

I SIT AND LOOK OUT: EMPLOYMENT DISCRIMINATION AGAINST HOMOSEXUALS AND THE NEW LAW OF UNJUST DISMISSAL

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I observe the slights and degradations cast by arrogant persons upon laborers, the poor, and upon Negroes, and the like;
Walt Whitman¹

I. INTRODUCTION

Under the employment-at-will rule² in many jurisdictions,³ a private

1. Whitman, "I Sit and Look Out," *THE TREASURY OF AMERICAN POETRY* 263 (N. Sullivan ed. 1978). Whitman may well have intended the phrase "the like" to refer to homosexuals. For a discussion of Whitman's homosexuality, see J. KAPLAN, *WALT WHITMAN: A LIFE* (1980).

2. See text accompanying notes 14-47. This article addresses the plight of private employees. The due process and equal protection clauses of the Constitution protect homosexuals working for public employers from discrimination. *Singer v. U.S. Civ. Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 1034 (1977); *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969). See Rivera, *Our Straight Laced-Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 813-818 (1980); Rivera, *Recent Developments in Sexual Preference Law*, 30 *DRAKE L. REV.* 311, 317-18 (1981).

3. For discussion of the status of the employment-at-will rule in the 50 states and Puerto Rico, see L. LARSEN, *UNJUST DISMISSAL* ch. 10 (1985).

employer may fire an employee at any time without notice for any reason, including homosexuality.⁴ Indeed, according to the classic formulation of the rule, an employer may fire an employee-at-will for any reason in the absence of a contractual or statutory provision to the contrary. Most statutory provisions limiting an employer's right to discharge workers afford no protection to homosexuals. The Equal Employment Opportunity Commission (EEOC) and the courts uniformly hold that Title VII of the Civil Rights Act of 1964⁵—which prohibits private and public employment discrimination on the basis of race, color, religion, sex or national origin—fails to prohibit employment discrimination against either effeminate males⁶ or homosexuals.⁷ The primary rationale of these decisions is that Congress, in passing Title VII, did not intend to protect homosexuals against employment discrimination. In addition, courts have held that neither 42 U.S.C. § 1981, which is the present codification of the Civil Rights Act of 1866,⁸ nor the California Fair Employment Practices Act⁹ afford any

4. *Payne v. Western & A. R.R. Co.*, 81 Tenn. 507, 519-520 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). See *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895); 3 A. CORBIN, CONTRACTS § 684 at 224 (1960); 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-130 (3d ed. 1967).

5. 42 U.S.C. § 2000e-2000e-17 (1976). Section 2000e-2(a) provides:

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 or applicants for employment in any way which would . . . adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 2000e-2 sets out similar nondiscrimination requirements with respect to employment agencies, labor organizations, and training programs in subsections (b), (c), and (d) respectively.

Proposed bills to amend Title VII to cover sexual preference discrimination include: H.R. 2074, 96th Cong., 1st Sess. (1979); H.R. 8269, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 7775, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 166, 94th Cong., 1st Sess. (1975).

6. *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1979).

7. *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

8. *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (which prohibits employment discrimination on the basis of race, color, and, possibly, national origin).

9. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (similar to many state fair employment laws). *Gay Law Students*

protection to homosexuals. These decisions rest on the rationale that respective legislative bodies intended to exclude homosexuals from the scope of their laws. Through these rulings, courts advised gay activists that the legislature, not the judiciary, was the proper forum for their employment discrimination claims.

With resort to the political process, however, homosexuals encountered only modest success. Both Wisconsin and the District of Columbia declared illegal employment discrimination on the basis of sexual orientation or preference.¹⁰ In addition, New York City and other municipalities passed various ordinances protecting homosexuals from employment discrimination.¹¹ Nevertheless, such jurisdictions represent the minority. Most state legislatures and Congress resist gay activists' attempts to redress the legitimate grievances of homosexuals.¹² The hostility and indifference of most legislative bodies illustrates that any immediate protection of privately employed homosexuals will have to come from a source other than the traditional civil rights laws.

During the past fifteen years, the judiciary has imposed major limitations on the traditional employment-at-will rule.¹³ Many jurisdictions now protect employees against some types of discharges, and there is widespread recognition that further protection is forthcoming. The purpose of this article is to examine the emerging law of unjust dismissal to determine whether its development will provide a remedy for homosexuals fired solely because of their sexual orientation.

Part II of the Article reviews the major developments in the law of unjust dismissal. Part III examines the contract exception to the employment-at-will rule. In this section the author argues that courts should construe both the implied-in-law and implied-in-fact theories of employment contracts to require just cause for discharge. Additionally, the author provides examples of what constitutes just cause for the

also held that California Labor Code §§ 1101 and 1102 prohibited arbitrary employment discrimination against manifest homosexuals. *Id.* The Attorney General of California recently concluded that these sections also prohibited employment discrimination on the basis of undisclosed or suspected homosexual orientation. Attorney General of California, Opinion No. 85-404, p. 5 (1986).

10. D.C. Code Encycl. § 6-2221 (West Supp. 1978-79); Wis. Stat. Ann. §§ 111.31, 111.32, 111.36 & 111.37 (West Supp. 1983-84).

11. New York, N.Y. Municipal Code B1-7.2.

12. *See, e.g.,* De Santis v. Pacific Telephone & Telegraph Co., 608 F. Supp. 327, 329 (9th Cir. 1979).

13. For a history of these developments, see L. LARSEN, UNJUST DISMISSAL §§ 2.06, 2.07 (1986).

termination of a homosexual. Part IV discusses the public policy exception to the employment-at-will rule. The author concludes that strong policies favoring free speech and the exercise of political rights, as well as the policy against discrimination in general, should support a homosexual's cause of action for unjust dismissal. The final section briefly addresses other available theories of recovery. These avenues of recourse, however, offer less promise to homosexuals because courts have not been receptive to similar claims brought by heterosexuals.

II. THE LAW OF UNJUST DISMISSAL

A. *The Employment-at-Will Rule*

The employment-at-will rule applies to approximately sixty-seven percent of American employees.¹⁴ The rule provides that "[a]ll [employers] may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹⁵ Technically, the rule establishes a presumption that

14. Of American employees, 18% are unionized, and approximately 16% are federal and state employees. See U.S. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States, 1986, Table 662 at 393 (total labor force), Table 713 at 424 (union membership), Table 692 at 410 (non-agricultural establishments). See Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979).

Union members in the private sector are protected from unjust dismissal by collective bargaining agreements. Almost 80% of such agreements provide that covered employees can only be terminated for "just cause." 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 40:1 (Apr. 10, 1975). For a discussion of "just cause" protection for unionized employees, see Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 499-508 (1976); Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22ND ANN. CONF. ON LAB. 171, 186-201 (1970).

Federal civilian employees are protected by the Civil Service Reform Act of 1978, 5 U.S.C. § 7513(a), (b) (1982). See Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287, 290-307 (1968). State employees are protected by tenure and government unions, civil service systems and by state and by the Constitution. See Branti v. Finkel, 445 U.S. 507 (1980); Perry v. Sindermann, 408 U.S. 593 (1972); R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW § 5.4 (1976); J. WEISBERGER, JOB SECURITY AND PUBLIC EMPLOYEES 9-19, 45-65 (2d ed. 1973); Lowy, *Constitutional Limitations on the Dismissal of Public Employees*, 43 BROOKLYN L. REV. 1 (1976); Vaughn, *Public Employees and the Right to Disobey*, 29 HAST. L.J. 261 (1977).

15. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-520 (1894), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). See 3 A. CORBIN, CONTRACTS § 684, at 224 (1960); 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-130 (3d ed. 1967).

when an employment contract fails to specify a duration for the worker's services, either the employer or the employee may terminate the employment relationship at will.¹⁶ Since few employment contracts specify a duration, the vast majority of employees in the United States risk the possibility of summary dismissal.

To the surprise of many who have read the cases attesting to the precedent behind the rule,¹⁷ the rule is of relatively recent origin.¹⁸ There was little conformity in the cases until 1877, when Horace G. Wood published his *Treatise on the Law of Master and Servant*.¹⁹ Wood inaccurately declared that an indefinite hiring is prima facie a hiring at will, and the discharged employee carries the burden of proving otherwise.²⁰ Many courts adopted Wood's theory, and the employment-at-will rule was born.

Numerous reasons explain the rapid acceptance of the employment-at-will rule. Legal scholars justified the rule on the basis that it enabled courts to reach consistent decisions and avoid a tedious factual analysis of each case.²¹ The prevalent *laissez-faire* economic theory of the late nineteenth and early twentieth century, often couched in the rhetoric of the absolute freedom of the employer and employee to contract on whatever terms they chose without governmental interference, has also contributed to the acceptance of the rule.²² In fact, the Supreme Court enshrined the employer's absolute right to discharge as a constitutionally protected property right. In *Adair v. United States*²³ the Court

16. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). See *Martin v. New York Life Insurance Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

17. For the history of the employment-at-will rule, see 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913); Feinman, *The Development of the Employment at Will Rule*, 20 AMER. J. LEGAL HIST. 118 (1976).

18. Feinman, *supra* note 17, at 120.

19. L. LARSEN, UNJUST DISMISSAL § 2.03 (1986).

20. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, § 134 at 272 (1877). Wood cited the following four cases as authority: *Wilder v. United States (Wilder's Case)*, 5 Ct. Cl. 462 (1869); *De Briar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871). Scholars have shown that Wood's formulation of the rule was not supported by his claimed authorities. See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-345 (1974).

21. L. LARSEN, UNJUST DISMISSAL § 2.04 (1986).

22. See Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-1825 (1980); Feinman, *supra* note 17, at 124, 129-130.

23. *Adair v. United States*, 208 U.S. 161 (1908); see also *Coppage v. Kansas*, 236

held that a federal law barring common carriers from dismissing employees for union membership unconstitutionally interfered with the employer's freedom of contract and constituted a taking of property in violation of the fifth amendment.²⁴

In *NLRB v. Jones & Laughlin Steel Corporation*²⁵ the Court rejected the laissez-faire philosophy of *Adair* and applied the formal law of contracts, including the principles of mutuality of obligation and consideration, to sustain the rule of employment-at-will.²⁶ Courts have interpreted mutuality of obligation, which requires that a contract bind both parties, to mean that since an employee can quit his job at will, the employer is likewise free to terminate the contract by firing the employee at will.²⁷ Moreover, courts consistently held that "permanent" employment contracts, in which an employer agrees to retain an employee so long as his work is satisfactory, lacked mutuality and were unenforceable.²⁸ Most contemporary commentators, however, agree that mutuality of obligation is an anachronistic, unworkable principle which courts no longer apply.²⁹

Courts have also relied on the doctrine of consideration to include "permanent" contracts within the scope of the employment-at-will rule.³⁰ They reasoned that an employee's wages compensated him for

U.S. 1 (1915) (the Court struck down a Kansas Law that outlawed yellow dog contracts that required employees to agree not to join a union as a condition of employment). These opinions mark the height of the Court's insistence on laissez-faire principles in the labor area. Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826 (1980).

24. 208 U.S. at 176.

25. 301 U.S. 1 (1937). The Court held that the provisions in the National Labor Relations Act prohibiting an employer from intimidating or dismissing an employee for union activity did not unconstitutionally interfere with an employer's freedom of contract.

26. *Id.*

27. See *Pitcher v. United Oil and Gas Syndicate, Inc.*, 174 La. 66, 69, 139 So. 760, 761 (1932).

28. See, e.g., *Rape v. Mobile & O. R.R.*, 136 Miss. 38, 100 So. 585 (1924).

29. J. CALAMARI & J. PERRILLO, *THE LAW OF CONTRACTS* § 4-14 (2d ed. 1977); 1 A. CORBIN, *CONTRACTS* § 152; J. MURRY, *CONTRACTS* § 90 (rev. ed. 1974); *RESTATEMENT (SECOND) OF CONTRACTS* § 79 (1981).

30. *Bixby v. Wilson & Co.*, 196 F. Supp. 889, 902 (N.D. Iowa 1961); *Sauter v. Walnut Grove Products*, 188 N.W.2d 305, 322 (Iowa 1971); *Hanson v. Central Show Printing Co.*, 256 Iowa 1221, 130 N.W.2d 654, 657 (1964); *Forrer v. Sears Roebuck & Co.*, 36 Wis. 2d 388, 393, 153 N.W.2d 587, 589 (1967).

However, contemporary courts wishing to mitigate the harshness of the rule that a contract for permanent employment or employment for life is "an indefinite hiring ter-

all of his services and therefore required independent or additional consideration on the part of the employee to support a limitation on the employer's power to fire.³¹ Such independent consideration may take the form of relocating,³² sacrificing another job,³³ or selling the em-

minable at the will of either party," *Lynas v. Maxwell Farms*, 279 Mich. 684, 687, 273 N.W. 315 (1937), have said that the rule is merely a rule of construction. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880, 885, *reh'g denied*, 409 Mich. 1101 (1980).

31. This reasoning was used by the employer in *Toussaint*.

In *Forrer v. Sears Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967), the plaintiff returned to work after retirement. In exchange for giving up a farm he had purchased, he was promised permanent employment. Shortly after returning to work, he was fired. The plaintiff sued, claiming there was a contract for permanent employment. Although the court indicated that the plaintiff could have recovered if he had shown additional consideration, it said:

We do not deem that the detriment to the plaintiff herein in giving up his farming operations at a loss constituted such additional consideration. . . . A permanent employment contract is terminable at will unless there is additional consideration in the form of an economic or financial benefit to the employer. A mere detriment to the employee is not enough.

Id. at 394, 153 N.W.2d at 590. *See also* *Wright v. C.S. Graves Land Co.*, 100 Wis. 269, 75 N.W. 1000 (1898).

It is often impossible for an employee to establish the necessary additional consideration. In *Odum v. Bush*, 125 Ga. 184, 53 S.E. 1011 (1906), a coffin maker was induced to leave his employment of 25 years to work for a competitor who wanted to establish a business in another town. After accepting the new employment, the coffin maker sold his residence and shares of stock he owned in his old employer and moved to the new town. He was fired soon thereafter. He sued for damages, claiming that his discharge without just cause breached his employment contract. The court held that the additional consideration supplied by the coffin maker was ineffective since the contract was too indefinite to be enforced.

An executory contract of service for no fixed period of time is obviously too indefinite to be capable of enforcement: an offer or employment at so much per month will in the absence of anything further indicating the period of employment, be treated as meaning employment for a term of one month.

Id. at 189, 53 S.E. at 1015.

32. *See, e.g.*, *Topper v. York Gazette Co.*, 66 Pa. D & C 3d 337 (York County Ct. C.P. 1974). *Contra* *Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002 (8th Cir. 1982).

33. *See, e.g.*, *Riefkin v. E.I. DuPont de Nemours & Co.*, 290 F. 286 (D.C. Cir. 1923); *Stauter v. Walnut Grove Products*, 188 N.W.2d 305 (Iowa 1971); *Rogozinaki v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977). *Contra* *Moody v. Bogue*, 310 N.W.2d 655 (Iowa App. 1981); *Edwards v. Kentucky Util. Co.*, 286 Ky. 341, 150 S.W.2d 916 (1941). Some courts hold that giving up another job is sufficient consideration only if the employer knew about it. *See, e.g.*, *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982); *Collins v. Parsons College*, 203 N.W.2d 594 (Iowa 1973).

ployee's business to the employer.³⁴ By the mid-twentieth century the employment-at-will rule applied to over seventy million employees, although several factors curtailed it. First, federal, state, or local governments, which employ approximately sixteen (16) percent³⁵ of the workforce, have civil service systems which normally require good cause for dismissal.³⁶ Second, collective bargaining agreements, which generally impose a just cause standard for dismissal, protect most union members from the at-will rule.³⁷ Finally, numerous federal, state, and local laws which limit an employer's common law right to fire an employee at will mitigate the harshness of the rule. Among some of the best known federal laws are the Labor Management Relations Act,³⁸ Occupational Safety & Health Act,³⁹ Age Discrimination in Employment Act,⁴⁰ Employee Retirement Income Security Act,⁴¹ and the Civil Rights Act of 1964.⁴² State and local laws curtailing the rule include civil rights laws,⁴³ state labor laws,⁴⁴ workmen's compen-

34. See, e.g., *Stauter v. Walnut Grove Products*, 188 N.W.2d 305 (Iowa 1971); *Dutch Maid Bakeries v. Schleicher*, 58 Wyo. 374, 131 P.2d 630 (1943).

35. See *supra* note 14. U.S. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States, 1986*, Table 662 at 393 (total labor force); *id.* Table 692 at 410 (non-agricultural establishments).

36. See, e.g., Civil Service Reform Act of 1978, 5 U.S.C. § 7513(a), (b) (1982) (permits removal of federal civil service employees "only for such cause as will promote the efficiency of the service.").

37. See note 24, *supra*. Cf. *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 383 P.2d 571 (1963).

38. ("LMRA"), § 8(a)(1), (3), (4), 29 U.S.C. § 158(a)(1), (3), (4) (1975) (prohibits discharge for union activity, protected concerted activity, or filing charges or giving testimony under the Act).

39. ("OSHA"), 29 U.S.C. § 60(c) (1975) (prohibits retaliatory discharge of employees for exercising rights under the Act).

40. 29 U.S.C. §§ 623, 631, 633(a) (1975 & Supp. 1982) (prohibits discharge because of age by private employers and federal government of persons over 40 and retaliation for exercising statutory rights).

41. 29 U.S.C. §§ 1140, 1141 (1975) (prohibits termination of employees to prevent them from receiving vested pension rights).

42. 42 U.S.C. §§ 2000e-2, 2000e-3(a) (1981) (prohibits discharge based on race, color, religion, sex, or national origin and retaliation for exercising rights under Title VII).

