Id.* The court held that a debtor (employer) can reject a collective bargaining agreement if it (debtor) can show that the agreement "burdens the [bankruptcy] estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *Id.* at 1196.

In response to the *Bildisco* decision, in mid-July of 1984, Congress amended the Bankruptcy Code. See 98 Stat. 333 (Supp. 1984). This amendment does not greatly alter the standard for allowing a debtor (employer) to reject a union contract. See 11 U.S.C. § 1113(c)(1)-(3). It merely adds more procedures for a debtor to follow which makes it more difficult for a debtor (employer) to reject a union contract. See 11 U.S.C. § 1113(b)(1)(A) & (B) (1982).

\(^6\) See *supra* notes 3-5 and accompanying text. It should be noted that even if an airline is successful in getting out of a union contract (through bankruptcy), the airline will still be unionized. The Railway Labor Act provides that once employees are unionized, they cannot be forced to disband their union. See generally Railway Labor Act, 45 U.S.C. §§ 151-188 (1972). Hence, an airline such as Continental may be released from a union contract but must still negotiate with the union in reaching another agreement.

\(^7\) The usual product of collective bargaining is a written contract between the employer and the union. The agreement sets forth the relationship between the two parties, including provisions dealing with the recognition of the union as the exclusive representative for employees in the bargaining unit. The contract also
cause" before terminating an employee. Non-union
workers, who are not covered by such collective bargain-
ing agreements are not guaranteed the degree of protec-
tion given unionized workers. Unless these non-union
employees have individually negotiated employment con-
tracts, they risk being subjected to the common law em-
ployment-at-will doctrine. Generally, under this
discipline, an employer can terminate an employee at any
time for any reason.

The employment-at-will doctrine has been a part of em-
ployer/employee relations since the late nineteenth cen-
tury. Recently though, the doctrine has been eroded by
both federal and state law to give the at-will employee
more job security. The degree of protection afforded
at-will employees varies greatly from state to state.

This Comment will explore the relationship between
the erosion of the employment-at-will doctrine and the

includes provisions governing wages, hours, discipline, promotions and transfers. Also, the collective bargaining agreement regulates the term and tenure of em-
ployment of the union employees. In doing so, it often includes a provision that
employees cannot be dismissed without "good" or "just" cause. R. GORMAN, LA-
BOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING Ch. XXIII, § 1 (1976).

Note, Limiting the Right to Terminate at Will — Have the Courts Forgotten the Em-
ployer?, 35 VAND. L. REV. 201, 202 (1982). For certain "just cause" limitations, see, e.g., Peerless Laundry Co., 51 Lab. Arb. 331 (1968); see generally M. TROTrA, ARBI-

In the airline industry, it is very unlikely that an employee has an individually
negotiated contract. For typical hiring process see infra notes 169-170 and accom-
panying text.

For a discussion of employment-at-will doctrine, see infra notes 21-36 and accompanying text.

For evolution of doctrine see infra notes 21-27 and accompanying text.

See infra notes 37-66 and accompanying text.

See infra notes 37-146 and accompanying text.

See infra notes 67-146 and accompanying text. For example, California, in
certain circumstances, requires that an at-will employee can only be discharged
for good cause. See infra notes 93-98 and accompanying text. On the other hand,
Texas does not recognize any exceptions to the harsh at-will rule. See infra note
175. In the past, judicial erosion of the at-will rule has typically benefited man-
agement employees. See infra note 165 for examples.
trend toward non-union airline carriers entering the market. More specifically, it will focus on how the erosion of the employment-at-will doctrine will extend protection to non-management employees of non-union carriers. Finally, it will discuss some possible alternatives that will allow employers in the airline industry to protect themselves from liability which might result from discharging non-union employees.

II. BACKGROUND

A. Common Law Employment-At-Will Doctrine

When a private sector employer hires an employee for an indefinite period of time, and the employee does not have a formal written employment contract, the employee can generally be discharged for good or bad cause. This situation is characterized as an employment-at-will. The employment-at-will doctrine developed in the United States primarily as a result of the writings of one commentator, H. G. Wood. Wood formulated the employment-at-will doctrine in his 1877 work on master-servant relationships:

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

Though he offered no justification for his rule, which de-
parted from the English common law, Wood's Rule became the primary doctrine governing employment duration in the United States. Perhaps the judicial acceptance of Wood's doctrine can be attributed to our country's desire to promote economic and industrial development during the industrial revolution.

The employment-at-will doctrine reached its peak in the United States in the early 1900's in *Adair v. United States.* In *Adair*, a railroad employee was discharged because of his membership in a labor union. The employee claimed that his discharge violated a federal statute which prohibited firing a railroad employee for union membership. The United States Supreme Court held

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25 Note, *supra* note 23, at 341. The respective rights of an employer and employee under English common law came from the Statute of Labourers, which provided that "no master can put away his servant or servant leave his master, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace . . . ", 1 W. BLACKSTONE, COMMENTARIES *43 (1879). English courts followed the concepts embodied in the Statute of Labourers, even after it was repealed. Note, *supra* note 8, at 206-07. They held that an indefinite hiring was intended to be an employment contract for one year. *Id.* If the employment continued for more than a year, then the employee could be discharged only after an additional year. *Id.*

26 Note, *supra* note 8, at 206. Some early leading cases applying Wood's Rule include: Clarke v. Atlanta Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908) (contract that does not state term is terminable at will); Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1889) (agreement to employ a person permanently is nothing more than an indefinite employment terminable by either party); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) (contract not specifying any time is terminable at will).

