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Employment and Labor Law

Patrick J. Cihon James Ottavio Castagnera

9E

Employment and Labor Law

Ninth Edition

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PREFACE

Nearly 30 years ago, when we first undertook the writing of an employment and labor law textbook, we had no notion that our creative effort would carve itself such a long-lasting niche in higher education. Clearly, however, the release of this ninth edition, as well as accolades like those below, confirm that *Employment and Labor Law* is now firmly established. Lest this sound as if we were resting on our laurels, allow us to hastily add that this new edition has been significantly revised and updated. A source of particular pride is Part One, expressly intended to bring our "old standard" firmly into the employment and labor firmament of the 21st century. Three issues of critical importance in the new millennium—privacy, globalization, and immigration—are treated specifically and in-depth. Additionally, numerous new cases, case problems, hypotheticals, and The Working Law features ensure that every chapter of this new volume is on the cutting edge of the topic it covers.

> I have practiced labor and employment law for over twenty years and I think this is the best text for a basic labor and employment law class…. It's simple to read and straightforward. I tell my students to keep the book and not sell it because it is quite helpful for the basic questions they will be asked in the work world.
>
> Maris Stella (Star) Swift
> *Grand Valley State University*

> The text is well laid-out, and is written in language that is appropriate for the students; there is no reason for the students to not read the text. The questions that follow the edited cases help to focus the student's analysis of the case in question, its relevance to the topic, and introduce the student to legal concepts and outcomes they tend to neglect or may not fully understand….
>
> Curt M. Weber
> *University of Wisconsin—Whitewater*

> [*Employment and Labor Law* has an] excellent balance of in-depth case-law readings, related ethical considerations, Internet resources and foundational materials for the non-lawyer audience.
>
> Susan F. Alevas
> *New York University*

Hallmark Features

In the constantly changing, often controversial areas of employment and labor law, the ninth edition of *Employment and Labor Law* provides current information in a way that highlights critical thinking, ethical decision-making, and relevance to the business world. The unique hallmark features of this text that have been retained include the following.

Current and Balanced Coverage

This text offers a comprehensive balance of both employment law and labor law topics and includes up-to-date information. This edition specifically examines the revolutionary changes being wrought by the Obama administration with regard to who is an employee under the National Labor Relations Act (NCAA Division I athletes) and the Fair Labor Standards Act, and by the United States Supreme Court (a corporation can hold religious beliefs that trump the Affordable Care Act per the First Amendment). Expanded employee rights under Obamacare, the Family and Medical Leave Act, and the Supreme Court's same-sex-marriage decisions are fully delineated, while the EEOC's challenge to corporate wellness programs is also described.

Readability

In no other area of the law are nonlawyer professionals exposed to such legal regulation, and in no other area do they experience the need for "lawyer-like" skills to the extent that human resources directors and industrial relations specialists do. This book is therefore written to help business and management students, not necessarily lawyers. The straightforward writing style clarifies complex concepts, while pedagogical features help readers develop the legal reasoning and analysis skills that are vital for success in the business world.

The Working Law

Connecting legal concepts and cases to our everyday environment, The Working Law features highlight the relevancy of the law while sparking student interest and bringing concepts to life. Cutting-edge topics like emotional distress via social networking websites and increasing age discrimination claims in today's tough economy, as well as controversial discussions about sweatshops and the landmark Affordable Care Act, are just a few of those considered in this edition.

Ethical Dilemma

What is the extent of global corporate social responsibility? Can employers use genetic information in hiring decisions? What are the boundaries regarding religion and harassment in the workplace? Questions like these, presented in the Ethical Dilemma features in each chapter, address the increasing need for ethical behavior in decision-making. These features can be used to encourage debates in class or as assignments that consider the differences between what is legal and what is ethical.

Guide to Briefing Cases

Students will find the Guide to Briefing Cases to be a valuable reference. It gives a quick overview of how to read a case citation and outlines what information to provide in a brief. While offering an excellent refresher for students who have already taken legal environment or business law courses, it also gives students with no previous legal background an introduction to the basics of case analysis.