43. See, e.g., *New York: Human Rights Law*, N.Y. EXEC. LAW § 296(a)(1) & (3) (McKinney 1980) (prohibits termination because of race, color, religion, national origin, or sex; or handicap; or because person has opposed practices made illegal by or filed a complaint, testified, or assisted in proceedings under the statute). *California: Fair Employment and Housing Act*, CAL. LAB. CODE § 1420(a) & (e) (West 1971 & Supp.

sation laws,⁴⁵ laws prohibiting the discharge of employees who serve on juries,⁴⁶ and, of course, the rare state and local laws prohibiting the discharge of employees because of their sexual orientation.⁴⁷

B. *The Development of a Cause of Action for Unjust Dismissal*

In 1959 the California Supreme Court in *Peterman v. International Brotherhood of Teamsters*⁴⁸ held that public policy considerations such as that prohibiting the suborning of perjury could limit an employer's right to fire an employee. In 1967 Professor Lawrence Blades argued in a seminal law review article that abusively discharged employees should have a tort cause of action.⁴⁹ By the 1980's many jurisdictions recognized a cause of action for wrongful termination or unjust dismissal.⁵⁰ A few jurisdictions, however, steadfastly clung to the old rule.⁵¹

The theoretical basis for the emerging law of unjust dismissal has been inconsistent at times. Generally, however, new causes of action

1975). *Wisconsin*: WIS. STAT. ANN. § 111.36(1)(d) (West Stat. Ann. § 111.36(1)(d) West Supp. § 1983) (prohibits discharge because of sexual orientation).

44. See, e.g., *New York*: New York State Labor Relations Act, N.Y. LAB. LAW § 704(2), (5), (8) (10) (McKinney 1977) (private sector). *California*: State Employer-Employee Relations Act, CAL. GOV'T CODE § 3519(a) (West 1980) (public sector).

45. See, e.g., *New York*: Workers' Compensation Law, N.Y. WORK. COMP. LAW 120 (McKinney Supp. 1981). *California*: Workers' Compensation and Insurance Act, CAL. LAB. CODE 132a (West 1971).

46. See, e.g., *New York*: Judiciary Law, N.Y. JUDIC. LAW § 532 (McKinney 1968) (prohibits discharge of employees for serving as jurors). *California*: CAL. LAB. CODE § 230 (West 1971).

47. See, e.g., D.C. CODE ENCYCL. § 6-2221 (West. Supp. 1978-79); WIS. STAT. ANN. §§ 111.31, 111.32, 111.36 & 111.37 (West Supp. 1983-84).

48. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). The California District Court of Appeals held that an employee fired for refusing to perjure himself in violation of the criminal law and at his employer's request had a cause of action against his employer for wrongful discharge because the public policy of California is to discourage all hindrances to truthful testimony.

49. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COL. L. REV. 1404 (1967). Professor Blades believed that punitive damages, which are recoverable in tort actions, would deter employer abuses. *Id.* at 1427.

50. For a compilation of the status of the employment-at-will rule in the 50 states and Puerto Rico, see L. LARSEN, UNJUST DISMISSAL, ch. 10 (1985). Among those states recognizing exceptions to the rule are: California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Tennessee, Pennsylvania, and Washington.

51. See note 3 *supra*.

or "exceptions to the rule" arise from public policy, contract law, or tort law. The public policy and contract causes of action are the most widespread and coherent of the three.

The remainder of this Article examines the three exceptions to the employment-at-will rule and discusses the potential relief each offers a wrongfully discharged homosexual employee. The author concludes that both the contract and public policy exceptions strongly support the existence of a cause of action. Recovery on a tort theory is less likely.

III. THE CONTRACT EXCEPTION: IS THERE A JUST CAUSE STANDARD FOR DISMISSAL?

By arguing that a just cause standard for discharge is implicit in all employment contracts, advocates of employment security for homosexuals can find success with the contract exception to the employment-at-will rule. Consequently, summary dismissal of a homosexual would be unlawful because an employee's sexual orientation fails to constitute cause for discharge. No case concerning the discharge of a homosexual by a private employer has unequivocally accepted this argument. There is, however, a trend in favor of this position.⁵² It is now possible to make two intermediate arguments that will strengthen job security for many homosexuals. First, an employment-at-will contract coupled with additional factors, such as an employee's longevity on the job⁵³ or an employer's promise of fair treatment,⁵⁴ should be sufficient to require just cause for discharge. Second, in order for homosexuality to constitute just cause for discharge, an employer must show that an employee's homosexuality adversely affects his job performance.

The contract exception evolved as a means to defeat the presumption under the at-will rule that by failing to agree to a definite term the parties intended to provide for at-will termination by the employer or the employee. Courts infer the existence of a contract not by the existence of written words, but by implication and deduction from the cir-

52. See Blades, note 49 *supra*, at 1421-1427.

53. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 10 at 10 (Hornbook ed. 1970). See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 361-62 (1974).

54. *Comunale v. Trader's Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198 (1958). See *Bliss v. Hoyt*, 70 Vt. 534, 41 A. 1026 (1898); *Kellum v. Broivisg's Adm'r*, 231 Ky. 308, 24 S.W.2d 459, 465 (1929). See, e.g., *Brawthen v. H & R. Block, Inc.*, 28 Cal. App. 3d 131, 104 Cal. Rptr. 486 (1st Dist. 1972).

cumstances surrounding the transaction or by the conduct of the parties. There are two types of implied contracts: implied-in-fact and implied-in-law. Both potentially obligate the employer to refrain from firing an employee without just cause. Despite the language of implied contracts, the basic employment contract between parties remains a bilateral agreement. The implied agreement is only part of that contract and is a means to avoid the presumption of at-will hiring.

A. *Implied-in-law Contracts*

An implied-in-law contract, also known as a constructive or quasi-contract, is an obligation imposed by law in the interest of fairness despite the absence of a promise or the intent to make one. The terms of implied-in-law contracts depend on the court's conception of what the agreement between the parties should have been.

1. Implied Covenant of Good Faith & Fair Dealing (CGF & FD)

The implied covenant of good faith and fair dealing (CGF & FD) creates an obligation on both parties to avoid acts which impair the other party's right to receive the benefit of the contract. Despite the covenant's origin in the insurance field, Congress codified the covenant in the Uniform Commercial Code (U.C.C.) as an element of all commercial contracts.⁵⁵

Although employment contracts are not regulated by the U.C.C., they are commercial in nature and should contain the CGF & FD. Some courts have adopted such a proposal. In *Tameny v. Atlantic Richfield Co.* the California Supreme Court held that the covenant existed in employment contracts,⁵⁶ and in *Cleary v. American Airlines*, the California Court of Appeals held that an implied covenant of good faith and fair dealing exists in every contract.⁵⁷ Because of the similarity between insurance contracts and employment contracts, this result

55. Uniform Commercial Code § 1-203. The section provides, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." See generally Summers, *infra* note 59.

56. 27 Cal. 3d 167, 172-174, 610 P.2d 1330, 1332-34, 164 Cal. Rptr. 839, 841-43 (1980). Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 67-83 (1982); Note, *Tameny v. Atlantic Richfield Co.: Wrongful Discharge, a New Tort to Protect At-Will Employees*, 18 W. ST. U.L. REV. 91 (1980). For a discussion of *Tameny* see notes 77-82 and accompanying text *infra*.

57. 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 711, 728 (2nd Dist. 1980); Miller & Estes, *supra* note 56 at 83-95.

seems justified.⁵⁸ Both contracts deal in security, well-being, and peace of mind. Moreover, insurance companies and employers control access to relationships crucial to survival in modern society. Both have great power over the parties with whom they contract—often to the point of adhesion. Finally, if either party acts in bad faith, the consequences for society can be serious.

Other attributes of the employment contract justify application of the CGF & FD. First, the employment relationship is more of a status relationship than a contractual one. Second, the disparity of power between the employer and the employee and the ambiguous nature of the typical oral employment contract leave the employee subject to employer abuse. Third, most employment contracts are not the result of free bargaining between parties; arguably, many are contracts of adhesion. Moreover, the rights arising from most employment-at-will agreements are less than the reasonable expectations of employees. No reasonable employee would grant an employer the right to fire him for an arbitrary or capricious reason.⁵⁹ The CGF & FD gives the employee legitimate relational expectancies, including freedom from abuse, pension rights, and limits on reemployability owing to employment longevity.⁶⁰ Finally, the typical employee is a weaker party, dependant on the good will of the employer for the necessities of life. Some commentators have therefore asserted that the relationship between them is fiduciary.⁶¹

2. What Constitutes a Breach of the Covenant?

No court has definitively held that an employer breaches the CGF & FD when he fires an employee without just cause, but convincing arguments supporting that proposition do exist. In *Cleary v. American Air-*

58. Miller & Estes, *supra* note 56, at 83-95.

59. See Summers, 'Good Faith' in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 201, 251 n.222 (1968) ("a party presumably agrees merely to the grant of a power, and not also to the grant of a power to abuse a power").

60. These relational expectancies have also been called "employee equities," "valuable rights," or "new property." See, e.g., E. GINZBERG & I. BERG, *DEMOCRATIC VALUES AND THE RIGHTS OF MANAGEMENT* 172-89 (1963); F. MEYERS, *OWNERSHIP OF JOBS: A COMPARATIVE STUDY* 15-16 (1964).

61. Comment, *The Covenant of Good Faith and Fair Dealing: A Common Ground For the Torts of Wrongful Discharge from Employment*, 21 SANTA CLARA L. REV. 1111 (1980). See *Nelson v. Abraham*, 29 Cal. 2d 745, 751, 177 P.2d 931, 943 (1947) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933); *Stevens v. Marco*, 147 Cal. App. 2d 357, 372, 305 P.2d 669, 678 (1956).

lines,⁶² the employer discharged the plaintiff after 18 years of service, allegedly for union activity. The plaintiff claimed that the discharge was without cause and that company regulations providing fair, impartial, and objective procedures for reviewing employee grievances protected him. The California Court of Appeals, reversing the trial court's summary dismissal, acknowledged that the implied CGF & FD applied to the employment contract. The appellate court held that the longevity of plaintiff's service, together with the expressed policy of the employer precluded discharge of such an employee without just cause.⁶³ By requiring the employee to show additional factors to achieve just-cause protection, the court stopped short of holding that a discharge without just cause violates the CGF & FD. In other words, discharged homosexuals, like the plaintiff in *Cleary*, would have to prove longevity of service and some kind of commitment to fair treatment on the part of the employer.

Although the *Cleary* rule grants significant protection in California, it is theoretically inconsistent. If a covenant is implied by law, it is difficult to understand why courts should apply it on the basis of longevity. By firing an employee of only five years service, the employer would still violate the principle of good faith and fair dealing. Indeed, so long as an employer had sufficient time to accurately assess the employee's job performance, a capricious summary dismissal is unfair regardless of length of service. Moreover, the second prong of *Cleary*—that an employer's policy creates a just-cause standard—erroneously incorporates the action and intent of the parties, which is normally the domain of an implied-in-fact contract.

Other problems exist with the additional factors required to trigger just-cause protection. First, with respect to longevity, the determination of the necessary time span is subjective and will result in more litigation than the more objective just-cause standard. Second, the employer policy requirement in *Cleary* is equally confusing. Unless the policy was less concrete and less vigorous than the employer conduct required to give rise to an implied-in-fact contract, the CGF & FD would be superfluous.

Of the other standards advanced for determining a breach of the covenant, the good faith standard is the most common. Although it is difficult to distinguish good faith from just cause, the good faith deter-

62. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

63. *Id.* 456, 168 Cal. Rptr. at 729.

mination made by reference to an employer's motive is a less stringent standard than just cause.⁶⁴ If an employer acts in good faith, just cause is probably unnecessary.⁶⁵ In a general sense, "good faith" denotes honesty of purpose, freedom from intention to defraud, and adherence to one's obligation.⁶⁶ Some have advocated a business judgment rule, which precludes review of the legitimacy of an employer's business reasons for discharging an employee if the employer shows that he exercised honest judgment.⁶⁷ A third possible standard is the proposition that the covenant is breached only when the employer's conduct is malicious or shocking.⁶⁸

Clearly, if courts hold that an employer breaches the CGF & FD whenever he fires an employee without cause, they would avoid making subjective rulings regarding employer's intent and whether the longevity of employment merits just cause protection. Furthermore, courts could use the rules governing the discharge of public employees and the law of arbitration to articulate a fair and practical definition of just cause.⁶⁹ Although opponents to employment security for homosexuals predict that modification of the employment-at-will rule would result in a flood of litigation from discharged employees, their fears have yet to materialize. Under the *Cleary* test and the good-faith standard, however, more litigation is likely to result than under a just-cause standard. Both terms are indefinite, imprecise, and subjective. Good faith, however, is more problematic because it depends on motive, which is notoriously difficult to prove.

Motive is less important under a just-cause standard. The just-cause standard readily lends itself to the *McDonnell Douglas v. Green*⁷⁰ allocation of proof used in employment discrimination cases.⁷¹ Under this

64. See Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1840 (1980).

65. See *Wanee v. Board of Directors*, 56 Cal. App. 3d 644, 128 Cal. Rptr. 526 (1976).

66. *Efron v. Kalmanovetz*, 249 Cal. App. 187, 57 Cal. Rptr. 248, 251 (1977).

67. See *Crozier v. United Parcel Service Inc.*, 150 Cal. App. 3d 1132, 1139, 198 Cal. Rptr. 361, 366 (Cal. App. 2d Dist. 1983).

68. See, e.g., *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315, 319 (1976) ("extreme and outrageous" conduct by an employer in terminating an employee could create a cause of action for intentional infliction of emotional distress).

69. For a discussion of homosexuality as just cause for termination of an employee, see text accompanying notes 131-159 *infra*.

70. 411 U.S. 792 (1973).

71. This allocation of proof is used to prove that a plaintiff was subject to disparate

standard, a plaintiff must first make a *prima facie* showing that the employer discriminated against him. If the plaintiff satisfies this initial burden, the employer must then provide a business justification or other defense for his action. Finally, the plaintiff must show that the defendant's explanation is merely a pretext for discrimination.

In the present context, the plaintiff would first demonstrate a *prima facie* case of wrongful termination which violated his employment contract. The burden of proof shifts to the employer, who must provide evidence as to the reason for the termination. The employee could then attack the offered explanation, either on the ground that it is pretextual or on the ground that it is insufficient to meet the employer's obligations under contract principles.⁷² Notably, the plaintiff must prove that the employer wrongfully terminated him.⁷³ This tripartite allocation facilitates a response to the motivation question, which is relevant only to the third step. At this final step, the plaintiff may use the employer's actions as indicia of motive. Under the good-faith standard, it would be more difficult to infer motive because the action of the employer is irrelevant. For example, in the case of an employee fired because of homosexuality, a court applying the just-cause standard would be concerned with whether the employee's homosexuality made it impossible for him to perform his job. Under the good-faith standard, however, the court's concern would be whether the employer's prejudice against homosexuals was in good faith and uniformly applied throughout the business. The first element of that concern is highly subjective and difficult to prove.

The just-cause standard is also more flexible than the alternatives.

treatment. For discrimination based on the adverse impact of a neutral selection device such as an employment test, a slightly different allocation is used. The plaintiff must first establish a *prima facie* case that the selection device in question has an adverse impact on a protected class. If he does, the burden shifts to the employer to show that the selection device is job related. If the employer succeeds, the plaintiff can then attempt to show that the device is not truly job-related because another selection device would perform the same business function as the first while having less adverse impact. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* at 13-22, 82-92 (1983) (student edition).

72. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329-330, 171 Cal. Rptr. 917, 927 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722 (1980).

73. *Pugh*, 116 Cal. App. 3d at 329-330, 171 Cal. Rptr. at 927; *Cleary*, 111 Cal. App. 3d at 456, 168 Cal. Rptr. 722 (1980); cf. *McDonnell Douglas v. Green*, 411 U.S. 792, 802-807 (1973).

Good faith is an absolute concept which is constant regardless of the nature of the job or the characteristics of the employee. Just cause for termination, however, can vary from case to case, depending on the nature of the job, the nature of the industry, and the length of service. Since successful job performance often depends on personality, the confidence of higher management, and subjective evaluations, the concept of just cause of discharge allows management to consider these factors.⁷⁴ Another factor in favor of the just-cause standard is that the law of labor arbitration, which has refined the concept of just cause for termination,⁷⁵ would be available for guidance.

The final and most convincing argument in favor of a just-cause standard lies in its fairness. The other standards in varying degrees overlook the plight of the dismissed individual. To such a person, the employer's motive or other wrongful conduct is irrelevant. It is significant that unions, which represent individual employees, have made just cause protection a major point of their negotiations and have advertised it as a benefit of unionization.⁷⁶

Employers have argued strenuously against the abolition of the at-will rule in general and the contract exceptions in particular. No gay activist has argued that an employee should be retained when economic conditions do not justify his employment, or when he cannot perform the job. Even the most progressive arguments maintain only that an employer should have a valid reason for firing an employee. Since no employer would want his clients to know him as arbitrary, unfair, or capricious, these arguments are reasonable. The resistance to a just-cause standard seems both detrimental economically and hypocritical.

74. See *Pugh*, 116 Cal. App. 3d at 330, 171 Cal. Rptr. at 928 (1981).

75. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* Ch. 15 (1985). See generally M. GOLLUB, *DISCHARGE FOR CAUSE* (1948); Holly, "The Arbitration of Discharge Cases: A Case Study," in *CRITICAL ISSUES IN LABOR ARBITRATION* 1 (J. McKelvey ed. 1957); Note, *Discharge in the 'Law' or Arbitration*, 20 VAND. L. REV. 81 (1966). For a discussion how arbitrators have handled the issue of whether homosexuality constitutes just cause for discharge, see text accompanying notes 149-159 *infra*.

76. See *Blades*, *supra* note 49 at 1410. See 2 *Collective Bargaining Negotiations & Contracts* (BNA) 40:1 (1979). However, only 18 percent of American workers are unionized, note 14 *supra* and accompanying text, and approximately 67 percent are without any kind of just cause protection. *Id.* Arguably, unions are hostile to the developing law of unjust dismissal because it removes one of the major incentives for unionization.