27 Note, *supra* note 8, at 207; see generally, Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976). Briefly, Wood's Rule was in accordance with the prevalent *laissez faire* ideology and freedom of contract theory. In this context Wood's Rule was equitable. Terminable at-will employment enabled the employer to control the workplace, while at the same time allowed the employee the freedom to resign if he found better employment. Note, *supra* note 8, at 208.

28 208 U.S. 161 (1908). There, the at-will rule received constitutional protection. The United States Supreme Court invalidated a federal law that prohibited firing a railroad employee for union membership on the grounds that it interfered with liberty and property rights guaranteed by the Fifth Amendment. *Id.* at 179. *Id.* at 170.

30 Erdman Act, ch. 370, 30 Stat. 424 (1898) (repealed 38 Stat. 108 (1913)). This statute made it unlawful for an employer to require as a condition of employment that an employee agree not to become a member of a labor union. *Id.* § 10.

31 *Adair*, 208 U.S. at 162.
that the federal statute was unconstitutional because it interfered with the liberty to contract and because "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of employer, for whatever reason, to dispense with the services of such employee."\textsuperscript{32}

The United States Supreme Court next addressed the employment-at-will doctrine in \textit{Coppage v. Kansas}.\textsuperscript{33} There, a Kansas statute made it unlawful for employers to require, as a condition of employment, that an employee agree not to become a union member.\textsuperscript{34} The United States Supreme Court held the Kansas statute unconstitutional as a violation of the due process clause of the Fourteenth Amendment.\textsuperscript{35} Specifically, the Kansas statute

\textsuperscript{32} Id. at 174-75. The Court further stated:

While . . . the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require. . . it is not within the functions of government . . . to compel any person in the course of his business and against his will to accept or retain the personal services of another . . . The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

\textit{Id.} at 174-76.

\textsuperscript{33} 236 U.S. 1 (1915).

\textsuperscript{34} \textit{Id.} at 26. \textit{See} KAN. STAT. ANN. §§ 4674-75 (1909).

\textsuperscript{35} 236 U.S. at 26. Here, the Court stated:

Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employ[ee] shall enter into an agreement not to become or remain a member of any labor organization while so employed, is
unlawfully infringed upon an individual’s liberty to contract.\textsuperscript{36} The United States Supreme Court has not addressed the at-will doctrine since \textit{Adair} and \textit{Coppage}.

B. \textit{Erosion of the Employment-At-Will Doctrine}

1. \textit{Federal Law}

a. \textit{National Labor Relations Act}

The impact of the employment-at-will doctrine and, more specifically, an employer's right to discharge an employee for joining a union, was curtailed in \textit{N.L.R.B. v. Jones \& Laughlin Steel Corp.}.\textsuperscript{37} In that case, the Supreme Court upheld the Wagner Act (now known as the National Labor Relations Act (NLRA)).\textsuperscript{38} The NLRA mandates that employees must be allowed to organize and form unions in order to bargain collectively through a representative.\textsuperscript{39} The Court said that “[e]mployees in industry have a fundamental right to organize and select representatives of their own choosing for collective bargaining; and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative author-

\textsuperscript{36} Id. at 13.
\textsuperscript{37} 301 U.S. 1 (1937).
\textsuperscript{39} National Labor Relations Act, 29 U.S.C. § 157 (1982). This section provides in pertinent part:

\textbf{RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.}

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

\textit{Id.}
The Court noted, however, that the NLRA did not alter an employer's right to discharge for cause. The NLRA was significant because it encouraged the formation of labor unions, which limited the application of the employment-at-will doctrine by increasing the number of unionized workers. These workers enter into collective bargaining agreements which regulate the term and tenure of their employment. In addition, Congress created the National Labor Relations Board (NLRB) to insure that employees would have the right to join labor organizations. Together, the NLRB and the courts have given terminated employees protection under the NLRA. For example, employees have been protected in the following situations: participating in protests over the firing of a supervisor; stopping work to show disagreement with the employer's conduct; and complaining to the employer about breaches of the collective bargaining agreement.

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40 *Jones & Laughlin Steel*, 301 U.S. at 33.
41 *Id.* at 45-46. Here the Court stated:

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board [NLRB] is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.

42 *Id.*
44 *See Gorman, supra note 7.*
45 *See 29 U.S.C. §§ 153-156. (1983).*
46 *Hill, supra note 42, at 126. The Board consists of five members. Its function is to process representation cases (process by which employees select labor organizations for purposes of collective bargaining) and unfair labor practices cases. *Id.* at 126-27.
47 *See infra notes 47-49 and accompanying text.*
48 *Puerto Rico Food Products Corp.*, 101 L.R.R.M. (BNA) 1307 (1979); *see also Hill, supra note 42, at 127 n.85.
49 *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237 (6th Cir. 1980) (Board ordered employees reinstated and made whole for any loss of pay); *see also Hill, supra note 42, at 127 n.87.
50 *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967) (Board
b. **Title VII of the Civil Rights Act of 1964**

Title VII of the Civil Rights Act of 1964 specifically makes it unlawful to discriminate in employment regarding hiring, firing and terms of employment on the basis of race, color, sex, religion or national origin. Title VII applies to all employers "engaged in an industry affecting commerce who [have] fifteen or more employees." Furthermore, Title VII makes it unlawful for an employer to retaliate against an employee who has brought a claim under Title VII.

Title VII also created the Equal Employment Opportunity Commission (EEOC). Anyone alleging that he or she has been aggrieved under Title VII can file a claim ordered employer to stop unfair labor practice and to reinstate employee with back pay); see also Hill, supra note 42, at 127 n.79.