3. Tort or Contract?

In *Tameny v. Atlantic Richfield Co.*,⁷⁷ which involved the termination of an employee who refused to engage in an illegal price-fixing scheme, the California Supreme Court held that the employee had a cause of action based on the public policy exception both in contract and in tort.⁷⁸ By including both causes of action as in the *Cleary* contract exception situation,⁷⁹ a party can expand his remedies and obtain the most favorable statute of limitations.⁸⁰ Courts limit contractual damages to compensatory damages, which normally include only back pay.⁸¹ In a tort action, however, an employee can recover all damages proximately caused by the discharge, including punitive damages.⁸² This distinction may explain the employer resistance to the just-cause standard. If a violation of the CGF & FD sounded only in contract, the damages in most cases would be smaller and the employer's resistance to the just-cause standard weaker. Advocates of homosexual rights should employ this approach because their proper concern should be to obtain job security for the greatest number of persons, rather than to recover large sums for isolated instances of unjust discrimination.

This approach has been adopted in the public policy context by the Supreme Court of Wisconsin. In *Brockmeyer v. Dunn & Bradstreet*⁸³ the court held that the public policy exception should sound exclusively in contract, even though most jurisdictions enforce the public policy exception in tort. The court justified its holding as follows:

We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee whole. Therefore, we conclude that a contract action is most appropriate for wrongful discharges. . . Tort actions cannot

77. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

78. 27 Cal. 3d 167, 175.

79. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (2nd Dist. 1980).

80. See L. LARSEN, UNJUST DISMISSAL § 3.02 (1985).

81. See *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 181-92, 474 P.2d 689, 692, 89 Cal. Rptr. 737, 740 (1970); *Rabago-Alvarez v. Dart Industries, Inc.*, 55 Cal. App. 3d 91, 98, 127 Cal. Rptr. 222-226 (1976).

82. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

83. 335 N.W.2d 834 (Wis. 1983).

be maintained.⁸⁴

The advantage of the *Brockmeyer* approach is that it would provide at-will employees with protection similar to that which union members enjoy. When an employer fires a worker covered by the just-cause provision of a collective bargaining contract without cause, the employee can through arbitration recover only reinstatement and backpay.⁸⁵ Since one of the main arguments in favor of mitigating the employment-at-will rule has been to equalize the treatment of union and non-union workers, it makes little sense to provide the latter with greater protection.

B. *Implied-in-Fact Contracts*

Courts infer implied-in-fact contracts from the circumstances surrounding the transaction, including the acts and conduct of the parties.⁸⁶ They find that in the interests of justice, it is reasonable, or even necessary, to assume that a contract exists between the parties. In the employment-at-will context, courts use the implied-in-fact contract theory to create exceptions to the rule in a number of areas. Two recognized exceptions important to the topic of this article are contracts created by oral representations⁸⁷ and those created by collateral written policies and representations such as personnel handbooks.⁸⁸ Such implied contracts usually contain "terms" requiring just cause for termination. Another limitation commonly implied requires the employer to follow a specific procedure in terminating an employee. As with the implied CGF & FD, any implied contract creating a promise to discharge only for cause will protect homosexuals from unjust discrimination.

84. *Id.* at 840.

85. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 688 (1985).

86. See *Power Matics Inc. v. Ligotti*, 79 N.J. Super. 294, 191 A.2d 483, 489 (1963); 3A CORBIN, *CONTRACTS* § 561-72A (1960); 1 WILLISTON, *CONTRACTS* 10-12 (3d ed. 1979).

87. See, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employer stated that termination would be pursuant to a specific procedure).

88. See, e.g., *Reid v. Sears Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986). See L. LARSEN, *UNJUST DISMISSAL* § 3.04[3][c] and [d] (1985). Strictly speaking, the "exception" based on personnel handbooks are not exceptions at all. In requiring just cause in such cases the courts are not creating an exception to the employment at will rule, but establishing the terms and conditions of an employment contract on the basis of the representations of the parties and the particular facts of the case.

1. Implied Promise of Job Security

In *Pugh v. See's Candies*,⁸⁹ the employer fired the plaintiff, a corporate vice president, after thirty years of service, allegedly for opposing the company's sweetheart contract with a union.⁹⁰ Refusing to accept the plaintiff's argument that the company agreed to employ him as long as his performance was satisfactory, the trial court directed a verdict for the employer. Reversing the trial court, yet refusing to follow *Cleary*, the California Court of Appeals held that the parties impliedly agreed that good cause would be required for termination. The indicia of the implied contract included: (1) the longevity of the plaintiff's service; (2) the routine raises, bonuses, and promotions the plaintiff received; (3) the assurance of the prior president that the plaintiff's employment would continue if he did a good job; (4) the company's acknowledged practice of terminating executive personnel only for cause; (5) the fact that the employer never criticized the plaintiff nor warned him that his job was in jeopardy, and (6) the practices of the industry in which the employer was engaged.⁹¹ The totality of these circumstances created the employer's implied promise to refrain from arbitrarily terminating an employee.

Despite the theoretical difference, the *Pugh* case is similar in result to *Cleary*. Both cases require cause for discharge and both hold that the just-cause standard is not inherent in the fact of holding the job. The employee must establish just cause by additional factors such as longevity or the employer's normal policy. The *Pugh* court expanded the factors with which an employee could establish a just-cause promise. In addition to longevity and employer policy, the court was willing to evaluate all the circumstances of the employment relation including promotions, lack of criticism and the practice of the industry. Thus, it should be easier to prove the existence of an implied-in-fact contract than an implied-in-law one, and courts will grant summary dismissals only if the evidence supporting the implied contract is meager.⁹²

Recent developments suggest that courts will be receptive to the *Pugh* implied-in-fact contract because it adheres to traditional contract law.⁹³ First, courts must accept the widely held belief that the addi-

89. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

90. *Id.*

91. *Id.* at 326-327, 171 Cal. Rptr. at 925-926.

92. Miller and Estes, *Recent Judicial Limitations On the Right to Discharge: A California Trilogy*, 16 U.C.D.L. REV. 65, 99 (1982).

93. *Id.* at 100.

tional consideration requirement for so-called "permanent" employment is a rule of construction, rather than a substantive limitation on the formation of employment contracts. Second, courts must reject the discredited mutuality of obligation principle. The *Pugh* approach is more consistent with current legal thought, which considers the circumstances surrounding a legal relationship to establish and modify the rules by which it is regulated. Examining the totality of an employment relationship to determine if there is an implied promise to fire only for cause is within this disposition. In the commercial context, this is known as gap-filling and permits the implication of reasonable terms.⁹⁴

Numerous courts using the *Pugh* approach have held that an employer implicitly promised to fire an employee only if his performance was unsatisfactory.⁹⁵ Recruiters, interviewers, personnel representatives, or other members of management⁹⁶ each have the capacity to make implied promises, so long as they appear to have authority to make it. For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*, a statement by an interviewer that the prospective employee "would be with the company as long as [he] did [his] job," implied that the company would fire the employee only for just cause.⁹⁷ Another court found a statement by the personnel department that the employer fired employees only for cause to be an implied promise that the employer would not fire the plaintiff arbitrarily.⁹⁸

The major benefit of both *Pugh* and *Cleary* for homosexual employ-

94. Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1833 (1980).

95. See, e.g., *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378 (6th Cir. 1983) (statement in manual that probationary employees could be fired at will implied that nonprobationary employees could only be terminated for cause); *Eales v. Tanana Valley Medical Surgical Group, Inc.*, 633 P.2d 958 (Alaska 1983); *Rabago-Alvarez v. Dart Industries, Inc.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (implied promise that an employee would not be fired without good cause created by employer's representation that it only fired employees for cause); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (interviewer's statement that an employee would not be fired as long as he did his job implied that just cause was required for termination of employee); *Yartzoff v. Democrat-Herald Publishing Co.*, 576 P.2d 356 (Or. 1978).

96. E.g., *Rabago-Alvarez v. Dart Industries, Inc.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (personnel representative); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (interviewer).

97. *Toussaint*, 408 Mich. at 585, 292 N.W.2d at 886.

98. *Rabago-Alvarez v. Dart Indus.*, 55 Cal. 3d 91, 127 Cal. Rptr. 222 (1976).

ees lies in their implication of a just-cause standard for termination. If the employee establishes the standard by either rationale, then a discharged homosexual can argue that the employer fired him without cause. Typically, the employee will argue that his homosexuality did not prevent him from satisfactorily performing his job. Although this argument will not always succeed, it gives homosexuals a better chance for job security than exists under the employment-at-will rule.

Pugh offers an unjustly discharged homosexual additional arguments. Between 1976 and 1981 the National Gay Task Force (NGTF) conducted a survey of Fortune 500 companies to ascertain the extent of sexual orientation discrimination.⁹⁹ Revealing that there were indeed major companies which claim not to discriminate, the results were well publicized, especially in the gay community. Did the employers who claimed not to discriminate also make an implied promise not to fire employees because of their sexual orientation. The implied-in-fact theory outlined above applies to this situation, the main issue being whether a discharged gay employee was aware of the employer's policy of non-discrimination at the time the company hired him. Certainly representatives with authority to bind the responding corporations answered the NGTF survey. Moreover, it would seem unfair to allow the employers to benefit from the reputation as being unbiased, and then to allow them to discriminate with impunity. This is the situation that courts tailored the doctrine of implied contracts to prevent.

An employer's commitment not to discriminate against homosexuals may also support a remedy based on promissory estoppel.¹⁰⁰ Under the promissory estoppel doctrine, a homosexual employee fired because

99. NGTF Survey is on file with author.

100. This argument was originally developed in Note, *Challenging Sexual Preference Discrimination in Private Employment*, 41 OHIO ST. L.J. 501, 526 (1980). Cases applying the doctrine in the employment context are based on the idea that an employer should not be allowed to ignore a promise to an employee if the employee reasonably relied on it to his detriment. See *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776 (D. Col. 1982); *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982); *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 2d 596, 440 N.E.2d 998 (1982); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); *Nilsson v. Cherokee Candy & Tobacco Co.*, 639 S.W.2d 226 (Mo. 1982). But see *Walker v. Modern Realty of Missouri*, 675 F.2d 1002 (8th Cir. 1982); *Bates v. Jim Waters Resources, Inc.*, 418 So. 2d 903 (Ala. 1982).

Section 90 of the Restatement of Contracts defines promissory estoppel as: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

of sexual preference after relying on an employer's statement of non-discrimination in the NGTF survey should have a basis for recovery. Such an employee would argue that the employer's policy of impartiality encouraged him to reveal his sexual orientation or to support gay rights openly. Because of this reliance, he lost his job. Although this argument appears theoretically attractive, it is impractical. Courts have used the promissory estoppel theory primarily to enforce a promise of initial employment.¹⁰¹ When employees have attempted to enforce a promise of job security under the theory of promissory estoppel, courts have not been receptive.¹⁰²

Similar arguments were raised unsuccessfully in *Satori v. Society of American Military Engineers*.¹⁰³ The Society, Satori's employer for eight years, stated in its bylaws that it would terminate employees only for cause and that homosexuality was not cause for discharge.¹⁰⁴ Believing that his employer had impliedly agreed not to fire him because of his sexual orientation, Satori spoke about gay politics with a journalist and other men. After being identified in a newspaper article as a gay man working for the Society, the Society fired him. Satori sued alleging unjust dismissal in tort and contract, estoppel, intentional infliction of emotional distress, and defamation.¹⁰⁵ After initially denying the existence of the bylaw provision, the Society in a motion for summary judgment argued that "the representation does not raise to a high enough level, as a matter of law, to rebut the presumption that the employment . . . was terminable at will."¹⁰⁶ Judge Grenadier of the

RESTATEMENT OF CONTRACTS § 90 (1932), *slightly modified* in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

101. *Hunter v. Hayes*, 533 P.2d 952 (Cal. App. 1975); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981). See L. LARSEN, UNJUST DISMISSAL § 3.04[1] (1986).

102. L. LARSEN, *supra* note 101.

103. No. 9008 (Cir. Ct. Alexandria, Va. June 6, 1984). *Satori* is discussed at length in Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459, 475-476 (1985).

104. The bylaws provide:

Nondiscrimination Policy: The Society fully supports the policy of equal opportunity and will not discriminate or knowingly participate in any activity that discriminates on the bases or [sic] race, color, religion, sex, *sexual orientation*, or national origin. Likewise, The Society will take no official action which is or appears to be detrimental or discriminatory to any class or group of persons.

Plaintiff's Motion for Judgment, *Satori*, No. 9008 (emphasis added).

105. *Id.*

106. *Id.*

Circuit Court for the City of Alexandria in a conclusory order granted the employer's motion.¹⁰⁷

Other circumstances can establish an implied promise not to fire employees for sexual preference. For instance, the employee could imply from the length of his employment the employer's promise not to engage in sexual preference discrimination. If a gay employee worked for an employer for a number of years, and the employer was aware of his sexual orientation, the employee could infer such a promise based on the employer's failure to terminate him immediately upon discovering his homosexuality. By failing to act immediately, the employer waived his right to do so later. The reasoning behind this longevity argument is the same used in *Cleary* and *Pugh*, to imply a just-cause requirement for discharge.¹⁰⁸

Obviously, the arguments advanced so far present problems of proof and are germane largely in industries where the least discrimination exists. Problems of proof exist, however, because of the significance of past discrimination, and the novelty of the arguments is not the litigant's theory, but the context in which he expressed it. These arguments are, in most cases, formal articulations of unwritten rules. And because these rules are unwritten, the potential for individual abuse exists even in normally tolerant environments.

2. Personnel Handbooks and Other Written Policies

Often expressed in a personnel manual or handbook, an employer's personnel policies and practices may create a contract even though the employer retains the right to change or repeal its policies at any time.¹⁰⁹ Normally, the contract results from a policy statement in a

107. Order, *Satori*, No. 9008. Professor Rivera notes that the dismissal will be appealed. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459, 476 (1985).

108. *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925 (1st Dist. 1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (2d Dist. 1980). For a discussion of longevity as a factor in creating an exception to the employment at will rule, see Heshizer, *The Implied Contract Exception To At-Will Employment*, 35 LAB. L.J. 131, 133-134 (1984). *But see* *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982); *Wells v. Thomas*, 569 F. Supp. 426 (E.D. Pa. 1983); *Runar v. Ciba-Geigy Corp.*, 560 F. Supp. 619 (N.D. Ill. 1983).

109. *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Southwest Gas Corp. v. Ahmad*, 668 P.2d 261 (Nev. 1983); *Weiner v. McGraw Hill Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982). *See also* *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Pine River State Bank v. Mettile*,

handbook that an employer will discharge only for cause. Theoretically, it is difficult to place contracts based on handbooks within the emerging law of unjust dismissal. In one sense, they are not exceptions to the employment-at-will rule because they create express contracts, which may not contain a definite duration.¹¹⁰ The theoretical distinction is of little consequence for this paper, and the author treats contracts as implied-in-fact exceptions to the employment-at-will rule.

Courts have adopted an ad hoc approach to determine whether a personnel manual is part of an employment contract.¹¹¹ The issue in each case is whether a reasonable person, examining the policies the employer delineated in the manual, would conclude that the employer intended to include a just-cause standard in the employment agreement. In *Toussaint v. Blue Cross & Blue Shield of Michigan*¹¹² the Supreme Court of Michigan held that the provisions in a voluntarily adopted personnel manual, distributed to employees at or after hiring, and providing that discharge will only be for cause, may become part of the employment contract.

In *Weiner v. McGraw-Hill, Inc.*¹¹³ the New York Court of Appeals, which previously resisted all other exceptions to the employment-at-will rule, held that a statement in a personnel manual created a binding

333 N.W.2d 622 (Minn. 1983); *Yartzoff v. Democrat-Herald Publishing Co.*, 576 P.2d 356 (Or. 1978); *Reid v. Sears Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982).

110. L. LARSEN, UNJUST DISMISSAL §§ 3.01, 8.01 (1985).

111. See generally *Pine River State Bank v. Mettile*, 333 N.W.2d 622 (Minn. 1983); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983).

112. 408 Mich. 579, 292 N.W.2d 880, *reh'g denied*, 409 Mich. 1101 (1980). In *Toussaint* the plaintiff claimed that the company's personnel manual and oral representations made by an employment interviewer created a contract requiring just cause for discharge. The manual provided that the company would "treat employees leaving Blue Cross in a fair and consistent manner and . . . release employees for just cause only," *id.* at 597-98, 292 N.W.2d at 884, and specified certain procedures to be followed in the event of a discharge. In addition, the interviewer told the plaintiff in his job interview that he would be employed as long as he did his job. *Id.*

113. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). In *Weiner* the employment application signed by Weiner and company representatives stated that his employment was subject to the company handbook which required just cause for discharge and specified termination procedures. Also, he was told that he would have job security as an inducement for him to leave his former employer to work for McGraw-Hill. During his tenure, Weiner was instructed to fire subordinates only for cause and in strict accordance with the procedures required by the handbook. Moreover, he was told that failure to do so might subject the employer to liability. After eight years of satisfactory job performance, Weiner was suddenly fired for "lack of application" and without the rehabilitative efforts required by the handbook.

contract. The manual provided that the employer would discharge only for just and sufficient cause and only after the company failed to take all practical steps toward rehabilitation of the employee. This language, the court held, created a binding contract under traditional contract law. The necessary additional consideration was found in the recruitment of the plaintiff from his former employer with the assurance that he would be discharged only for cause. Other courts have interpreted the additional consideration requirement more liberally, deeming it a rule of construction rather than rule of substance.¹¹⁴

As with other implied promises of job security, homosexual employees will clearly benefit when a handbook expressly provides that an employer will only fire for cause or outlines a procedure for all terminations. As is possible with implied contracts,¹¹⁵ handbooks and other policy statements could also contain a promise not to discharge an employee because of his sexual orientation. For example, employers often declare themselves to be an equal opportunity employer. Citing such a statement, a wrongfully discharged homosexual can argue that the employer promised to be impartial.

Courts can analyze other statements by employers, such as invitations to minorities to apply for particular jobs, as applying to homosexuals as well. Of course, the meaning of "equal employment opportunity" and other terms derive from the connotations they convey to the people using them. If the rights of homosexuals increase in the future, as they have in the recent past, it is likely that the meaning of these phrases will change. Consequently, use of these phrases will strengthen the argument for the existence of an implied contract against termination on the basis of sexual orientation.

3. The Employer Escape Hatch

Although courts are receptive to the implied-in-fact contract exception, a serious drawback discourages its widespread acceptance. Since a handbook is a unilateral statement of company policy, an employer may change it at any time and reestablish the employment on an at-will basis.¹¹⁶ In fact, with the growing awareness of the exception, this ap-

114. See, e.g., *Pine River State Bank v. Mettile*, 333 N.W.2d 622, 629 (Minn. 1983).

115. See *supra* notes 55-76 for discussion of implied-in-law contracts.

116. *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 613-15, 292 N.W.2d 880, 892, *reh'g denied*, 409 Mich. 1101 (1980). See also *Batchelor v. Sears Roebuck & Co.*, 574 F. Supp. 1480 (E.D. Mich. 1983); *Schwartz v. Michigan Sugar Co.*, 106 Mich.

pears to be precisely what employers, with court approval, are doing.¹¹⁷ Many handbooks now include statements which disclaim an intent to enter into a contract.¹¹⁸

In *Shapiro v. Wells Fargo Realty Advisers*,¹¹⁹ the employer fired the plaintiff after three and one-half years of service, contrary to indications in benefit brochures and supervisors' statements that the employer would terminate workers only for good cause.¹²⁰ A stock-option agreement between the plaintiff and his employer, however, reserved the employer's right to discharge the employee at any time, with or without good cause.¹²¹ Applying standard contract law, the court held that an implied-in-fact contract limiting the employer's right to terminate cannot exist where the parties expressly agreed that the employee is terminable at will.

Other courts have used this reasoning,¹²² thereby raising major doubts as to the future utility of the implied-in-fact contract exception. An incidental effect of these cases is that they discourage employers from treating employees fairly and consistently. Moreover, they promote a working environment in which it is clear that all employees serve at the whim of the employer. Such an unstable work environ-

App. 471, 308 N.W.2d 459 (1981); *Mau v. Omaha National Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

117. The following statement was issued by a company after a dispute over the meaning of handbook provisions relating to medical insurance disability: "The *** handbook issued in early 1984 is out-of-date and should not be relied upon for current policy. The Human Resources Department is presently revising the handbook for distribution to employees in the fall." (Internal company memo on file with the author).

118. In *Novosell v. Sears Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980), for example, the employment application provides "my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself . . ." The plaintiff had signed the application and the court held that the personnel manual created no contractual obligation. *Accord*, *Summers v. Sears Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982). See also *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. App. 1981).

119. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

120. *Id.*

121. *Id.*

122. *Novosell v. Sears Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613, 119 Cal. Rptr. 646. See also *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076, 1077 (N.D. Cal. 1982); *Crain v. Burroughs Corp.*, 560 F. Supp. 849, 852 (C.D. Cal. 1983); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303-05, 448 N.E.2d 86, 91, 461 N.Y. Supp. 2d 232, 237 (1983).

ment negatively affects employees and is detrimental to society in general.

4. *Madsen v. Erwin*

To date, no court has held that the termination of a homosexual employee because of his sexual orientation breaches an implied-in-fact contract. One recent case, however, implies that such a holding is possible. In *Madsen v. Erwin*¹²³ the plaintiff, a writer for the *Christian Science Monitor*, was a member of the Christian Science Church. After five years of employment during which she received raises and promotions, the employer fired her when she admitted she was a lesbian and refused to "heal herself of homosexuality."¹²⁴ The employee sued her employer, claiming that the discharge was a breach of contract.¹²⁵ The court dismissed the plaintiff's claims under the state and federal constitutions, state civil rights laws, and her claims of unjust dismissal and breach of contract. Noting that publication of the *Christian Science Monitor* was a religious activity of the Christian Science Church, the court held that granting the requested relief would violate the free exercise and establishment clauses of the United States Constitution.¹²⁶ According to the church, homosexuality is a sin, and by allowing the plaintiff to collect damages the court would penalize the church for its religious belief. The implication of the holding is that the court would uphold a breach of contract claim against a nonreligious employer.¹²⁷

The court cited two cases which also imply that a cause of action would exist against a secular defendant. In *Walker v. First Presbyterian Church*¹²⁸ the church discharged the plaintiff, a church organist, after he admitted his homosexuality. The court held that forcing the defendants to pay damages would substantially burden the free exercise of their religion. Similarly, in *Lewis ex rel. Murphy v. Buchanan*¹²⁹ a parochial school withdrew its job offer to the plaintiff upon discovering

123. 395 Mass. 715, 481 N.E.2d 1160 (Mass. 1985).

124. *Id.*

125. *Id.* Although the exact nature of the contract claim is unclear from the report, it is reasonable to assume that it was for the breach of an implied-in-fact contract. The facts conform to the implied-in-fact contract exception to the employment-at-will rule, and the implied-in-law exception is unavailable in Massachusetts.

126. *Id.* at 720, 481 N.E.2d at 1165-1166.

127. *Id.* at 726, 481 N.E.2d at 1170.

128. 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).

129. 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979).

his homosexuality. The plaintiff sued under a municipal ordinance that prohibited sexual preference discrimination. In refusing to enforce the municipal ordinance, the judge held that the city's interest in protecting homosexuals from job discrimination was insufficient to justify the invasion of an individual's freedom of conscience.¹³⁰ Given the religious context of these three cases, none of them are conclusive authority against the application of the contract exception to the employment-at-will rule to discharged homosexuals. Indeed, the clear implication is the opposite.

C. *Homosexuality as Just Cause for Termination of Employment*

In the employment-at-will context just cause is a flexible standard that may differ with each job. The terms "just cause" and "good cause" connote a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.¹³¹

130. *Id.* at 698.

131. *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 917-918 (1981). Examples of just cause for discharge include: *Stephens v. Justice-Mears Oil Co.*, 300 So. 2d 510 (La. App. 1974) (inability to perform the job); *Scarpace v. Sears Roebuck & Co.*, 113 Wis. 2d 608, 335 N.W.2d 844 (1983) (excessive absenteeism); *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975) (lying); *Rozier v. St. Mary's Hosp.*, 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980) (insubordination); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536 (Tex. Civ. App. 1982) (impairing company morale). For a discussion of the concept of just cause, see *Abrams & Nolans, Toward A Theory of 'Just Cause' in Employee Discipline Cases*, 1985 DUKE L.J. 594. The authors' developed a theory of just cause based on three principles. First, the employee's work must be satisfactory. This term encompasses four components: regular attendance, obedience, reasonable productivity and abstention from conduct that would hinder the employer's ability to conduct its business. Second, in order for discipline to be just, it must be based on a legitimate management interest including rehabilitation of an employee, deterrence, or protection of the employer's business. Finally, just cause means that discipline must be fair, which includes granting the employee industrial due process, industrial equal protection and individualized treatment. See generally *Jacobwitz v. United States*, 424 F.2d 555 (Ct. Cl. 1970); *Kawneer Co.*, 86-1 ARB ¶ 8185 (Dec. 27, 1985); *Mastic Corp.*, 86-1 ARB ¶ 8217 (Sept. 9, 1985); *L. & N. Uniform Supply Co.*, 83-2 ARB ¶ 8605 (Nov. 11, 1983); *Kaiser Steel Corp.*, 78 L.A. 185 (June 8, 1982); *R.J. Tower Corp.*, 68 LA 1160 (June 9, 1977); *Major Safe Co., Inc.*, 76-2 ARB ¶ 8642 (Dec. 9, 1976); *Bellace, A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983); *Blades, supra* note 49 at 1406; Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. LEGISL. 35, 63 (1981).

Some states deal with the just cause statutorily. South Dakota, for example, provides: "An employment even for a specified term may be terminated at any time by the employer for habitual neglect of duty or continued incapacity to perform or any willful breach of duty by the employee in the course of his employment." S.D. CODIFIED LAWS ANN. § 60-4-5 (1978). See also CAL. LAB. CODE § 2924 (West Supp. 1984). Just

Courts have yet to address the issue of whether homosexuality constitutes just cause for discharge in the employment-at-will context.¹³² It is clear, however, from the definitions of just cause that the result depends on the nature of the job. The question *has* been extensively considered in two areas of the law: in litigation under the due process clause of the United States Constitution, which gives public employees just-cause protection; and in the arbitration of discharge cases where the employee was covered by a just-cause provision in a collective bargaining contract. The answer is that, except for a limited number of jobs such as military service, homosexuality alone is not cause for discharge.¹³³ Moreover, these decisions should be applicable to the same question arising under an implied contract to discharge only for cause.

1. Public Employment

Civil service systems govern discharge for most governmental employees. Most systems require just cause, thereby creating a statutory exception to the employment-at-will rule. The United States Civil Service Reform Act of 1978¹³⁴ provides that an agency may remove, suspend, furlough or reduce the grade or pay of a civil service employee "only for such cause as will promote the efficiency of the service."¹³⁵

cause is defined statutorily in Puerto Rico, which provides compensation for an employee at will discharged without good cause, P.R. LAWS ANN. tit. 29, § 185a (Supp. 1983):

Good cause for the discharge of an employee of an establishment shall be understood to be:

(a) That the worker indulges in a pattern of improper or disorderly conduct.

(b) The attitude of the employee of not performing his work in an efficient manner or of doing it belatedly and negligently or in violation of the standards of quality of the product produced or handled by the establishment.

(c) Repeated violations by the employee of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been timely furnished to the employee.

(d) Full, temporary or partial closing of the operations of the establishment.

(e) Technological or reorganization changes as well as changes of style, design or nature of the product made or handled by the establishment and in the services rendered to the public.

(f) Reductions in employment made necessary by a reduction in the volume of production, sales or profits, anticipated or prevalent at the time of the discharge.

P.R. LAWS ANN. tit. 29, § 185b (Supp. 1983).

132. See *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (Mass. 1985), which skirts the issue.

133. See, e.g., *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

134. 5 U.S.C. § 7513 (1982).

135. 5 U.S.C. § 7513(a), (b) (1982). For a summary of the remedial system avail-

Prior to dismissal, a federal employee is entitled to receive advance written notice, an opportunity to answer, the representation of an attorney, a written decision, and an opportunity to appeal.¹³⁶

"Efficiency of the service" generally denotes just cause,¹³⁷ and courts have frequently applied the standard to the termination of homosexuals by federal, state, and local governments. The evolving majority rule holds that governmental summary dismissal of a civilian homosexual employee is not just cause for discharge, and thereby violates the due process clause of the 5th and 14th amendments.¹³⁸ To establish just

able to insure fair treatment of federal employees, see *Bush v. Lucas*, 462 U.S. 365, 387-88 (1983). See also *Does the Constitution Prevent the Discharge of Civil Service Employees?* 124 U. PA. L. REV. 942 (1976); Tang, *On the Legal Protection of Civil Service Employees from Arbitrary Dismissal*, 37 ADMIN. L. REV., 37 (Winter 1985); *Removal for Cause from the Civil Service: The Problem of Disproportionate Discipline*, 28 AM. U.L. REV. 207 (1979).

136. 5 U.S.C. § 7513(b)-(d) (1982) provides:

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title. (emphasis added).

137. See *Hatcher v. Department of the Air Force*, 705 F.2d 1309, *reh'g denied*, 712 F.2d 1419 (11th Cir. 1983); *Laden v. Crosson*, 108 F. Supp. 240 (D.C. Pa. 1952); *Chauerdi, Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. REV. 287 (1968); Tang, *On the Legal Protection of Civil Service Employees from Arbitrary Dismissal*, 37 ADMIN. L. REV. 38 (Winter 1985). State employees enjoy similar protection. See J. WEISBERGER, *JOB SECURITY AND PUBLIC EMPLOYEES*, 9-19, 45-65 (2d ed. 1973).

138. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969). See *Smith v. Schlessinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975); *McKeand v. Laird*, 490 F.2d 1262, 1264 (9th Cir. 1973); *Martinez v. Brown*, 449 F. Supp. 207, 212 (N.D. Cal. 1978); *Berg v. Clayton*, 436 F. Supp. 76, 80 (D.D.C. 1977); *Saal v. Middendorf*, 427 F. Supp. 192, 202-203 (N.D. Cal. 1977); *Marks v. Schlesinger*, 384 F. Supp. 1373, 1379 (D.C. Cal. 1974); *Society for Individual Rights v. Hampton*, 63 F.R.D. 339, 401 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975); *Friedman, Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 537-540 (1979). See also *McConnel v. Anderson*, 316 F. Supp. 809, 814 (D. Minn. 1970); *Board of Education of Long Beach v. Jac, M.*, 19 Cal. 3d 691, 700-701,

cause, the government agency must show that an employee's homosexuality directly impairs his ability to perform the job.¹³⁹

In *Norton v. Macy*¹⁴⁰ the leading case on unjust dismissal, the court held that an employer must show a nexus between a worker's homosexuality and his job performance. In *Norton* a federal government employee was arrested for a traffic violation. The police notified Norton's employer, the National Aeronautics and Space Administration, of the arrest. After Norton received a summons, NASA invited him to come to headquarters for a talk. At headquarters, Norton admitted he had homosexual desires and may have engaged in homosexual activities when drunk. Subsequently, NASA fired him for "immoral, indecent,

566 P.2d 602, 604-05, 139 Cal. Rptr. 700, 705-06 (1977); *Petit v. State Board of Education*, 10 Cal. 3d 29, 36, 513 P.2d 889, 894, 109 Cal. Rptr. 665, 669-70 (1973); *Morrison v. State Board of Education*, 1 Cal. 3d 214, 237-38, 461 P.2d 375, 386, 82 Cal. Rptr. 175, 193 (1969); *Gaylord v. Tacoma School Dist.*, 88 Wash. 2d 286, 296-97, 559 P.2d 1340, 1346 (1977); *Sefransky v. State Personnel Board*, 62 Wis. 2d 464, 478, 215 N.W.2d 379, 383-84 (1974). See generally *Levine, Legal Rights of Homosexuals in Public Employment*, 1978 SURVEY OF AMERICAN LAW 455 (1978); *Rivera, Our Straight Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 818-20 (1979); Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970).

139. *Norton v. Macy*, 417 F.2d 1151 (D.C. Cir. 1969). Homosexuality can effect an individual's job performance if it impairs his ability to get a security clearance, *McKeand v. Laird*, 490 F.2d 1262, 1263 (9th Cir. 1974), *Gayer v. Schlesinger*, 490 F.2d 740, 749 (D.C. Cir. 1973), *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *Marks v. Schlesinger*, 384 F. Supp. 1373, 1377 (C.D. Cal. 1974), if the employee identifies his homosexuality with the employer, *Singer v. U.S. Civil Service Comm'n*, 530 F.2d 247, 255 (1976), or if the employe "flaunts" his homosexuality, *Sefransky v. State Personnel Board*, 62 Wis. 464, 215 N.W.2d 379 (Sup. Ct. 1974). It is difficult to define "flaunting" precisely, and judges have often applied the term to behavior they personally disapprove of. Synonyms include "flagrant" or "open and notorious." In *Sefransky*, the discharge of a homosexual attendant in a mental hospital who wore makeup and grabbed the leg of another attendant was upheld in part because it was "so substantial, often repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service." *Id.* at 474, 215 N.W.2d at 384. In *Singer v. U.S. Civil Service Commission*, 530 F.2d 247 (1976) the plaintiff was fired for, among other things, flaunting his homosexuality by kissing a male in the building where he had been employed, being interviewed as a homosexual by the press, dressing as a homosexual, and applying for a marriage license with another man. In upholding the discharge, the court said that "the discharge was the result of appellant's openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities" while identifying himself as a member of a federal agency. *Id.* at 255. Similar actions by heterosexuals would not be so stigmatized.

140. 417 F.2d 1161 (D.C. Cir. 1969).

and disgraceful conduct.”¹⁴¹ The District of Columbia held the dismissal unconstitutional because NASA based its action solely on Norton’s homosexuality without showing any relationship between his sexual orientation and his job performance.¹⁴² A mere conclusion of “immorality” is insufficient to establish the requisite just cause. Citing several examples of conduct which might bear on job performance, including potential blackmail, sexual advances made on the job, and notorious conduct, the court concluded that none existed in the instant case.

*Norton v. Macy*¹⁴³ left the door open for the government to inquire into and make employment decisions on the basis of an individual’s private sexual conduct.¹⁴⁴ The government has conducted this inquiry for teachers,¹⁴⁵ military servicemen and women,¹⁴⁶ and policeman,¹⁴⁷ and many courts have found a nexus between an individual’s sexual

141 *Id.* at 1163.

142. *Id.* at 1167. “A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee’s potentially embarrassing conduct and the efficiency of the service. Once the connection is established it is for the agency and the commission to decide whether it outweighs the loss to the service of a particular competent employee.” *Id.*

143 417 F.2d 1161 (D.C. Cir. 1969).

144. *Id.* at 1168. The Court stated: “we emphasize that we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee. Nor do we even conclude that potential embarrassment from an employee’s private conduct may in no circumstances affect the efficiency of the service.” *Id.* One commentator has characterized this limitation of the *Norton* decision as follows:

The court indicated that [the refusal to hire to discharge of a homosexual] would pass constitutional muster if the agency proved that a decision to retain or hire such an individual could result in a deleterious effect on the efficiency of the service. Therein lies the fatal shortcoming of *Norton*. While the *Norton* majority decried ‘the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority’s conventional codes of conduct in the private lives of its employees,’ [it] failed to openly and forthrightly declare that one’s sexual orientation is no more rationally related to job qualification than one’s gender, race, or heritage. Thus, the court left the door open for governmental scrutiny into, and employment related decisionmaking based on, an individual’s atypical, private sexual activity.

Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 461, 539-540 (1979).

145. *Thompson v. Southwest School District*, 483 F. Supp. 1170 (W.D. Mo. 1980); *Hoagland v. Mount Vernon School District*, 623 Wash. 2d 1156 (1981).

146. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), *reh’g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984); *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977), *rev’d sub nom.*, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

147. *Childers v. Dallas Police Department*, 513 F. Supp. 134 (N.D. Tex. 1981).

preference and their inability to perform a job.¹⁴⁸ One must not, however, underestimate the importance of the *Norton* holding. In many cases a dismissed employee will be able to show that homosexuality does not affect job performance. In addition, it should be easier to make such a showing in the private sector where jobs do not involve the public interest or national security as do jobs in the military, the police-force, and the schools.

2. Arbitration

Most collective bargaining contracts provide that an employer may discharge only for cause, good cause, or just cause.¹⁴⁹ When an employee believes his employer fired him without cause, he can file a grievance, which may progress to arbitration. Although the just-cause standard arbitrators use is almost identical to that used in the public employment context, most cases hold that homosexuality does not interfere with job performance.

With respect to management's right to fire an employee for conduct outside the plant, including homosexuality, arbitrators consistently hold that there is no cause for discharge unless the employee's conduct affects plant operations.¹⁵⁰ One arbitrator, in language reminiscent of the *Norton v. Macy* court, held that the adverse effect of an employee's outside conduct on his employer's business must be reasonably discernible,¹⁵¹ speculation as to the effect of the conduct is insufficient.

148. Indeed, one commentator asserted:

While courts have paid lip service to the illegality of automatic exclusionary policies by subjecting the government's conduct to rational basis review, they have effectively precluded any meaningful challenge to such practices. After carefully indicating that the government must always provide proof of a rational connection between sexual orientation and a number of related factors loosely termed "efficiency of the service," the courts then willingly either erect their own or accept defendants' baseless rationalizations to legitimize such policies.

Friedman, *supra* note 144 at 540.

149. 2 *Collective Bargaining Negotiations and Contracts* (BNA) § 40:1 (Dec. 28, 1978). Approximately 80% of collective bargaining agreements in the United States grant just cause protection to employees. *Id.* In addition, some arbitrators will imply just-cause protection in any collective bargaining agreement. E. ELKOURI & F. ELKOURI, *HOW ARBITRATION WORKS* 652 (4th ed. 1983).

150. ELKOURI, *supra* note 149, at 657-658; O. FAIRWEATHER, *THE PRACTICE AND PROCEDURE OF LABOR ARBITRATION* 240-43 (2d ed. 1983). See Sussman, *Work Discipline Versus Private Life: An Analysis of Arbitration Cases*, 10 I.L.R. RESEARCH 3 (1964).

151. *Allied Supermarkets, Inc.*, 41 Lab. Arb. (BNA) 713, 714-715 (1963) (Mitten-thal, Arb.).

Although courts must decide the issue on a case-by-case basis,¹⁵² conduct normally justifying dismissal includes behavior which renders an employee unable to perform his duties or appear at work, behavior which undermines the ability of the employer to direct the workforce, behavior which harms the company's reputation or product, and behavior which leads to refusal, reluctance or inability of other employees to work with the discharged employee.¹⁵³ With respect to the latter two kinds of behavior, arbitrators have been willing to consider the prejudicial attitudes of others toward homosexual employees in deciding whether cause existed for dismissal.¹⁵⁴

In deciding grievances of discharged homosexuals, arbitrators consistently evaluate the evidence more thoroughly than do courts when deciding whether the government's discharge of a homosexual is constitutional. In *Ralph's Grocery Store*,¹⁵⁵ for example, the company fired several employees who attended a party where a "lesbian show" was performed. In deciding whether the discharged employee's actions adversely affected the employer's business, the arbitrator noted that the employer had the burden of proof and that management disapproval alone did not constitute just cause. Moreover, judges and arbitrators must apply the same standard to homosexuals that they apply to heterosexuals. Since there was no showing of an adverse effect, the employee was reinstated.

Arbitrators have even failed to find that an employee's egregious or even illegal behavior caused an adverse effect on an employer's business. In *Hughes Air Corp.*¹⁵⁶ the grievant, a male flight attendant, offered to perform fellatio on a hotel attendant who came to his room to inspect a malfunctioning bathtub. The arbitrator found no cause of

152. *Inland Container Corp.*, 28 Lab. Arb. (BNA) 312, 314 (1957) (Ferguson, Arb.). "The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits."

153. *W.E. Caldwell Co.*, Lab. Arb. (BNA) 434, 436-437 (1957) (Kesselman, Arb.). See also *Marshall Brass Co.*, 78 Lab. Arb. (BNA) 806, 808 (1982) (Keefe, Arb.); *City of Wilkes-Barre*, 74 Lab. Arb. (BNA) 33, 35 (1980) (Dunn, Arb.); *Morris Lab, Inc.*, 50 Lab. Arb. (BNA) 632, 633 (1968) (McMahon, Arb.); *The Great Atlantic & Pacific Tea Co., Inc.*, 45 Lab. Arb. (BNA) 495, 497 (undated) (Livengood, Arb.).

154. See *Hughes Air Corp.*, 73 Lab. Arb. (BNA) 148, 157-158 (1979) (Barsamian, Arb.); *Robert Shaw Controls Co. v. United Steelworkers, Local 1163*, 64-2 ARB (CCH) ¶ 8748, 5613 (1964) (Duff, Arb.).

155. 77 Lab. Arb. (BNA) 867 (1981) (Kaufman, Arb.).

156. 73 Lab. Arb. (BNA) 148 (1979) (Barsamian, Arb.).

termination. There was no evidence that the grievant's conduct resulted in the loss of business, and despite the fact that flight attendants are held to a higher standard of off-duty conduct than most employees, the attendant's commission of the single incident was insufficient to establish his lack of fitness to perform his job. Furthermore there was no evidence that employees had refused to work with the grievant or the grievant had undermined the company's ability to direct the workforce. A salient feature of the *Hughes* case is the repeated insistence of the arbitrator that the company produce evidence of serious harm to its business.¹⁵⁷

In *Community College*¹⁵⁸ the grievant, a professor, was placed on probation after pleading guilty to the misdemeanor of attempting to engage in sexual misconduct with an undercover policeman. The college discharged him for immorality and unprofessional conduct. Drawing on cases deciding whether the state's dismissal of a teacher for homosexuality violated the due process clause, the arbitrator held that immorality or unprofessional conduct could be grounds for discharge only if it demonstrated a lack of fitness to teach. The arbitrator found that the grievant's conduct did not impair his fitness to teach for a number of reasons. The professor's students were of considerable maturity compared to the grammar or secondary school students involved in most of the decided cases. The grievant's conduct took place away from the school, and it was unclear whether the academic community had knowledge of it earlier than the discharge date. More important there appeared to be no adverse effect on the grievant's relations with his colleagues or students. In fact even with full knowledge of the arrest, his supervisor recommended that the university renew his contract.

Even those few reported cases where an arbitrator has found just cause for the discharge of a homosexual, the arbitrator has acknowledged that cause exists only in extraordinary situations. In *Robertshaw Controls Company*,¹⁵⁹ the grievant, an operator in a machine shop and leader of a local Boy Scout troop, was convicted of committing sodomy

157. *Id.* at 157-158.

158. 85 Lab. Arb. (BNA) 687 (1985) (Goldberg, Arb.).

159. *Robert Shaw Controls Co. v. United Steelworkers*, Local 1163, 64-2 ARB (CCH) ¶ 8748 (1964) (Duff, Arb.); *but see Armco Steel Corp.*, 43 Lab. Arb. (BNA) 977, 981 (1964) (Kates, Arb.). Although an employee with long years of service was convicted of a morals charge, the arbitrator ordered conditional reinstatement. The effect of the conviction on the business was uncertain. If an adverse effect developed, the employer could discharge the employee.

with and corrupting the morals of a minor. In upholding the discharge, the arbitrator found a direct relation between the grievant's off-duty conduct and his employment, attributable in large part to the special circumstances of the case. The company was the largest employer in a community of 1,200 people, and parents of the children in the Boy Scout troop were fellow employees of the grievant. According to the arbitrator, continued employment of the grievant in this unique situation would disrupt the company with conflict and hinder the business of the employer.

IV. THE PUBLIC POLICY EXCEPTION

The public policy exception is the oldest and most common of the exceptions to the employment-at-will rule.¹⁶⁰ Many courts have held that the discharge of an employee which violates a clear mandate of public policy is illegal. This type of unlawful dismissal usually gives rise to an action in tort for all the damages proximately resulting from the discharge.¹⁶¹ The major problem with the exception is the diffi-

160. Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

In *Peterman v. International Brotherhood of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), the first case to adopt a public policy exception, the plaintiff was fired for allegedly refusing to perjure himself at his employer's request. The California District Court of Appeals held that the plaintiff could sue his employer for wrongful discharge in a civil action. Allowing the suit would "more fully effectuate the state's declared policy against perjury," *id.* at 189, 344 P.2d at 27, which was outlawed by the California Penal Code, CALIF. PENAL CODE § 118 (West Supp. 1984). The court explained:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. . . . To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury.

Peterman, 174 Cal. App. 2d at 188-89, 344 P.2d at 27.

161. See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984); *Novosell v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983) (applying Pa. law); *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1982); *Novosell v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983) (applying Penn. law); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Peterman v. International Brotherhood of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Lampse v. Presbyterian Medical Center*, 590 P.2d 513 (Colo. Ct. App. 1978); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 205 (1980).

culty of defining public policy. Generally, courts have defined public policy with reference to sources such as federal and state statutes or constitutions. Some courts require applicable statutes to contain provisions for a private cause of action or criminal penalties.¹⁶² More liberal courts have found the common law a satisfactory source.¹⁶³

The public policy exception presents several problems for advocates of job security for homosexuals. In light of a recent Supreme Court decision, it would be difficult to argue that there is a public policy protecting the right of individuals to engage in homosexual activity.¹⁶⁴ Moreover, there is arguably a specific public policy against homosexuality, evidenced by the fact that homosexual conduct such as sodomy remains a crime in many states. Therefore, protection for homosexuals will have to come from a general policy which is broad enough to encompass homosexuals.¹⁶⁵ This approach to the public policy excep-

162. See, e.g., WIS. STAT. ANN. § 756, 251(1) (West 1981); compare *Sventko v. Krolger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) with *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834, 840 (Wis. 1983).

163. See *Peterman v. International Brotherhood of Teamsters*, 184 Cal. App. 2d 174, 188, 344 P.2d 25, 27 (1959); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 178, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

A majority of courts, however, require some statutory support before finding a public policy exception. See, e.g., *Percival v. General Motors Corp.*, 539 F. Supp. 1126 (E.D. Mo. 1975); *Rogers v. International Business Mach.*, 500 F. Supp. 867 (W.D. Penn. 1980).

164. In *Bowers v. Hardwick*, — U.S. —, 106 S. Ct. 2841 (1986), *Hardwick* who had engaged in fellatio with another male in his bedroom was charged with violating the Georgia statute outlawing sodomy. GA. CODE ANN. § 16-6-2 (1984). Before he was convicted, he sued alleging that the statute was unconstitutional. The Supreme Court rejected *Hardwick's* argument that the statute violated the due process clause of the Fourteenth Amendment. First, homosexuals have no fundamental right to engage in sodomy, and the right claimed by *Hardwick* is clearly distinguishable from prior decisions on fundamental rights which involved family relationships, marriage, and procreation. Nor can it be claimed that a right to engage in sodomy, which is criminal activity in many states, is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Moreover, the Court declared its strong resistance to discovering new fundamental rights in the due process clause. Third, the fact that the sodomy at issue took place in the privacy of *Hardwick's* home does not change the result. And finally, the Court rejected *Hardwick's* argument that the law was unconstitutional because there was no rational basis for it other than the belief of a majority of the Georgia electorate that "homosexual sodomy is immoral and unacceptable." — U.S. at —, 106 S. Ct. at 2846.

165. In approximately half the states, homosexual conduct between consenting adults in private is no longer a crime. Those states are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Penn-

tion, however, encounters theoretical problems. By definition, the concern is with the public good, and any justice granted to an individual is merely incidental.¹⁶⁶ The inevitable result is that in many cases, injustice will remain unremedied. Job security will depend on whether a particular discharge fortuitously falls within the policy exception.

Notwithstanding these problems, proponents of homosexual job security can still argue that in certain cases the discharge of a homosexual violates public policy. The remainder of this section develops three policy arguments: the policy favoring free speech, the policy in favor of privacy, and the policy against sexual preference discrimination.

A. *The Constitutional and Statutory Policies Favoring Free Speech and the Exercise of Other Political Rights*

The Constitution staunchly protects free speech in general and speech directed toward political activity in particular. Courts,¹⁶⁷ as

sylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

Although homosexual activity is still technically a crime in Massachusetts, the Supreme Judicial Court has indicated that the state has no legitimate interest in criminalizing such conduct. *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 428 (1974); *Commonwealth v. Scagliotti*, 373 Mass. 626, 371 N.E.2d 726 (1977).

In the remaining states, however, private consensual sodomy between adults remains a crime. ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. § 13-1411 (West Supp. 1985); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (West 1981); FLA. STAT. ANN. § 800.02 (West 1985); GA. CODE ANN. § 16-6-2 (1984); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1985); KY. REV. STAT. § 510.100 (1985); LA. REV. STAT. ANN. § 14.89 (West Supp. 1986); MD. ANN. CODE, art. 27, § 553-554 (1982); MASS. ANN. LAWS CH. 272, § 34 (Michie/Law. Co-op. 1970); MICH. COMP. LAWS § 750.158 (1968); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (1973); MO. REV. STAT. § 566.090 (1978); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1985); N.C. GEN. STAT. § 14-177 (Michie 1981); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (1983); VA. CODE § 18.2-361 (1982). Only six of the state statutes specifically refer to sexual activity between members of the same sex. ARK. STAT. ANN. § 13-1411 (1977); KAN. STAT. § 21-3505 (1985); KY. REV. STAT. § 510.100 (1985); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1985); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974).

166. Comment, *The Covenant of Good Faith & Fair Dealing: A Common Ground for the Torts of Wrongful Discharge from Employment*, 21 SANTA CLARA L. REV. 1111, 1138-1140 (1980). See Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937, 1947-1950 (1983).

167. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). See *N.A.A.C.P. v. Claiborne Co.*, 458 U.S. 886, 913 (1982), quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980).

well as state constitutions,¹⁶⁸ recognize freedom of political speech in particular as the linchpin of democracy.¹⁶⁹ This section demonstrates that the broad societal policy favoring free speech will support a policy exception to the employment-at-will rule.

1. *Gay Law Students Association v. Pacific Tel. & Tel.*

In *Gay Law Students*¹⁷⁰ the plaintiffs brought a class action against Pacific Telephone on behalf of applicants for employment and employees of the company, alleging that the company had an illegal policy of discriminating against homosexuals. They sought injunctive and declaratory relief as well as damages. The California Supreme Court, in a decision with far reaching implications, held that the plaintiffs had several causes of action.

The plaintiffs alleged that the defendant interfered with their political freedom in violation of the California Labor Code. Sections 1101 and 1102 of the Code protect the rights of employees to engage in political activity without interference by employers.¹⁷¹ Employers cannot, for example, prevent employees from engaging in political activity.¹⁷² Nor can an employer force employees to follow or reject any political theory.¹⁷³ Since the homosexual plaintiffs' activity was political, Pacific Telephone's discriminatory policy attempted to coerce it and violated the labor code.

The plaintiffs in *Gay Law Students*¹⁷⁴ also sued the California Fair Employment Practices Commission alleging that the Commission's refusal to take remedial action violated the California Fair Employment Practices Act.¹⁷⁵ The court held that the Act did not prohibit discrim-

168. Note, *Free Speech, The Private Employee, and State Constitutions*, 91 YALE L.J. 522, 529-30 (1982).

169. It should be noted that statutory prohibitions against religious discrimination do not protect political speech or activity on the grounds that they constitute a creed. "A religious belief includes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social theology." *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 400 (9th Cir. 1974). See *Welsh v. United States*, 398 U.S. 33 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

170. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

171. CAL. LAB. CODE §§ 1101, 1102 (West 1971).

172. CAL. LAB. CODE § 1101 (West 1971).

173. CAL. LAB. CODE § 1102 (West 1971).

174. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

175. *Id.* at 472, 595 P.2d at 611, 156 Cal. Rptr. at 33.

ination against homosexuals.¹⁷⁶ In so doing, it firmly rejected the arguments that the Act prohibited discrimination in general and that the legislature's enumeration of specific bases of discrimination was illustrative rather than restrictive.¹⁷⁷

Gay Law Students is important for several reasons. First, it stands for the proposition that the advocate's best strategy is to bring homosexuals under the protection of general rights such as free speech and statutes such as California Labor Code Sections 1101 and 1102. Second, this case indicates that several sources of policy can cumulatively make an overwhelming case for plaintiffs.¹⁷⁸ If only one cause of action had been alleged in *Gay Law Students*, the plaintiffs might not have recovered. By alleging multiple causes, the stronger ones supported the weaker. Finally, *Gay Law Students* adumbrates the arguments that can support a public policy exception to the employment-at-will rule.

2. Sources of Policy

The First Amendment to the United States Constitution,¹⁷⁹ provides that Congress shall make no law "abridging the freedom of speech, or the press,"¹⁸⁰ and this clause applies to the states through the Fourteenth Amendment.¹⁸¹ Since the First Amendment applies only to governmental restrictions on free speech,¹⁸² it is unlikely that the Constitution alone can serve as the source of a policy for an exception to the employment-at-will rule.