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ordered employer to stop unfair labor practice and to reinstate employee with back pay); see also Hill, supra note 42, at 127 n.79.


51 Id. Title VII provides in part:

- It shall be an unlawful employment practice for an employer—
  - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; or
  - (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2.

52 Civil Rights Act of 1964, tit. VII, § 701(b), 42 U.S.C. § 2000e(b)(1982). It also applies to most labor organizations. Id. § 2000e(c), (d) (1982).

53 See, Civil Rights Act of 1964, tit. VII, § 704(a), 42 U.S.C. § 2000e-3(a) (1982). This section provides in part:

**Other unlawful employment practices**

- (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training . . . programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

with the EEOC,\textsuperscript{55} which has the authority to investigate individual claims of discrimination.\textsuperscript{56} The EEOC also promotes voluntary compliance with Title VII and has the power to bring civil actions against those employers charged with an unlawful discriminatory practice.\textsuperscript{57}

c. \textit{Other Federal Laws}

Other federal statutes which limit an employer's freedom to discharge at will include the Age Discrimination in Employment Act\textsuperscript{58} which protects persons between forty and seventy years old from discrimination in employment.\textsuperscript{59} The Fair Labor Standards Act\textsuperscript{60} prohibits an employer from retaliating against an employee for exercising protected rights under the statute.\textsuperscript{61} The Occupational Health and Safety Act\textsuperscript{62} also prohibits the discharge of employees who refuse to perform hazardous work.\textsuperscript{63} Furthermore, the Consumer Credit Protection Act\textsuperscript{64} prohibits the discharge of an employee who has had his wages garnished to pay a debt.\textsuperscript{65} Unless an employee is dismissed


\textsuperscript{56} See \textit{supra} note 54.

\textsuperscript{57} \textit{Id.}


\textsuperscript{59} \textit{Id.} § 31. The Age Discrimination in Employment Act makes it unlawful to refuse to hire or otherwise discriminate because of an individual's age. \textit{Id.} § 623.

\textsuperscript{60} 29 U.S.C. §§ 201-219 (1976).

\textsuperscript{61} Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1982). Such protected rights include filing a complaint with the Department of Labor or cooperating with the Department of Labor during an investigation. \textit{Id. See also} Hill, \textit{supra} note 42, at 154.


in violation of one of the above statutes, he or she will have no cause of action.\textsuperscript{66} Hence, the at-will employee must look elsewhere for assurances of job security.

2. \textit{State Law}

Much of an employee's real protection from the employment-at-will doctrine is derived from state law.\textsuperscript{67} Some states have eradicated the employment-at-will doctrine to the point that an at-will employee cannot be discharged without good cause.\textsuperscript{68} In such states, the at-will employee receives as much job security as the unionized employee.\textsuperscript{69} State law protecting an at-will employee is based on two general theories: (1) contract law,\textsuperscript{70} and (2) tort law stemming from public policy exceptions.\textsuperscript{71}

a. \textit{Contract Law — Covenant of Good Faith and Fair Dealing}

Some courts have declared that the at-will employee/employer relationship is governed by a covenant of good faith and fair dealing.\textsuperscript{72} The covenant mandates that neither party do anything that will injure the right of the other to receive the benefits of the agreement.\textsuperscript{73} Essentially, no matter what an employer says to an employee to indicate that he or she is an at-will employee, and thus may be dismissed without cause, the law prevents an employer from firing that employee unless it is done in good faith.\textsuperscript{74} In light of this increased protection for employees, it is unlikely that an employer will consciously act in

\textsuperscript{66} Hill, \textit{supra} note 42, at 136.
\textsuperscript{67} See \textit{infra} text accompanying notes 68-146.
\textsuperscript{68} See \textit{infra} text accompanying note 93.
\textsuperscript{69} See \textit{infra} note 9 and accompanying text.
\textsuperscript{70} See \textit{infra} text accompanying notes 72-117.
\textsuperscript{71} See \textit{infra} text accompanying notes 118-146.
\textsuperscript{72} See \textit{infra} text accompanying notes 74-103.
\textsuperscript{73} \textit{Fortune v. National Cash Reg. Co.}, 373 Mass. 96, 364 N.E.2d 1251, 1257 (1977). No case specifically defines good faith. Good faith is a factual determination which varies from situation to situation.
bad faith for fear of the possibility of large jury awards. Now that a covenant of good faith and fair dealing has been judicially implied into the employer/employee relationship, whether an employer’s actions are in good faith is ultimately going to be determined by a jury.

The first major case to declare the existence of a covenant of good faith and fair dealing was Monge v. Beebe Rubber Co. In Monge, a female employee was hired to work as a conversion machine operator in the defendant’s factory. The employee did not have a written contract, but was employed under an oral contract. The female employee was harassed by her foreman and personnel manager and ultimately was fired because she refused to go out with her foreman. The Supreme Court of Massachusetts held that “a termination by the employer of a contract of employment-at-will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract.” Here, such a termination injured the right of the employee to receive the benefits of the agreement.