The Supreme Court has made it clear that states may protect free

176. *Id.* at 473, 595 P.2d at 611-12, 156 Cal. Rptr. at 34.

177. *Id.* at 473, 595 P.2d at 612, 156 Cal. Rptr. at 34.

178. *Id.* at 464, 595 P.2d at 595, 156 Cal. Rptr. at 17. See H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 5.28 n.97.

179. U.S. CONST. amend. I. See generally *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Jamison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Novosell v. Nationwide Insurance Co.*, 721 F.2d 894, 899 (3d Cir. 1983).

180. U.S. CONST. amend. I.

181. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

182. See, e.g., *Novosell v. Nationwide Insurance Co.*, 721 F.2d 894, 899 (3d Cir. 1983) (Applying Pa. law); *Rozier v. St. Mary's Hospital*, 88 Ill. App. 3d 994, 1008, 411 N.E.2d 50, 57-58 (1980) (dissenting opinion); *Nees v. Hocks*, 272 Or. 210, 218-19, 536 P.2d 512, 516 (1975); *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 561, 567, 335 N.W.2d 834, 840 (1983).

speech beyond the scope of the First Amendment.¹⁸³ Unlike the First Amendment, many of the state free speech guarantees were enacted to protect individual liberty rather than to limit governmental power.¹⁸⁴ Since federalism is not at issue regarding the enforcement of state constitutions,¹⁸⁵ the protections granted are affirmative and broad. The California Constitution, for example, provides:

Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press.¹⁸⁶

This affirmative guarantee is representative of those in forty-three other state constitutions.¹⁸⁷

Many states have also enacted legislation to protect the political activities of employees.¹⁸⁸ The scope of protection provided by the stat-

183. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980). Note, *Private Abridgment of Speech and The State Constitutions*, 90 YALE L.J. 165, 178 (1980). See R. RANKIN, *STATE CONSTITUTIONS: THE BILL OF RIGHTS* (1960). Grad, *The State Bill of Rights*, in 6 CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE 117 (1980); Note, *Free Speech, The Private Employee, and State Constitutions*, 91 YALE L.J. 522, 541 (1982).

184. See R. RANKIN, *STATE CONSTITUTIONS: THE BILL OF RIGHTS 4-5* (1960); Grad, *The State Bill of Rights*, in 7 CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE 117, 118 (1980); cf. *THE FEDERALIST*, No. 84 (A. Hamilton). In *Rozier v. St. Mary's Hospital*, 88 Ill. App. 3d 994, 1008, 411 N.E.2d 50, 64 (1980) (dissenting opinion), one judge recognized the possibility of using state constitutional protection of free speech as a source of policy in wrongful discharge cases.

185. Note, *Free Speech, The Private Employee, and State Constitutions*, 91 YALE L.J. 522, 541-542 (1982); see Yackle, *The Burger Court, State Action, and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 484-485 (1975).

186. CAL. CONST., art. I § 2. Similarly, the New York Constitution provides "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." N.Y. CONST., art. I, § 8 (McKinney 1968).

187. See ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; FLA. CONST. art. 1, § 4; GA. CONST. art. I, § 1, para. 4; IDAHO CONST. art. I, § 9; ILL. CONST. art. 1, § 4; IOWA CONST. art. I, § 7; KAN. BILL OF RIGHTS, § 11; KY. BILL OF RIGHTS, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. DECL. OF RIGHTS, art. 40; MASS. CONST. art. 77; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. Part I, art. 22d; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VT. CONST. ch. I, art. 13; WASH. CONST. art. I, § 5; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20; cf. DEL. CONST. art. I, § 5.

188. For a compilation of these laws see L. LARSEN, *UNJUST DISMISSAL* §§ 10,01010.52; [1980] 1 Lab. L. Rep. (CCH) ¶ 43.045. See, e.g., ARIZ. REV. STAT. ANN.

utes varies from negligible to substantial. The narrower laws protect the integrity of the electoral process and prohibit employers from interfering with an employer's right to vote, run for office, or sign petitions. The Nevada statute subjects an employer who prohibits an employee from engaging in politics or becoming a candidate for public office to a fine and/or civil damages.¹⁸⁹ The more specific Ohio law prohibits an employer from posting or placing in pay envelopes statements or threats intended to influence the political actions or votes of employees and from refusing to allow an employee to serve as an election official.¹⁹⁰ These narrower laws would not support a policy exception for political activities.

Several states, however, broadly protect employee political activities. California Labor Code sections 1101 and 1102, which were a basis of recovery in *Gay Law Students*, provide as follows:

§ 21-236 (Supp. 1983); MD. ANN. CODE ART. 33, § 126-16-(6) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 56, § 33 (1978); N.Y. ELEC. LAW, § 17-150(3) (McKinney 1978); R.I. GEN. LAWS § 17-23-6 (1981).

189. NEV. REV. STAT. §§ 613.040-613.060, 613.070 (1979). § 613.040 provides: It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state.

The other sections concern remedies and the responsibility of a corporation for the acts of its agents.

190. OHIO REV. CODE ANN. §§ 3599.05, 3599.06 (1972). § 3599.05 provides:

No employer or his agent or a corporation shall print or authorize to be printed upon any pay envelopes any statements intended or calculated to influence the political action of his or its employees; or post or exhibit in the establishment or anywhere in or about the establishment any posters, placards, or hand bills containing any threat, notice, or information that if any particular candidate is elected or defeated work in the establishment will cease in whole or in part, or other threats expressed or implied, intended to influence the political opinions or votes of his or its employees.

Whoever violates this section is guilty of corrupt practices, and shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

§ 3599.06 provides:

No employer, his officer or agent, shall discharge or threaten to discharge an elector for taking a reasonable amount of time to vote on election day; or require or order an elector to accompany him to a voting place upon such day; or refuse to permit such elector to serve as an election official on any registration or election day; or indirectly use any force or restraint or threaten to inflict any injury, harm, or loss; or in any other manner practice intimidation in order to induce or compel such person to vote or refrain from voting for or against any person or question or issue submitted to the voters.

Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars.

Section 1101. No employer shall make, adopt or enforce any rule, regulation or policy . . . (b) controlling or directing, or tending to control or direct the political activities of affiliations of employees.

Section 1102. No employer shall coerce or influence or attempt to coerce or influence his employees through or by any means of threat or discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.¹⁹¹

Similar statutes exist in Louisiana¹⁹² and Connecticut.¹⁹³ The Connecticut law provides that any employer who subjects an employee to discipline or discharge on account of that employee's exercise of First Amendment rights or comparable sections of the Connecticut Constitution shall be liable for damages, including punitive damages and attorney's fees.¹⁹⁴

Commentators have criticized these laws on several grounds.¹⁹⁵ First, the typical penalty,¹⁹⁶ which is normally a small criminal fine, is

191. CAL. LAB. CODE §§ 1101, 1102 (West 1971). See Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015 (1970).

192. LA. REV. STAT. ANN. § 23:961 (West 1964) provides:

No . . . employer shall adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character.

193. 1983 Conn. Acts 83-578 provides:

Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

194. *Id.* Cited in *Magnam v. Anaconda Indus.*, 193 Conn. 558, 564, 479 A.2d 781, 784, n.13 (1984).

195. See Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. LEGISL. 35, 39 (1981).

196. See, e.g., ARIZ. REV. STAT. ANN., § 16-304(B) (1975) (\$5,000 fine); MD. ANN. CODE, art. 33 § 26-16(b) (1957) (four-year ban on holding public office and one year imprisonment and/or \$1,000 fine); MASS. GEN. LAWS ANN. ch. 56, § 33 (1978) (imprisonment for not more than one year); NEV. REV. STAT. § 613.050 (1979) (fine of not more than \$500); OHIO REV. CODE ANN. §§ 3599.05 (1972) (fine of between \$500

too insignificant to deter employer abuse. Second, since employees are generally unable to bring suit and state prosecutors are unenthusiastic about doing so,¹⁹⁷ these laws do not provide the relief that the legislatures intended. Nevertheless, some laws do provide more than minor sanctions,¹⁹⁸ and constitute a statement of public policy.

At the federal level, the National Labor Relations Act¹⁹⁹ in certain instances protects an employee's political speech. Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .²⁰⁰

Under the NLRA, it is an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of these rights.²⁰¹ If the phrase "mutual aid or protection" includes political speech unrelated to unionization or collective bargaining, the NLRA will protect such speech from being abridged by an employer.²⁰² All employees working for employers subject to the NLRA are protected, for the rights the Act guarantees are not restricted to unionized employers or union organization campaigns.²⁰³ The political activities,

and \$1,000), § 3599.06 (fine of between \$50 and \$500); R.I. GEN. LAWS § 17-23-6 (1981) (forfeiture of right to vote or hold public office).

197. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 495 (1976).

198. CAL. LAB. CODE § 1105 (West 1971) (civil right of action for damages); COLO. REV. STAT. § 8-2-108(2) (1973) (action for damages caused by employer's interference with employee's running for office); 1983 Conn. Act. 83-578 (civil action for damages); DEL. CODE ANN. tit. 15, 5162 (1985) (action for \$500 in damages for employer coercion of an employee's vote); LA. REV. STAT. ANN. § 23:961 (West 1964) (civil action for damages); P.R. LAWS ANN. tit. 29, § 136 (1966) (civil action for damages for interference with political party membership).

199. 29 U.S.C. § 151-169 (1976).

200. 29 U.S.C. § 157 (1976).

201. 29 U.S.C. § 158(a)(1) (1976).

202. Such protection, however, may be moot because of labor law preemption. If an activity is either arguably protected, as may be the case with political speech, or arguably prohibited under the NLRA, then under the primary jurisdiction doctrine, only the National Labor Relations Board can exercise jurisdiction over the activity. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

203. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Walls Manufacturing Co., Inc. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963), *enforcing* 137 NLRB 1317 (1962), *cert. denied*, 375 U.S. 923 (1963); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325 (9th Cir. 1953); *NLRB v. Phoenix Mutual Life Insurance Co.*,

however, would have to be "concerted," meaning directed toward a goal of benefiting all employees of an employer.²⁰⁴

In *Eastex v. NLRB*,²⁰⁵ an employer denied union employees permission to distribute a newsletter in non-work areas on their own time. The newsletter contained one article urging employees to defeat right to work legislation being considered in Texas and another attacking President Nixon's veto of an increase in the federal minimum wage. It also urged workers to vote to "defeat our enemies and elect our friends." The union filed an unfair labor practice action against the employer, arguing that the NLRA protected the newsletter as concerted activity for the "mutual aid or protection" of employees. The Supreme Court held that "mutual aid or protection" is not limited to specific disputes between an employer and his employees. It includes support for employees of other employers and improvement of the terms and conditions of employment "through channels outside the immediate employer-employee relationship."²⁰⁶ Although the Court read the NLRA's phrase broadly enough to include some political speech by employees, it indicated limits without precisely delineating them. Generally, the closer the relationship between political speech and the immediate economic interests of employees, the more likely the speech will be considered "other mutual aid or protection."

It thus appears that there are clear policies in American society favoring freedom of speech in general and political speech in particular. Since some of the policies prohibit only governmental interference, however, it is necessary to examine the effect of the state-action requirement under the First Amendment.

167 F.2d 983 (7th Cir. 1948), *cert. denied*, 385 U.S. 845 (1948); *LESLIE, LABOR LAW IN A NUTSHELL* 89 (1979).

204. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *NLRB v. Charles H. McCauley Associates, Inc.*, 657 F.2d 685 (5th Cir. 1981), *enforcing in part* 248 NLRB 346 (1980); *Meyers Industries II*, 278 NLRB No. 118 (1986); *Meyers Industries, Inc.*, 268 NLRB No. 73 (1984).

205. 437 U.S. 556 (1978).

206. *Id.* at 565. *See Puerto Rico Food Prods. Corp. v. NLRB*, 619 F.2d 153 (1st Cir. 1980); *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cir. 1979); *NLRB v. Okla-Inn*, 488 F.2d 498 (10th Cir. 1973); *American Art Clay Co. v. NLRB*, 328 F.2d 88 (7th Cir. 1964); *Dobbs House, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963); *NLRB v. Guernsey-Muskingum Elec. Ins. Co.*, 167 F.2d 983 (7th Cir. 1984), *cert. denied*, 335 U.S. 845 (1948); *Bide-A-Wee Home Ass'n*, 248 NLRB 853 (1980).

3. State Action and Freedom of Speech

Courts have interpreted the First Amendment, which by its terms applies only to Congress, to protect the rights of state and federal employees to comment on matters of public or private concern.²⁰⁷ The First Amendment does not protect private employees unless their employer is so connected to the government that its action is considered state action.²⁰⁸ The Supreme Court has consistently interpreted the state-action requirement strictly,²⁰⁹ and it is unlikely that any private employer is bound by the First and Fourteenth Amendments.

One way to obviate the requirement would be to include private abridgement of freedom of speech within the prohibition of the First Amendment. Some commentators have suggested that constitutional limitations imposed on the exercise of governmental power should also be applied to private organizations.²¹⁰ Their arguments rest on the

207. See, e.g., *Connik v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *National Gay Task Force v. Oklahoma City Board of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, —U.S.—, 105 S. Ct. 1858 (1985); *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983); *Tygrett v. Barry*, 627 F.2d 1279 (D.C. Cir. 1980); *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Bickel v. Burkhart*, 462 F. Supp. 682 (N.D. Tex. 1978). See generally J. NOWAK, R. ROTUNDA & N. YOUNG, *CONSTITUTIONAL LAW* 1001-03 (1983); Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U. L. REV. 761 (1970); Note, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering*, 7 HASTINGS CONST. L.Q. 1001 (1980).

208. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

209. State action will exist if the entity in question performs a public function, see *Marsh v. Alabama*, 326 U.S. 501 (1946); *Kerr v. Enoch Pratt Free Library of Baltimore*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945), or if there is significant state involvement, see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). The latter test requires "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). See also *Rendel-Baker v. Kohn*, 457 U.S. 830 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967); *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 256 N.Y.S.2d 792, 204 N.E.2d 627 (1965); TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147-1162 (1978); Note, *Creditors Remedies as State Action*, 89 YALE L.J. 538, 540-545 (1980).

210. A.S. MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* 13 (Occasional Paper for the Center for the Study of Democratic Institutions 1959); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 953 (1952); Blades, *supra*

perceptions that the power of such entities is quasi-governmental and that their intrusion on the average individual's life is comparable to or greater than the government's.²¹¹ This is the reverse of the balance of power between governmental and non-governmental bodies at the time of the ratification of the Constitution.²¹² However laudable and justifiable these proposals may be, they are unlikely to have any practical consequences in the near future.

A second approach was adopted in *Novosell v. Nationwide Insurance Company*.²¹³ After working without reprimand for an insurance company for fifteen years, the plaintiff, a district sales manager, was fired because he refused his employer's request to lobby the Pennsylvania legislature for no-fault insurance legislation.²¹⁴ He alleged that the termination violated the public policy protecting his First Amendment rights. The court found that a wrongful discharge claim could be shown where the termination abridged a recognized public policy.²¹⁵ The court concluded that the First Amendment could be a source of public policy. After examining the cases involving public employees, the court noted that the policy was not confined to instances of state action. Whenever the power to fire is used to control an employee's political activity an important policy is violated.

The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions

note 49 at 1421; Pick, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 OHIO STAT. L.J. 2 (1979); Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1837 n.10 (1980); Note, *Non-Statutory Cause of Action for an Employer's Termination of an 'At Will' Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743 (1970). *Contra* Wellington, *The Constitution, the Labor Union, and 'Governmental Action'*, 70 YALE L.J. 345, 348 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).

211. See D. EWING, *FREEDOM INSIDE THE CORPORATION* 12-14 (1977); Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1018-19 (1970); Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 38 (1981).

212. Blades, *supra* note 49, at 1431.

213. 721 F.2d 894 (3d Cir. 1983).

214. *Id.* at 896.

215. *Id.* at 898.

promulgated by the state's courts suggests that this question be answered in the affirmative.²¹⁶

The court then held that the plaintiff's allegation stated a cause of action, thereby extending the public policy exception in Pennsylvania to "a non-constitutional claim where a corporation conditions employment upon political subordination."²¹⁷

The Court in *Novosell* also indicated that the Pennsylvania Constitution was also a valid source of policy.²¹⁸ It has been pointed out that all states guarantee freedom of speech.²¹⁹ Many of these guarantees are affirmative, and most do not contain an explicit state-action requirement. The states may go beyond the protections the First Amendment extends to free speech. In *Robbins v. Pruneyard Shopping Center* the California Supreme Court held that the state's constitutional guarantee of free speech applied to a privately owned shopping center.²²⁰ The holding, which was not premised on a finding of state action, was affirmed by the United States Supreme Court.²²¹ In addition, the California Supreme Court in *Gay Law Students* noted that the equal protection clause of the California Constitution contained no explicit state-action requirement.²²² While it would be guided by federal decisions construing the equal protection clause of the Fourteenth Amendment, the Court refused to be bound by them. Instead, it expanded the meaning of state-action and found that a public utility was,

216. *Id.* at 900.

217. *Id.*, citing *Sacks v. Commonwealth of Pa., Dep't of Pub. Welfare*, 502 Pa. 201, 465 A.2d 981 (1983); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

218. *Id.* at 899. The relevant portion of Article I, Section 7 of the Pennsylvania Constitution states:

The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

219. See notes 183-187 *supra* and accompanying text.

220. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.*, *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980). The holding was justified by the fact that shopping centers are public forums. 23 Cal. 3d at 907, 910-11, 592 P.2d at 345, 347, 153 Cal. Rptr. 858, 860. There was no finding that the curtailment of free speech by the shopping center owner constituted state action. The court merely stated that "the public interest in peaceful speech outweighs the desire of property owners for control over their property." *Id.* at 909, 592 P.2d at 347, 153 Cal. Rptr. 860.

221. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

222. *Gay Law Students*, 24 Cal. 3d at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20. For a full discussion of *Gay Law Students* see notes 170-178 *supra* and accompanying text.

in effect, a governmental entity.²²³ *Gay Law Students* clearly suggests that free speech guarantees in state constitutions can be used to circumvent the federal state-action requirement.

In states which require some form of state action²²⁴ there are typically few decisions interpreting the term. Courts are, therefore, free to define it broadly. They can follow earlier, more liberal federal cases which found state action whenever a private entity performed a public function²²⁵ or became entangled with the government.²²⁶ Or they can use a more expansive definition of state action. For example, judicial denial of recovery to an employee discharged for political expression could be interpreted as state action. It has been suggested that corporations should be considered state agencies since they operate under state charters. The most liberal approach would be to follow *Novosell* and dispense with state action altogether because the policy favoring freedom of speech outweighs it.

Some courts have already used state constitutions to prohibit private interference with freedom of speech. In *Freedman v. New Jersey State Police*²²⁷ the Superior Court of New Jersey held that the owner of an agriculture labor camp could not exclude members of the press who wished to interview workers in the camp because New Jersey's guarantee of free speech was broader than the First Amendment's.²²⁸ The Michigan Supreme Court²²⁹ and the Washington Court of Appeals²³⁰

223. 23 Cal. 3d at 469, 595 P.2d at 598, 156 Cal. Rptr. at 20-21.

224. See HAWAII CONST. art. I § 4; IND. CONST. art. I, § 9; OR. CONST. art. I § 8; S.C. CONST. art. I § 2; UTAH CONST. art. I § 15; W. VA. CONST. art. III § 7.

225. *Marsh v. Alabama*, 326 U.S. 501 (1946). A town in Alabama completely owned by the Gulf Shipbuilding Corporation forbade the distribution of religious literature on two sidewalks. The Supreme Court held that since the company town "had all the characteristics of any other American town," *id.* at 502, and functioned like a regular town, it was subject to the restrictions of the First Amendment. Thus, the ordinance prohibiting the distribution of religious literature was unconstitutional.

226. See *Holodnak v. Avco Corp.*, 514 F.2d 285, 288-89, *cert. denied*, 423 U.S. 892 (1975). The defendant was a private defense contractor who, the Court held, had "contractually assumed" the responsibility to honor the free speech rights of its employees because the government's involvement in the defendant's business was so great. The federal government owned the land, buildings, and a majority of the equipment used in the business, which consisted primarily of supplying weapons to the military.

227. 135 N.J. Super. 297, 343 A.2d 148 (1975).

228. *Id.* at 301, 343 A.2d at 151.

229. *Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc.*, 370 Mich. 547, 563-74, 122 N.W.2d 785, 793-99 (1963).

230. *Sutherland v. Southcenter Shopping Center*, 3 Wash. App. 833, 846, 478 P.2d 792, 799, *appeal denied*, 79 Wash. 2d 1005 (1971).

used similar reasoning to uphold, respectively, handbilling and signature gathering in shopping centers.

Novosell held that *either* the Pennsylvania constitution or the first amendment could support a policy exception for political expression.²³¹ Perhaps because it considered either source alone sufficient, it ignored the possibility that the two could combine to support the exception. The first amendment and the case law behind it show the importance of free speech and political activity to the maintenance of a democratic society. They evidence a general policy in favor of free speech, which was limited to governmental interference because the drafters thought they lacked the power to reach private interference. State constitutions, with their relaxed notion of state action, used in tandem with the first amendment can reach private interference, exactly as the founding fathers intended the federal system to operate. This approach has been hinted at by the Court as it withdrew from restraining abridgment of free speech in privately owned shopping centers and as a commentator advocated:

the considerations of federalism that have dictated the Court's withdrawal from the private abridgment field, together with the contemporary impact of private abridgment on the expression system . . . , dictate that the states enter and protect persons against private abridgment.²³²

4. Homosexuality as Speech or Political Activity

Many actions by homosexuals other than sexual conduct can, depending on the context, qualify as speech.²³³ Obviously, a homosexual's appearance on television to discuss homosexuality²³⁴ or before a

231. *Novosell v. Nationwide Insurance Co.*, 721 F.2d 894, 899 (3d Cir. 1983).

232. Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 177 (1980). See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976), "While statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."

233. See, e.g., *NGTF v. Oklahoma City Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, — U.S. —, 105 S. Ct. 1858 (1985); *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977); *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). *But cf. Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 1373 (1985).

234. *Acanfora v. Board of Education* 491 F.2d 498, 501, *cert. denied*, 419 U.S. 836 (1974).

court to discuss gay rights²³⁵ is speech. The reach of the First Amendment is broad and protects such non-traditional forms of speech as a gay rights organization's sponsorship of social events²³⁶ and the right of a young man to take a male date to his high school prom.²³⁷ It can also be argued that other behavior associated with homosexuals such as modes of dress and mannerisms is a form of speech.²³⁸ Going to gay bars and socializing with other men may be within the ambit of the First Amendment as an associational right.²³⁹ Indeed, many opponents of homosexual rights readily admit the communicative nature of such conduct. An Oklahoma statute,²⁴⁰ which an equally divided Supreme Court recently struck down as violating the First Amendment,²⁴¹ punished teachers for homosexual conduct. The ordinance regulated conduct such as advocating or promoting public or private homosexual activity so as to create a substantial risk that such conduct will come to the attention of school children or school employees.²⁴² Armed with such a statute, prosecutors could easily argue that effeminate mannerisms or merely associating with homosexuals was homosexual conduct.

Under state laws prohibiting an employer from interfering with his employees' participation in politics, political activity was originally limited to involvement in the process of government.²⁴³ In *Lockheed Aircraft Corporation v. Superior Court*,²⁴⁴ an early case construing the provisions of California Labor Code Sections 1101 and 1102,²⁴⁵ the

235. *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980).

236. *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974). See *Papish v. Board of Curators*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972); *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *New Left Educ. Project v. Board of Regents*, 326 F. Supp. 158 (W.D. Tex. 1970), *vacated on other grounds*, 404 U.S. 541 (1972).

237. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980).

238. See *Singer v. U.S. Civil Service Comm'n*, 530 F.2d 247, 255 (9th Cir. 1976); *Gay Students Organization v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

239. See *id.*; *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 487-488, 595 P.2d 592, 610-611, 156 Cal. Rptr. 14, 32 (1979).

240. OKLA. STAT. tit. 70, § 6-103.15 (1985 West Supp.).

241. *National Gay Task Force v. Board of Educ. of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, — U.S. —, 105 S. Ct. 1858 (1985).

242. OKLA. STAT. tit. 70, § 6-103.15(A)(2) (1985 West Supp.).

243. Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGISL. 35, 60-62 (1981).

244. 28 Cal. 2d 481, 171 P.2d 21 (1946).

245. CAL. LAB. CODE §§ 1101, 1102 (West 1971).

defendant, a defense contractor, fired several employees for security reasons. In response to the employees' suit alleging that the discharges interfered with their political activities, Lockheed argued that the statute was unconstitutionally vague. The California Supreme Court narrowly construed the scope of the statute:

In each case the interference prescribed by the statute is interference with "political activities or affiliations," and the test is not membership in or activities connected with any particular group or organization, but whether those activities are related to or connected with the orderly conduct of government and the peaceful organization, regulation and administration of government.²⁴⁶

Under this test, a court would consider to be political only activity directed toward the normal functions of government such as partisan politics, running for office, sponsoring legislation, lobbying the legislature, and introducing referenda.

In *Gay Law Students*²⁴⁷ the California Supreme Court significantly expanded the scope of "political activity." The court found that employees' self-identification as homosexuals could bring them within Sections 1101 and 1102.²⁴⁸ The court noted that the application of the sections should not be limited to "partisan activity."²⁴⁹ Acknowledging the decisions of the U.S. Supreme Court, which has found engaging in litigation,²⁵⁰ wearing armbands,²⁵¹ and the association with others to promote a cause²⁵² to be political, the court found that:

Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual

246. 28 Cal. 2d at 485, 171 P.2d at 24. The court defined the word "political" as follows:

Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of state.

Id. at 484-85, 171 P.2d at 24.

247. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 487, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979).

248. *Id.* at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32.

249. *Id.*

250. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

251. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

252. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.²⁵³

Since an important aspect of the gay rights movement is the encouragement of men and women to associate with other homosexuals, the telephone company's policy of not hiring individuals who are gay, or who are identified with gay organizations, was an attempt to control the political activities of employees.²⁵⁴

B. *The Right of Privacy*

Although the Supreme Court recognized a constitutionally guaranteed right of privacy in *Griswold v. Connecticut*,²⁵⁵ the right has been difficult to define.²⁵⁶ *Griswold* held that the right was violated by a statute criminalizing the use of contraceptives by married couples. Subsequently, the Court extended the right to the use of contraceptives by unmarried couples,²⁵⁷ a woman's decision whether or not to terminate her pregnancy²⁵⁸ and certain other fundamental decisions about family relations.²⁵⁹ The Supreme Court abruptly halted this gradual expansion in *Bowers v. Hardwick*,²⁶⁰ which held that the right of privacy does not protect sodomy and other private sexual activity between consenting adult homosexuals from state prohibition.²⁶¹ The decision

253. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979).

254. The decision was limited to discrimination "against persons who identify themselves as homosexuals who defend homosexuality, or who are identified with activist homosexual organizations." *Id.* at 488, 595 P.2d at 610, 156 Cal. Rptr. at 33.

255. 381 U.S. 479 (1965).

256. See generally D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); Richards, *Constitutional Privacy and Homosexual Love*, N.Y.U. REV. L. & SOC. CHANGE 895, 895-899 (1986).

257. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

258. *Roe v. Wade*, 410 U.S. 113 (1973).

259. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

260. 54 U.S.L.W. 4919 (June 30, 1986).

261. — U.S. —, 106 S. Ct. 2841 (1986). See Dunlap, *Brief Amicus Curiae, Bowers v. Hardwick*, 14 N.Y.U. REV. OF L. & SOC. CHANGE 949 (1986); Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 808 (1986) (criticizing the decision).

elucidates that the federal constitution cannot support a public policy exception based on the right to privacy.

There are, however, other sources of the right of privacy. Some states have statutes which create a privacy right.²⁶² Massachusetts, for example, protects a person against unreasonable, substantial or serious interference with his privacy.²⁶³ In addition, there is the common law tort of invasion of privacy²⁶⁴ that may give protection to homosexuals.

Courts have occasionally recognized a policy exception based on privacy when an employee has been fired for refusing to answer an employer's personal inquiries.²⁶⁵ In *Cort v. Bristol Myers Co.*,²⁶⁶ several employees refused to answer questions on a personnel form which they claimed were personal and unrelated to their jobs. Although it denied recovery in this particular case because some of the information refused was a matter of public record, the court acknowledged that an employee could not be fired for failing to complete an unreasonably intrusive questionnaire.²⁶⁷

This is especially true with respect to requests for information which

262. ALASKA CONST. art. I, § 22 (1972); ARIZ. CONST. art. II, § 8 (1910); CAL. CONST. art. I, § 1 (1972); FLA. CONST. art. I, § 23 (1981); HAWAII CONST. art. I, § 5 (1968); ILL. CONST. art. I, § 6 (1970); LA. CONST. art. I, § 5 (1974); MONT. CONST. art. II, § 10 (1972); S.C. CONST. art. I, § 10 (1971); WASH. CONST. art. I, § 7 (1889). Alaska's constitution, for example, provides that "[t]he right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22 (1972). In some states, Arizona, Hawaii, Illinois, Louisiana, South Carolina, and Washington, the constitutional right to privacy is connected with prohibitions against unreasonable searches.

263. MASS. GEN. LAWS Ch. 214 § 1B (1974). In *Bratt v. IBM Corp.*, 392 Mass. 508, 467 N.E.2d 126 (1984), the Massachusetts Supreme Court held that the disclosure of private medical facts about an employee through intracorporate communication is sufficient publication to impair an employee's right to privacy. *Id.* at 515, 467 N.E.2d at 134. See *Bratt v. IBM Corp.*, 785 F.2d 352 (1st Cir. 1986).

264. In order to recover for an invasion of privacy, a plaintiff must prove that he had a reasonable expectation of privacy concerning the alleged intrusion and that his privacy was, in fact, invaded. Although harm is theoretically presumed if an invasion is proved, it is likely that homosexuals alleging an invasion of privacy will also have to prove actual harm such as psychological, occupational, social, and similar damages. SEXUAL ORIENTATION AND THE LAW § 5.03[3][a][ii] (R. Achtenberg, ed. 1985). See generally W. KEETON & W. PROSSER, THE LAW OF TORTS § 117 (5th ed. 1984). See also *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1st Dist. 1984); *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160, 1167 (Mass. 1985); *Cort v. Bristol-Meyers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982).

265. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979). *Accord* *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982).

266. 385 Mass. 300, 431 N.E.2d 908 (1982).

267. *Id.* at 308 n.9, 431 N.E.2d at 912 n.9.

the legislature has prohibited an employer from making. In Massachusetts such requests include information about criminal²⁶⁸ and mental health care²⁶⁹ histories of applicants or employees. Moreover, the court in *Cort* noted that recovery was also possible for intrusive requests that were not within the scope of such protective legislation.²⁷⁰ The reasonableness of an inquiry depends on the nature of the job (with higher level jobs justifying broader and more personal inquiries than menial jobs) and on whether the information sought is relevant to job performance. When an employer asks about an employee's sexual orientation, a court's concern would be essentially the same as in *Norton v. Macy*—whether a nexus existed between the employee's sexuality and his ability to perform the job.²⁷¹ The reasoning of *Cort* should enable a Massachusetts employee fired for refusing to answer questions about his sexual orientation to sue for unjust dismissal, alleging that his discharge violated public policy protecting his privacy.

C. *Sexual Preference Discrimination Statutes as a Source of Policy*

In Wisconsin,²⁷² the District of Columbia,²⁷³ and a large number of municipalities' legislatures, including New York City, San Francisco, Berkeley, Detroit, Seattle, and Minneapolis, have enacted laws prohibiting discrimination on the basis of sexual orientation.²⁷⁴ Since these

268. MASS. GEN. LAWS ANN. Ch. 151 B, § 4(9) (1974).

269. MASS. GEN. LAWS ANN. Ch. 151 B, § 4(9A) (1974).

270. 385 Mass. 300, 306-307, 431 N.E.2d 908, 912 (1982).

271. 417 F.2d 1161 (D.C. Cir. 1969).

272. WIS. STAT. ANN. §§ 111.31, 111.32, 111.36 & 111.37 (West Supp. 1983-84).

273. D.C. CODE ENCYCL. § 6-2221 (West Supp. 1978-79).

274. See, e.g., Alfred, N.Y., Village Ordinance, art. II, Equal Rights and Opportunities (May 6, 1974); Ann Arbor, Mich., City Code tit. IX, ch. 112, §§ 9:151-9:153 (1972); Austin, Tex., Ordinance 75 9710-A (July 10, 1975); 306. Berkeley, Cal., Municipal Code ch. 13-28; Berkeley, Cal., Resolution No. 46, 148-N.S. (Oct. 30, 1973); Bloomington, Ind., Human Rights Ordinance 75-67 (Dec. 4, 1975); Boston, Mass., Mayor's Executive Order (April 12, 1976); Chapel Hill, N.C., Personnel Ordinance, art. IV (Sept. 16, 1975); Cupertino, Cal., Affirmative Action Plan, adopted pursuant to Resolution No. 3833 (Feb. 10, 1975); Detroit, Mich., City Charter, Declaration of Rights, ¶ 2 ch. 10, § 7-1004 (1974); East Lansing, Mich., City Code tit. I, ch. 4, §§ 1.124, 1.136, 1.127 (1973); Howard County, Md., County Council Legislative Bill No. 38 (Oct. 20, 1975); Los Angeles, Cal., Affirmative Action Program (May 10, 1976); Madison, Wis., City Code, Equal Opportunities Ordinance, § 3.23 (1975); Marshall, Minn., City Personnel Manual (1975); Minneapolis, Minn., Code of Ordinances, Civil Rights, ch. 945 (1975); Mountain View, Cal., Resolution No. 10435 (Mar. 31 1975); New York, N.Y., Municipal Code § 131-7.2; Palo Alto, Cal., Municipal Code §§ 2.22.05-22.070 (1974); Portland, Ore., Resolution No. 31510 (Dec. 18, 1974); San Francisco, Cal., Administra-

ordinances are of recent vintage, it is difficult to assess their importance in protecting the rights of homosexuals.²⁷⁵

Many of the ordinances were enacted in an effort to expand existing human rights laws by including sexual preference discrimination among the prohibited kinds of discrimination. Accordingly, the discrimination some states prohibit is subject to the same jurisdictional, procedural, and remedial limitations applicable to discrimination on the basis of race, religion, sex, age, national origin, or handicap. For example, anti-discrimination statutes often limit their coverage to employers employing a minimum number of workers and contain strict procedural requirements, such as a short statute of limitations or mandatory mediation and conciliation efforts.²⁷⁶ Since the remedies available under most human rights law evolve from the make-whole theory, ordinances prohibiting sexual preference discrimination usually limit recovery to equitable remedies such as back pay and reinstatement.²⁷⁷ Because of this limitation, many discharged homosexuals in jurisdictions prohibiting sexual orientation discrimination find themselves with an inadequate remedy. Moreover, the delay and inefficiency of pursuing an equitable remedy before an administrative agency will discourage them further. Since such plaintiffs often prefer a common law remedy, the issue whether the ordinances can also be the source of a policy exception inevitably arises.

tive Code ch. 128 (1972); San Francisco, Cal., Municipal Code art. 33, §§ 3301-3303, §§ 3306-3308 (1978); San Jose, Cal., Affirmative Action Hiring Policy Manual (1974); San Mateo County, Cal., Ordinance Code, Div. III, Pt. 4, ch. 1, §§ 3901 & 3905(e) (1975); Santa Barbara, Cal., Resolution No. 8166 (Dec. 30, 1975); Seattle, Wash., Fair Employment Practices Ordinance 102562 (Sept. 10, 1973); Sunnyvale, Cal., Memorandum No. 90.912 (Dec. 11, 1974); Yellow Springs, Ohio, Ordinance 75-20 (July 5, 1975). See NATIONAL GAY TASK FORCE, GAY RIGHTS PROTECTION IN THE UNITED STATES AND CANADA (1985).