In Fortune v. National Cash Register Co., a Massachusetts court implied a covenant of good faith and fair dealing in the face of a written employment contract. In Fortune, the employee worked for the National Cash Register Company (NCR) under a written “salesman’s contract”
which was terminable at will.\textsuperscript{85} The contract provided that the employee was to be paid a weekly salary plus a sales commission.\textsuperscript{86} Apparently the employee was fired in an effort by the employer to avoid paying the employee’s sales commissions.\textsuperscript{87} The court held that “NCR’s written contract contain[ed] an implied covenant of good faith and fair dealing, and [that] a termination not made in good faith constitute[d] a breach of the contract.”\textsuperscript{88} The court recognized the employer’s need to control its workforce but felt the adherance to a standard of good faith would not infringe upon this need.\textsuperscript{89} The court also felt that it was not radically altering the employment at-will rule\textsuperscript{90} but instead thought it was merely recognizing the requirement that parties to contracts and commercial transactions must act in good faith toward each other.\textsuperscript{91}

Other courts also have employed the implied covenant of good faith and fair dealing to protect the at-will employee.\textsuperscript{92} In \textit{Cleary v. American Airlines, Inc.},\textsuperscript{93} a California appellate court extended the implied covenant of good faith concept to the point where an employer could not

\textsuperscript{85} \textit{Id.} at 1253.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 1253-54.
\textsuperscript{88} \textit{Id.} at 1255.
\textsuperscript{89} \textit{Id.} at 1256. It seems fair to hold employers to a standard of good faith, even though they would complain that such a standard would infringe upon their control over the workplace, because employers often have stronger bargaining positions than employees.
\textsuperscript{90} 364 N.E.2d at 1256.
\textsuperscript{91} \textit{Id.} \textit{See also} U.C.C. § 1-203 (1981) (every contract or duty imposes an obligation of good faith in its performance or enforcement).
\textsuperscript{93} 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
discharge an employee without good cause. The court rejected the justifications for the employment-at-will rule, stating that "[t]here is an implied covenant of good faith and fair dealing in every contract" and that "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." The court further held that the duty arising from the covenant of good faith is unconditional and independent in nature and is not controlled by events, such as actions of the employee, in the same way as conditions precedent and subsequent are.

In reaching its decision, the court balanced the competing equities between an employee's right to job security and an employer's right to fire for cause or economic justification. The court identified two factors as being of "paramount importance" in reaching its decision in this particular case: (1) the longevity of service of the employee; and (2) the expressed policy of the employer to hear grievances.

The Cleary case is important because it

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94 Cal. Rptr. at 729.
95 Id. at 724. The employee was also charged with theft and leaving the work area which were both in violation of American Airline's regulations. Id.
96 See id. at 725. The at-will rule is based on the contractual concept of mutuality of obligation: if an employee can terminate the employment relationship whenever he or she wants, the employer is also entitled to terminate the relationship at his or her pleasure. Id.
97 Id. at 728 (quoting Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958)).
98 Cleary, 168 Cal. Rptr. at 728. A condition precedent is an act or event, other than the lapse of time, which must exist or occur before a duty of performance of the promise arises. J. CALAMARI & J. PERILLO, CONTRACTS § 136 (1970). A condition subsequent is the existence or occurrence of a fact or event which operates to discharge the duty of performance. Id. Hence, the court's characterization of the duty as unconditional means that the implied covenant of good faith is not dependent upon the existence of any other fact, event or occurrence.
99 Cleary, 168 Cal. Rptr. at 729.
100 Id. The employer in Cleary had worked for American Airlines for 18 years. Id.
101 Id. The employer's policy of hearing grievances involved the adoption of specific procedures for adjudicating employee disputes. The court felt that the
allowed a tort measure of damages for a cause of action sounding in contract.\textsuperscript{102} This is extremely important because one may recover punitive damages in a tort cause of action, where only compensatory damages are allowed in a contract claim.\textsuperscript{103} Hence, employers who violate the implied covenant of good faith and fair dealing by firing an employee in bad faith may be subject to large damage awards in addition to back pay.

b. \textit{Implied In Fact Promise of Job Security}

It is also possible for an at-will employee to achieve job security by bringing a cause of action sounding in contract based on the assertion that the employer impliedly promised job security through actions or company policy.\textsuperscript{104} In \textit{Toussaint v. Blue Cross \& Blue Shield of Michigan},\textsuperscript{105} a middle-level management employee was fired after five years of work.\textsuperscript{106} He claimed that both Blue Shield’s personnel manual and oral assurances of job security from his employer constituted an implied in fact promise of job security.\textsuperscript{107} The Michigan Supreme Court held that “[Blue Shield’s personnel manual] may become part of [a] contract either by express agreement, oral or written, or as a result of an employee’s legitimate expectations grounded in an employer’s policy statements.”\textsuperscript{108} Hence, the employer was bound by statements assuring job security made in its personnel manual.

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existence of this policy indicated that the employer “recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct.” \textit{Id.}
\textsuperscript{102} \textit{Id.} Actually, the court said that in this specific case a tort cause of action would also be appropriate. \textit{Id.} The court reasoned that as a result of the covenant of good faith and fair dealing a duty arose on the part of American Airlines to do nothing that would deprive the employee of the benefits of his employment. \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} Note, \textit{Employment at Will: Emerging Protections for the Employee}, 22 \textit{Washburn L.J.} 491, 508 (1983). For cases, see infra notes 105-117 and accompanying text.
\textsuperscript{105} 409 Mich. 579, 292 N.W.2d 880 (1980).
\textsuperscript{106} 292 N.W.2d at 883.
\textsuperscript{107} See \textit{id.} at 884. It is important to note that Blue Shield’s personnel manual stated that an employee could not be fired except for cause. \textit{Id.} at 884.
\textsuperscript{108} \textit{Id.} at 885.
\end{flushright}
A California appellate court held for an employee in Pugh v. See’s Candies, Inc., basing its decision on the implied contract theory. In Pugh, the employee had worked his way from pot scrubber to vice-president in charge of production, before being terminated. In concluding that the implied contract (promise of job security) existed, the court emphasized certain factors: (1) the length of the employee’s service, (2) oral assurances of job security, and (3) personnel policies of the employer which assured job security. Since the employee in Pugh had worked for See’s Candies, Inc. for thirty-two years, and was told when he began work that his future was secure if he was loyal to the company, the court found an implied promise of job security.

The theory of an implied promise of job security has not been widely accepted. However, where it has been accepted, some employers have responded to this judicial theory by putting express provisions in their employment applications which state that an employee can be terminated at will. Likewise, some management and personnel consultants have begun to advise employers to get rid of assurances of job security in employee handbooks and personnel manuals. The theory of an implied promise

110 171 Cal. Rptr. at 918-19.
111 Id. at 925. The employee had worked for See’s Candies, Inc. for approximately 32 years. Id. at 919.
112 Id. at 926. When the employee first began work for See’s Candies, he was told, “If you are loyal to [See’s] and do a good job, your future is secure.” Id. at 919.
113 Id. at 925.
114 Id. at 927.
117 Brown, supra note 74, at 391-92.
of job security has already caused and will continue to cause employers to be more cautious in the interviewing process.

c. *Tort Law Stemming from Public-Policy Exceptions*

In a growing number of states, courts have begun to recognize a tort of wrongful or abusive discharge.\(^{118}\) The basis for such tort actions is usually the employer’s contravention of some state public policy.\(^{119}\) "As a general exception to the [at-will rule] . . . an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."\(^{120}\) The public policy exceptions to the at-will rule which are the basis of the tort cause of action can be divided into three general categories: (1) exercising a statutory right or privilege; (2) performing an important public obligation; (3) refusing to commit an illegal act.\(^{121}\)

A public policy exception to the at-will rule was first recognized in California in *Peterman v. International Brotherhood of Teamsters*.\(^{122}\) In *Peterman*, an employee of the Teamsters Union was fired for failing to commit perjury at a hearing.\(^{123}\) The court stated that "in order to more fully effectuate the state’s declared policy against perjury, the


\(^{123}\) Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54, 57 (1977); see also Olsen, supra note 21, at 268 n.17.
civil law, too, must deny the employer his generally unlimited right to discharge an employee . . . when the reason for the dismissal is the employee's refusal to commit perjury." As a result, the court allowed the employee's complaint which sought declaratory relief adjudging that he was wrongfully discharged, as well as the employee's claim for accrued salary since his discharge. Here, the court felt that "every impediment . . . to [the objective of encouraging truthful testimony] must be struck down when encountered." Peterman is just one example in which liability was imposed to further the public policy of not promoting the commission of an unlawful act or the violation of a statute.

Nees v. Hocks is a case in which a public policy exception to the at-will rule was used in order to further the performance of an important public obligation. An employee was terminated for missing two weeks of work because of jury duty. The court held that the employer's motive for discharge was contrary to an important community interest and thus justified compensation of the employee.

In Tameny v. Atlantic Richfield Co., a California appellate court created a public policy exception for an employee who refused to commit an illegal act. In Tameny, Atlantic Richfield Company fired an employee for refusing to participate in an illegal price-fixing scheme. The

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124 Id.
125 Id.
126 Id.
127 Id.
129 272 Or. 210, 536 P.2d 512 (1975).
130 536 P.2d at 512.
131 Id.
132 Id. at 515.
133 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal Rptr. 839 (1980).
134 610 P.2d at 1330.
135 Id. at 1331. The employee had worked for ARCO for over fifteen years. See also, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 88, 417 A.2d 505 (1980) (employee fired for refusing to violate a professional code of ethics).
court allowed the employee to bring an action in tort and held that an employer may not coerce compliance with unlawful directions by discharging an employee.\(^{135}\) The court explained that, by engaging in such conduct (coercing an employee to fix prices), an employer violates a basic duty imposed by law on all employers.\(^{136}\) Thus, an employee who suffers damages as a result can bring a tort action for wrongful discharge against the employer.\(^{137}\)

Other courts have held that tort liability exists when an employer fires an employee for exercising a statutory right or privilege designed to protect employees within the employment relationship.\(^{138}\) The first case to allow a cause of action based on an employee's discharge for filing a workers' compensation claim was *Frampton v. Central Indiana Gas Co.*\(^{139}\) In *Frampton*, an employee filed a claim

\(^{135}\) 610 P.2d at 1337.

\(^{136}\) Id. The court does not explicitly define the duty violated by the employer. Most likely the duty owed by the employer is to not force employees to commit illegal acts. *Id.*

\(^{137}\) Id. Here the court explicitly said that the tort cause of action for wrongful discharge can give rise to punitive damages. Allowing punitive damages can prove very costly for employers. It is common knowledge that many juries will react in sympathy for the "family man employee" who has been fired by the "large corporation." It should also be noted that punitive damages are not allowed in wrongful termination claims sounding in contract. Hence, it is very important for the employer, as a planning tool, to ascertain what type of liability it could be exposed to in discharging an employee.


after suffering a work-related injury. After receiving a settlement, the employee was terminated. The Indiana Supreme Court reasoned that an employee must be able to exercise his right without fear of reprisal. The court stated that "[i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined." Frampton is an example in which a court imposed liability on an employer in an effort to further the public policy of allowing an employee to pursue his or her legal rights.