275 For general discussions of these ordinances, see Meeker, Dombrink & Geis, *State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation*, 10 U. DAYTON L. REV. 745 (1985); Pearldaughter, *Employment Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 GOLDEN GATE U.L. REV. 537 (1979); Comment, *Challenging Sexual Preference Discrimination in Private Employment*, 41 OHIO ST. L.J. 501, 525-527 (1980).

276. See Title VII of Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e(b), 2000e-5; WIS. STAT. ANN. §§ 111.36, 111.39, 111.39(1); D.C. CODE ENCYCL. §§ 6-2221, 6-2284 (West Supp. 1978-79).

277. This contrasts with the public policy exception, which is normally a tort cause of action, entitling the plaintiff to compensatory and punitive damages. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); L. LARSEN, UNJUST DISMISSAL § 3.02 (1985).

The argument in favor views the statute not only as an express prohibition against sexual preference discrimination, but also as a declaration of policy. According to the argument, an appropriate legislative body had declared that employment discrimination based on sexual orientation is intolerable. For administrative reasons, however, it excluded adequate remedies and failed to expand the definition of sexual orientation to include matters of personal appearance or mannerisms. Nevertheless, such discrimination is equally contrary to declared policy and equally deserving of a remedy. Thus, courts should apply the policy exception to the employment-at-will rule. Gay rights litigants can make the same argument about the procedural and jurisdictional limitations of ordinances.²⁷⁸

Although no courts have addressed these issues, there is precedent for using discrimination statutes as the basis for a policy exception. In *Williamson v. Provident State Bank*,²⁷⁹ the employer bank demoted the plaintiff allegedly because a man working in her position would strengthen the company's image. Since the bank had less than fifteen (15) employees, the plaintiff could not sue under either Title VII or the applicable state fair employment practices law. Instead, she brought a common law action claiming that her discharge violated Maryland's policy against sex discrimination. The court held that although her at-will status exempted the plaintiff, she could use the state anti-discrimination law to establish Maryland policy that would support an exception to the employment-at-will rule.

There are strong arguments against the application of *Williamson* to ordinances prohibiting sexual orientation discrimination. Many courts have held that the statutory remedies created by state fair employment practice laws are exclusive, thereby precluding a common law wrongful

278. Logically, this argument also applies to the exclusion of sexual orientation discrimination from Title VII, which one could claim has the policy of forbidding all discrimination, not just the kinds specifically enumerated. Given the consistency with which courts have resisted any attempts to include homosexuals within the coverage of Title VII or state FEP laws, such an argument would probably be futile. See *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Smith v. Liberty Mutual Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978); *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 493, 595 P.2d 592, 611, 156 Cal. Rptr. 14, 25 (1979) (the California Fair Employment Act does not encompass sexual orientation discrimination).

279. 38 Fair Empl. Prac. Cas. (BNA) 1335 (Cir. Ct. Caroline Cty, Md., Dec. 11, 1981, published in 1986).

discharge action.²⁸⁰ Little authority exists on the issue of whether municipal fair employment practice laws create an exclusive remedy.²⁸¹ Some statutes, such as those in Berkeley and San Francisco, specifically allow a plaintiff to choose between an administrative remedy and a civil suit for damages.²⁸² In most cities, however, resolution of the issue necessitates interpretation or litigation. In New York City, for example, courts have yet to rule on this issue. The New York Human Rights Law, however, explicitly gives plaintiffs a choice between a civil action or the statutory remedy,²⁸³ and one might argue that the city by not providing to the contrary intended to give the same choice.

Opponents of the application of the *Williamson* reasoning to laws outlawing sexual preference discrimination will also argue that municipalities lack the power to enact them.²⁸⁴ In general, home rule cities possess those powers conferred upon them by the state, powers necessary to fulfill an express grant of power, and police power to legislate for the general welfare of the citizenry.²⁸⁵ Most gay rights ordinances

280. See, e.g., *Teale v. Sears Roebuck & Co.*, 66 Ill. 2d 1, 359 N.E.2d 473 (1976); *Johnson v. U.S. Steel Corp.*, 348 Mass. 168, 202 N.E.2d 816 (1964). The exclusivity rule applies when a plaintiff brings a common law action alone or coupled with a claim that a termination violates a FEP law. A few courts, however, have allowed remedies on both common law and statutory grounds. See *Chancellor v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982), cert. denied, 103 S. Ct. 113 (1983); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980).

281. Because of the availability of punitive compensatory damages, a plaintiff might want to bring a civil action for wrongful termination in conjunction with a statutory claim. When the pendant common law claim challenges the manner in which the discharge was made rather than the right of the employer to terminate, courts are more likely to allow it. L. LARSEN, *UNJUST DISMISSAL*, § 6.10[6] (1986). See *Craft v. Metromedia, Inc.*, 33 Fair Empl. Prac. Cases 153 (W.D. Mo. 1983). For example, a homosexual who is fired in an abusive manner in a jurisdiction prohibiting sexual orientation discrimination might combine his statutory claim with a cause of action for outrage or intentional infliction of emotional distress. Such claims have been successful when coupled with claims of sexual or racial harassment. See, e.g., *Stewart v. Thomas*, 538 F. Supp. 901 (D.D.C. 1982); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981); *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1973).

282. Berkeley, Cal., Municipal Code § 13.28.090(b)(2); San Francisco, Cal., Municipal Code § 3307(c)(2) (1978).

283. N.Y. EXEC. LAW § 297(9) (McKinney 1982).

284. See *SEXUAL ORIENTATION AND THE LAW* § 5.02[d] n.42 (R. Achtenburg, ed., 1985).

285. For a discussion of municipal law and the distinction between general law cities and charter cities, see 1 C. ANTEAU, *MUNICIPAL CORPORATION LAW* chs. III & IV (1978). For an in depth discussion of the powers of charter cities, see Sato, *Municipal Affairs in California*, 60 CALIF. L. REV. 1055 (1972).

can be justified as an exercise of police power.²⁸⁶ A home rule city may also legislate on municipal affairs, and gay rights ordinances can be justified on that basis.²⁸⁷ Numerous challenges to a municipality's power to pass anti-discrimination legislation have been litigated²⁸⁸ and full resolution of the issue depends on the intricacies of municipal law, a topic outside the scope of this article.

V. THE TORT EXCEPTION

A. *In General*

In addition to the tort of wrongful discharge based on public policy considerations, some commentators have advocated other tort causes of action to remedy unjust dismissals.²⁸⁹ Courts have considered the torts of abusive discharge based on employer malice or bad faith,²⁹⁰ intentional interference with contract,²⁹¹ fraud,²⁹² negligence,²⁹³ inter-

286. See, e.g., Berkeley, Cal., Municipal Code § 13.28 (1978); Madison, Wis., City Code, Equal Opportunities Ordinance, § 3.23(1) (1975); Minneapolis, Minn., Code of Ordinances, Civil Rights, § 945.010(a) (1975); Seattle, Wash., Fair Employment Practices Ordinances 102562, § 2 (Sept. 10, 1973).

287. Pearldaughter, *Employment Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 GOLDEN GATE U.L. REV. 537, 544-545 (1978).

288. See *City of Santa Clara v. Von Raesfeld*, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970); *People ex rel. Public Util. Comm'n v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952). Cf. *Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 30 Ohio Ops. 2d 491, 205 N.E.2d 363 (1965) (city's determination that an anti-discrimination ordinance met community need was not clearly erroneous).

289. E.g., *Blades*, *supra* note 49 at 1427. See also *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Mongee v. Bebee Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), modified by *Howard v. Don Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980).

Professor Blades favored a tort cause of action because he believed the availability of punitive damages would deter employers from unjustly discharging employees. *Blades*, *supra* note 49 at 1427. For a detailed discussion of the tort exception see L. LARSEN, UNJUST DISMISSAL §§ 4.01-4.10 (1985).

290. E.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (applying Pa. law); *Cloutier v. Great A. & P. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981).

291. Most courts agree that an employee at-will cannot recover on this theory. E.g., *Cote v. Burroughs Welcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982) (applying Virginia and North Carolina law); *Porcelli v. Joseph Schlitz Brewing Co.*, 397 F. Supp. 889 (E.D. Wis. 1975) (applying Wis. law), *aff'd*, 530 F.2d 980 (7th Cir. 1976); *Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division*, 281 Pa. Super. Ct. 560, 422 A.2d 611 (1980); *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 259 S.E.2d 814 (1979); *Threlkeld v. Christoph*, 312 S.E.2d 14 (S.C. App. 1984).

292. E.g., *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123 (10th Cir. 1953) (applying New Mexico law); *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983); *Harrison v. Fred S. James, P.A.*, 558 F. Supp. 438 (E.D. Pa. 1983); *Hamlen v. Fairchilds*

ference with the right to fair procedure,²⁹⁴ and the prima facie tort.²⁹⁵ Despite the early enthusiasm of commentators, courts have been reluctant to adopt these causes of action.²⁹⁶ There are also a number of independent torts which may be committed by an employer against an employee. They include the torts of invasion of privacy, defamation, interference with contractual relations, the infliction of emotional distress, and assault and battery.²⁹⁷ Since these torts are premised on a duty owed by members of society generally, rather than on a duty owed by an employer to his employees, detailed discussion of them is outside the scope of this paper. It should be noted, however, that few plaintiff-employees have recovered on these theories.

B. *Intentional Infliction of Emotional Distress*

Some at-will employees have successfully asserted causes of action against their former employees for the intentional infliction of emo-

Industries, Inc., 413 So. 2d 800 (Fla. App. 1982); *Sea-Land Services, Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982). *But see Silver v. Mohasco Corp.*, 94 A.D.2d 280, 462 N.Y.S.2d 163 (1983), *aff'd*, 62 N.Y.2d 741, 465 N.E.2d 361, 476 N.Y.S.2d 822 (1984); *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 460 N.Y.S.2d 552 (1983).

293. Two of the few courts considering this theory of recovery have rejected it. *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964), *cert. denied*, 379 U.S. 914 (1964); *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982). Michigan, however, has recognized that an employer undertaking an affirmative duty towards an employee must perform the duty with reasonable care. *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mo. 1982) (applying Michigan law); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981).

294. *See Ezekial v. Winkley*, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977). The right of fair procedure, which is similar to the federal constitutional right of due process is recognized only in California. For a discussion of due process in the employment context, see *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

295. A prima facie tort is the performance of a lawful act intended to inflict harm without justification. *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904). This theory of recovery is not available to discharged at-will employees either because jurisdictions do not recognize the tort at all or refuse to recognize it in the employment context. *See Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234 (S.D.N.Y. 1979) (applying Texas law); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 293, 461 N.Y.S.2d 232 (1983); *Ness v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). *But see Lundberg v. Prudential Insurance Co.*, 661 S.W.2d 667 (Mo. App. 1983).

296. *See L. LARSEN, UNJUST DISMISSAL* §§ 4.02[3], 4.05, 4.04, 4.10[1][3]; *SEXUAL ORIENTATION AND THE LAW* § 5.03[3][a]-[e].

297. *See Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985); *SEXUAL ORIENTATION AND THE LAW* § 5.03[a]-[3] (R. Achtenberg ed. 1985). *See generally W. KEETON & W. PROSSER, THE LAW OF TORTS*, §§ 117, 111-116A, 129 (5th ed. 1984).

tional distress after being discharged in an extreme and outrageous manner.²⁹⁸ The tort is a general one, not confined to the employment context, and, as such, is not strictly speaking part of the emerging law of unjust dismissal.²⁹⁹ The Restatement of Torts 2nd, Section 46, provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and, if bodily harm to the other results from it, for such bodily harm."³⁰⁰ The issue in most cases is whether the conduct of the tortfeasor is "extreme and outrageous," defined as conduct "so outrageous and extreme as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."³⁰¹

In the employment context, courts have been reluctant to find an employer's conduct in discharging an employee to be extreme and outrageous.³⁰² One line of cases, however, may be applicable to homosexuals.³⁰³ In *Alcorn v. Anbro Engineering, Inc.*³⁰⁴ the discharge of a

298. *Agis v. Howard Johnson*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); see *Novosell v. Sears Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980). *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (1983); *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776 (D. Colo. 1982); *Richey v. American Automobile Assn., Inc.*, 380 Mass. 835, 406 N.E.2d 675 (1980). See also *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 75 Ohio Ops. 2d 791, 348 N.E.2d 144 (1976).

299. See generally W. KEETON & W. PROSSER, *THE LAW OF TORTS* § 12 (5th ed. 1984).

300. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

301. *Id.* at § 46 comment d.

302. The termination of employment will not alone constitute extreme or outrageous conduct. *Smith v. Montgomery Ward & Co., Inc.*, 567 F. Supp. 1331 (D. Colo. 1983); *Carrillo v. Illinois Bell Telephone Co.*, 538 F. Supp. 793 (N.D. Ill. 1982); *Meyer v. C&H Sugar Co.*, 20 E.P.D. ¶ 30, 152 (N.D. Cal. 1979), *aff'd*, 622 F.2d 637 (9th Cir. 1981); *Novosell v. Sears Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Magruder v. Selling Areas Marketing, Inc.*, 439 F. Supp. 1155 (N.D. Ill. 1977); *Dowling v. Blue Cross of Florida, Inc.*, 338 So. 2d 88 (Fla. 1976). Nor will it be sufficient for plaintiff to show that he or she was treated unfairly. *Cutilli v. GAF Corp.*, 531 F. Supp. 71 (E.D. Pa. 1982); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977); *Paris v. Division of State Compensation Ins. Fund*, 517 P.2d 1353 (Colo. 1973).

303. See generally *Montgomery, Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879 (1980); Annotation, *Liability of Employer, Supervisor or Manager for Intentionally or Recklessly Causing Employee Emotional Distress*, 86 ALR 3d 454 (1978).

304. 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970). *Accord* *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Penn. 1983); *Agarwal v. Johnson*, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 65 P.2d 1173 (1977).

black employee was accompanied by loud and humiliating racist epithets by his white supervisor, who was aware of the employee's special sensitivity to racial discrimination. The California Supreme Court held that a trier of fact could reasonably conclude that the supervisor's conduct was "extreme and outrageous." Although no case has addressed the issue, the reasoning of *Alcorn* applies to the discharge of a homosexual accompanied by anti-homosexual slurs and other verbal abuse. In *Moye v. Gary*,³⁰⁵ however, the plaintiff's supervisor called an apparently heterosexual plaintiff a "fag" and a "poor woman." The court refused to find that the employer's abuse was outrageous or extreme.

VI. CONCLUSION

Over the past fifteen years the emerging law of unjust dismissal has created substantial protection for many employees against the injustice of the employment-at-will rule. This article examined the rights of the homosexual employee within the context of this development and showed that some protection is now available.³⁰⁶ A wrongfully discharged homosexual can sue in all jurisdictions recognizing the public policy exception. Homosexual plaintiffs in California also have a cause of action based on the contract exception to the employment-at-will rule, and in the future this exception will probably be accepted in other jurisdictions. It is not unreasonable to predict that in the near future many state courts will use either the implied-in-law or the implied-in-fact contract theory to make it impossible for an employer to fire an employee without just cause. Homosexuals as well as other employees will benefit because in most instances mere homosexuality does not interfere with the person's job performance.

The world has changed a great deal since Whitman wrote "I Sit and Look Out," and legal change has helped ameliorate the condition of

305. 595 F. Supp. 738 (S.D.N.Y. 1984).

306. Plaintiffs have, in fact, already begun to plead the grounds of recovery investigated in this article. See, e.g., *Madsen v. Trustees, Christian Science Publishing Co.*, No. 58-574 (Super. Ct. Suffolk Cty. Mass. Dec. 1, 1982) (breach of contract and violation of public policy), *aff'd in part, rev'd in part sub nom.*, *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985); *Rueman v. Advanced Underwriters Insurance Agency, Inc.*, No. 84-415382 (Cir. Ct. Mich. May 31, 1984) (breach of contract and violation of public policy); *Satori v. Society of American Military Engineers*, No. 9008 (Cir. Ct. Alexandria, Va. June 6, 1984) (wrongful discharge in tort and contract). These cases are discussed at length in Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties. Part I*, 10 U. DAYTON L. REV. 459, 471-476 (1985). However, since the discussions are based largely on the pleadings, they are of value primarily because they show the theories of recovery and the kinds of arguments that can be used.

laborers, the poor, and blacks. But the nature of injustice remains the same, and it is just as wrong to fire a competent employee today merely because he or she is a homosexual as it was to fire a poor man or a Black without cause in Whitman's day. It is ironic that Walt Whitman ended his poem with the lines, "All these—all the meanness and agony without end I sitting/look out upon,/ see, hear, and am silent,"³⁰⁷ for by recognizing and recording injustice, he laid the foundation for change.*

307. THE TREASURY OF AMERICAN POETRY 263 (N. Sullivan ed. 1978).

* Editors' Note

Gay activists gained a significant victory against sex based employment discrimination with the 9th Circuit decision in *Watkins v. U.S. Army*, 85-4006. The 9th Circuit held that the federal government cannot bar persons from the armed services solely because of their sexual preference. National Law Journal, Feb. 22, 1988, at 8. The 9th Circuit found that an existing Army regulation that required homosexuals to be summarily discharged violated the equal protection clause. *Id.* The court found that homosexuals constitute a "suspect class" entitled to special protection from the judiciary. *Id.* Homosexual rights advocates believe that the broadly written opinion affords anti-discrimination protection throughout government. *Id.*