Courts have employed various theories to lessen the impact of the harsh at-will rule. In some jurisdictions the at-will rule has been eradicated to the extent that an employer cannot discharge an employee without good cause. In other jurisdictions, the common law at-will rule remains untouched. Because of this varied treatment, non-union airline employees and employers will be affected to varying degrees depending upon the location of the airline.

III. IMPACT ON AIRLINES

Before 1978, the airline industry was regulated and, for the most part, unionized. The employment-at-will doctrine did not play a large role in the airline industry before 1978, because most airline employees were members of unions. In this respect, airlines were not different than other private companies. Only management employees (who by nature are not unionized) were subject to the at-will rule.

140 297 N.E.2d at 427.
141 Id.
142 Id.
143 Id.
144 See supra notes 67-143 and accompanying text.
146 See infra note 175.
147 See supra note 3.
148 Id.
In 1978, Congress passed the Airline Deregulation Act, which removed most restrictions on airline domestic route systems. As a result of deregulation, new non-union air carriers have entered the market. All non-union employees of these new carriers, not just management employees, are subject to the at-will rule. Also, the new non-union airline employers will be affected by the continuing erosion of the employment-at-will rule.

The erosion of the at-will doctrine will affect the airline industry in two major ways. The new causes of action, developing to different degrees in different states, will subject the non-union airline employer to increased liability through potentially large jury awards. Also, as a result of the erosion of the employment-at-will rule, all levels of employment in the airline industry will be affected, not just management employees.

A. Increased Potential Liability

When the airline industry was primarily unionized, employers did not have to fear the prospect of discharging an employee. Now that more non-union carriers are entering the market, airline employers must consider the possibility of large jury awards resulting from the wrongful termination of a non-union (at-will) employee. If an at-will employee brings a claim for wrong-

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150 See supra note 3 for effects of airline deregulation.
151 See supra note 4 and accompanying text.
152 See infra notes 155-164 and accompanying text.
153 See infra notes 155-164 and accompanying text.
154 See infra notes 165-170 and accompanying text.
155 See supra notes 1-8 and accompanying text.
156 It should be remembered that most union workers have collective bargaining agreements which provide that an employee cannot be discharged without just cause. See supra note 7. Many collective bargaining agreements contain arbitration provisions which would keep an employment dispute from going to court. GORMAN, supra note 7. Today, if an at-will employee brings a tort cause of action, he or she may recover both compensatory and punitive damages. See, e.g., Cleary v. American Airlines, 111 Cal. App. 3d 443, 454, 168 Cal. Rptr. 722, 728 (1980).
157 See supra notes 3-6 and accompanying text.
158 See, e.g., Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977)
ful or abusive discharge, the employer may be subject to liability for both compensatory and punitive damages. The real danger in this area, as in most tort cases, is the possibility of a jury being overly sympathetic with the aggrieved plaintiff. In one case, a jury “tacked on” a $25,000 punitive damage award to a lost pay claim of $749. The erosion of the employment-at-will doctrine will continue to provide a judicial forum for more employees; therefore, new non-union air carriers should strive to somehow keep from litigating.

B. Extension Beyond Management Employees

The erosion of the employment-at-will doctrine has typically benefited managerial employees who work under oral contracts. In the airline industry, however, the de-

See, e.g., Tameny, supra notes 133-137 and accompanying text; Kelsay, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (court stated that punitive damages would be proper for a wrongful discharge claim sounding in tort).

See, e.g., Harless v. First Nat. Bank, 247 S.E.2d 270 (W. Va. 1978) (em-}
ployer’s conduct surrounding discharge amounted to outrageous conduct causing severe emotional distress).
mise of the at-will rule will not only benefit management, but other employees as well.\textsuperscript{166} For some of the new non-union carriers,\textsuperscript{167} flight attendants, pilots, ticketing agents and ground crew could all be classified as at-will employees because they are not members of labor unions.\textsuperscript{168} As long as an airline employee is not working under a formal written contract for a specific duration, he or she will be considered an at-will employee.\textsuperscript{169} The employee is hired

\begin{footnotesize}
\begin{enumerate}
\item Not all commentators agree that the erosion of the at-will rule will benefit employees other than management. For a conflicting point of view see Note, \textsuperscript{supra} note 116, at 1937-1951. In the airline industry, all non-union employees will receive more job protection as a result of the erosion of the at-will rule. Pilots may not be affected much by this development however, because they are typically members of the Airline Pilots Association even where other airline employees are not unionized.\textsuperscript{167}
\item See \textsuperscript{supra} note 4.
\item For definition of an at-will employee see \textsuperscript{supra} notes 21-27 and accompanying text.
\item Airline employees of Frontier-Horizon, a new non-union carrier, do not have formal written contracts. Telephone conversation with Mr. Ned Walker, Vice President of Public Relations, Frontier-Horizon Airlines, February 26, 1984.
\end{enumerate}
\end{footnotesize}
as an at-will employee and must look to state law for assurances of job security.\textsuperscript{170}

There is no reason to believe that courts will alter their courses and embrace the common law employment-at-will doctrine in its harshest form.\textsuperscript{171} Actually, the trend appears to be toward a further erosion of the at-will rule in an effort create job security for non-union employees.\textsuperscript{172} That employees of new non-union carriers will come under the at-will rule should cause airline employers to take action to avoid future liability.\textsuperscript{173}

IV. CONCLUSION: SUGGESTIONS FOR FUTURE ACTION

Judicial approaches to the employment at will doctrine vary greatly.\textsuperscript{174} Some state courts still enforce the harsh common law rule,\textsuperscript{175} while others hold that an at-will employee cannot be discharged without good cause.\textsuperscript{176} It is a virtual certainty that the employment-at-will doctrine will continue to erode on a nationwide basis.\textsuperscript{177}

The demise of the at-will rule should have a great impact on the new non-union air carriers entering the mar-

\textsuperscript{170} See supra notes 105-117 and accompanying text.

\textsuperscript{171} See Brown, supra note 74, at 404. There, a table of cases indicates that many states are continuing to recognize exceptions to the employment-at-will doctrine. For a description of the common law employment-at-will doctrine, see supra note 20-26 and accompanying text. For cases applying the rule as recently as the early 1970's, see Buijan v. J.L. Jacobs & Co., 428 F.2d 531 (7th Cir. 1970); Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759 (2d Cir. 1964); Gressley v. Williams, 193 Cal.App.2d 636, 14 Cal. Rptr. 496 (1961).

\textsuperscript{172} See supra text accompanying note 171.

\textsuperscript{173} See supra text accompanying notes 155-164.

\textsuperscript{174} See supra text accompanying notes 67-146.

\textsuperscript{175} See, e.g., Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (no exception to the employment-at-will doctrine, where an employee was terminated for missing work to serve on grand jury); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978) (per curiam) (employer's motive for discharge is irrelevant because the at-will doctrine insulates the employer from liability); United States Auto Ass'n v. Tull, 571 S.W.2d 551 (Tex. Civ. App. — San Antonio 1978) (employee who is working under an oral contract for no specific duration can be discharged at any time without cause).


\textsuperscript{177} See supra text accompanying notes 171-173.
Job protection will be extended, through the creation of new judicial remedies, to employees other than those in management.\textsuperscript{179} The creation of new causes of action for discharged employees will increase non-union airline employers' potential liability.\textsuperscript{180} The publicity of jury trials resulting from the erosion of the at-will rule might also adversely affect the non-union employer. Non-union airline employers should fear having to litigate the claims of discharged employees in front of juries. The goal of the non-union airline employer is somehow to avoid litigating, while at the same time preserve a congenial employment relationship with its employees. Employers should take certain precautions in an effort to reduce potential future liability.\textsuperscript{181}

A. Employee Handbooks or Personnel Manuals

Employers should avoid making promises of or even reference to "job security," "permanent employment," or "discharge for good cause" in their handbooks or personnel manuals.\textsuperscript{182} If such statements are made, employers risk having courts interpret them as contractual commitments.\textsuperscript{183} Of course, if an employer desires to make such promises as job security or discharge only for cause, it is permissible to include them in employer manuals.\textsuperscript{184} Most importantly, an employer should say exactly what it means with regard to assurances of job security in its handbook or manual.\textsuperscript{185} It might be plausible to include a

\textsuperscript{178} See supra text accompanying notes 165-170.
\textsuperscript{179} See supra text accompanying notes 155-170.
\textsuperscript{180} See supra notes 155-164 and accompanying text.
\textsuperscript{181} For such precautions, see infra text accompanying notes 182-199.
\textsuperscript{182} Brown, supra note 74, at 391.
\textsuperscript{183} Id.
\textsuperscript{184} Id. An employer probably would desire to make such promises as a public relations tool. Here, an employer must weigh the public relations benefits against the legal drawbacks before making a decision to include such statements.
\textsuperscript{185} Id. This also applies to the interviewing process. An interviewer should not make rash statements such as, "If you are looking for job security, this is the place," if the employer does not want to comply with such a statement. It is a very good idea to have some sort of written guidelines on what interviewers should avoid saying. This will serve as both a means to educate interviewers, as
phrase such as the following: "Discharge for any cause at employer's discretion, provided that employee has been given proper notice." 186

B. Employee Evaluations

Employee evaluations should be conducted on a regular basis. 187 The evaluations should clearly reflect the employee's performance. 188 It is much better to criticize an employee than let a problem progress. 189 By identifying the poor performance of an employee, and including such observations in the employee's personnel file, the employer provides identifiable objective criteria for discharging the employee. 190 At the same time, the employer makes the employee aware of the problem and thus gives that employee a chance to remedy it. 191

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186 Id. at 392; see, e.g., supra note 116 and accompanying text.
187 Brown, supra note 74, at 393. If employee evaluations are conducted on a regular basis, incompetent or poor employees can be identified. These evaluations can serve as evidence that the employer acted in good faith in discharging an employee. Without the evaluations, it might appear that the employer "abused his discretion." Id. at 393-95.
188 Id.
189 Id.
190 Id. 393-94.
191 The elements of a good evaluation system are outlined by R. Lawrence Ashe, Jr., in an article in the Autumn 1980 issue of EEO Today. The article provides:
1. Clear written instructions to performance raters;
2. Relevant training for performance raters;
3. Documented performance-rater familiarity with the nature and importance of the various job duties on which the employee is being rated and with the "ratee's" actual performance of those duties;
4. Design and use of a performance appraisal form which is as job related and easily understood as the circumstances allow;
5. Reasonable precautions against improper performance-rater bias of any kind;
6. At least two-level performance rater review and sign-off;
7. Central monitoring (usually by the personnel department) to ensure use of uniform performance rating standards;
8. Strenuous efforts to achieve accuracy rather than the more typical excessive leniency;
9. Employee review and right to comment;
C. Internal Grievance Procedure; Arbitration

An employer should avoid having a jury decide the validity of the employer's termination of an employee. Most juries would probably have little difficulty identifying with a discharged employee. To avoid that eventuality, some kind of internal grievance system should be instituted and included in the employee manual or handbook. More importantly, the procedure should be fair and impartial. If the internal grievance system appears outwardly fair, it may be used as evidence that the employer has treated the employee fairly. This evidence not only will be useful at trial, but also could discourage possible plaintiffs from bringing suit.

10. Employee concurrence (or specified disagreement) with the listing of major duties on which performance was rated;
11. Employee sign-off to signify having read the review but not necessarily having concurred in the rating received;
12. Right of employee appeal within a reasonable time;
13. Statistical checks for adverse impact and for any unusual rating pattern requiring specific investigation; and
14. Specific and mutually agreeable goals.

Ashe, EEO TODAY (Autumn 1980) (quoted in Brown, supra note 74, at 394).
192 See supra notes 158-164 and accompanying text.
193 Id.
194 Putting such information into employee handbooks, as a practical matter, may not be good from an employee relations standpoint. The employer risks alienating employees by telling them in advance what will happen if they have a complaint. The employer should strive to explain, in a realistic and fair fashion, that employees will be treated fairly if there is a complaint.

From a legal standpoint, the inclusion of information such as internal grievance procedures, arbitration provisions, and expected standards of employee performance, makes sense. This information can provide for equitable dispute resolution without letting a sympathetic jury make the final decision. Also, such provisions in employee handbooks can be evidence of an employer's good faith efforts to accommodate his employees and thereby be beneficial to an employer as a shield against future liability. See Brown, supra note 74, at 390-91, 399.
195 Brown, supra note 74, at 399.
196 Id. A good internal grievance procedure contains two parts:
(1) Complaint to the immediate supervisor — employees should be encouraged to discuss problems with their immediate supervisor.
(2) Complaint to next level of management — if like problem was not solved by the immediate supervisor, employees should be advised to present their claims in writing to the next level of management. Here, after discussing the problem with the employee and his supervisor, the upper level manager should reach a written decision.

Id. at 399-400.
If the problem is not solved through internal grievance procedures, then the employee should be encouraged to seek arbitration. The employer should provide for voluntary and binding arbitration, possibly as the final stage of an overall grievance resolution program. This provision should be part of the employee manual or handbook. Essentially, it should state that if the internal grievance procedure fails to reach a resolution of the dispute, then the employer and employee agree to submit to voluntary and binding arbitration of the dispute.

Even if the above suggestions are implemented, the erosion of the at-will rule will still have an unfavorable effect on non-union airlines. The creation of new judicial remedies, which may extend job security to non-union employees, will also increase a non-union employer's costs. Most likely these increased costs will be passed on to non-union employees in the form of lower wages and

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197 It should be noted that arbitration has to be mandated by either a statute or a contract. In either of these cases, a court will view an arbitrator's decision as binding as to the issue that was before the arbitrator. See GORMAN, supra note 7.

198 Brown, supra note 74, at 400.

199 See supra note 184 for drawbacks of including such a provision in an employee handbook.

An arbitration agreement should include the following:

1. The dispute and issues to be resolved;
2. A statement indicating that the employee has had the opportunity and has been encouraged by the employer to consult an attorney;
3. The method of choosing the arbitrator, paying for the arbitration, and deciding who is to pay the employee's attorney's fees if he or she is successful;
4. The kind of relief that may be awarded by the arbitrator;
5. The amount and type of permitted discovery;
6. Pre-arbitration procedures such as exchange of witness lists, exhibits, and experts' names, if any;
7. Conduct of the hearing, including evidentiary standards to be used, whether a court reporter or other transcription device will be used, time and place of the hearing, etc.;
8. Briefing schedules;
9. Release of all claims by the employee in exchange for agreement to arbitrate; and
10. Agreement that the arbitrator's decision is to be final and binding and reviewable only for fraud, bias, or arbitrator misconduct.

Brown, supra note 74, at 400-401.
fewer benefits, which negates the employee’s supposed gains.

As a result, it is quite possible that such non-union airline employees will want to join unions so that they will not have to worry about job security and might receive higher wages. Joining a union in this context will only serve to perpetuate the problem since the proliferation of labor unions is one major cause of the difficulties in the airline industry. Labor unions in America arose because of a need to protect the worker.²⁰⁰ Ironically, though, labor unions appear to be a partial cause of the economic difficulties of many unionized airlines.²⁰¹ This is illustrated by the fact that some airlines have used the Bankruptcy Code as a means to reject a union contract.²⁰² In these cases “secure” employees suddenly find themselves out of a job. Unions can even cause a bankrupt airline to liquidate if they refuse to make any concessions in the renegotiation of a union contract.

Since deregulation,²⁰³ non-union carriers have entered the market and become competitive because of lower labor costs. The trend of non-union airlines entering the market has increased the number of non-union workers in the airline industry. On the surface, the judicial erosion of the employment-at-will rule appears to greatly benefit non-union employees. In reality, though, if non-union employers pass on the costs of greater financial exposure to their employees, the benefits to the employees will be negated. Hopefully, non-union airline employees won’t seek to unionize. Receiving lower pay in the short run is preferable to fueling a union movement that has usurped its role, and as such, has overburdened many airlines.

²⁰¹ See supra note 5; see also 114 Lab. Rel. Rep. (BNA) 224 (Nov. 21, 1983) (reporting that same stewardesses of Continental Airlines were receiving $39,000 a year before Continental filed for bankruptcy).
²⁰² See supra note 5.
²⁰³ See supra note 3.
Casenotes and Statute Notes