Case Treatment

Many new summarized cases, in which the authors outline the facts, issue, and decision of a real case in their own words, have been added to provide more case illustrations that are concise and student-friendly. However, as learning to interpret cases in the language of the court is crucial in developing analytical and critical thinking skills, half of the cases in the text remain excerpted in the words of the courts. These case extracts have been crisply edited to focus attention on the relevant concept, while including occasional dissents and/or concurring opinions, which allow the reader to experience the fact that law develops from the resolution—or at least the accommodation—of differing views. These two different types of case treatment allow for flexibility in approach and depth of coverage.

Concept Summaries

Concept Summaries throughout each chapter reinforce the legal concepts illustrated in applicable sections and provide students with a quick outline to ensure that they understand what they have read.

Key Terms

To help students master the specialized legal terminology and easily identify integral ideas, a Key Terms section is included at the end of each chapter. Page references direct students back to the relevant chapter content and marginal definitions.

End-of-Chapter Problem Types

Each chapter contains five short-answer questions regarding basic chapter comprehension, ten case problems based on real cases, and five hypothetical scenarios to provide students an opportunity to critically analyze real-life situations without a case citation reference. This versatility in the end-of-chapter assignments offers instructors a variety of ways in which to engage students and measure comprehension.

Recent Coverage

The ninth edition of *Employment and Labor Law* includes recent and up-to-date coverage on many topics. Some of the highlights of this edition include the following:

- **Chapter 1:** This cutting-edge chapter provides a broad overview of the employment and labor law landscape covered in the subsequent chapters. Gilbert and Sullivan notwithstanding, the law is not a seamless web. However, the American mosaic of employment

and labor laws does present a public-policy picture, which ought to be perceived and considered before embarking on in-depth considerations of its many and diverse pieces.

- **Chapter 4:** Perhaps no issue is of greater concern to employees—after compensation and benefits—than personal privacy in this so-called Information Age. From the possibility of genetic testing for latent medical defects to the ability to monitor our email, our Internet usage, indeed our every move, privacy rights are in jeopardy, while litigation nonetheless increases. Sure to encourage lively debates, this chapter brings privacy issues to the forefront.
- **Chapter 5:** "The world is flat," to quote *New York Times* columnist Thomas Friedman. Employers and employees alike compete against their counterparts in other regions of the globe. No longer is it enough for students of employment and labor law to grasp the major tenets of American statutory and common law. Furthermore, in a 21st-century society that has moved way beyond America's traditional melting pot, knowledge of the rules and regulations applying to immigrants, international students, and foreign workers is critical. This chapter explores these issues.
- **Chapter 7:** This chapter includes coverage of the Patient Protection and Affordable Care Act's provisions regarding nursing mothers, and the Working Law feature updates the legal protections for transgendered persons. Also covered is the Supreme Court's 2014 *Hobby Lobby* decision, according First-Amendment religious freedom to closely held corporations.
- **Chapter 8:** The case of *Lewis v. City of Chicago*, the most recent Supreme Court decision regarding disparate impact discrimination, is included.
- **Chapter 9:** The Supreme Court's decision in *Gross v. FBL Financial Services* is covered.
- **Chapter 10:** A case discussing the Genetic Information Nondiscrimination Act (GINA) and a more detailed discussion of the EEOC's definition of "medical exams and tests" under the ADA are included in this chapter. The EEOC's ADA-based challenge to corporate wellness programs is likewise covered.
- **Chapter 11:** This chapter includes a discussion of the impact of the repeal of the "Don't Ask, Don't Tell" policy.
- **Chapter 14:** An expanded discussion of the recent NLRB decisions regarding employer restrictions on employees' use of social media and the employee status of NCAA Division I football players is included, and the Working Law feature covers the NLRB unfair practice complaint against Boeing for moving production lines to South Carolina. The board's 2015 "quickie election" rules also are discussed.
- **Chapter 16:** A case addressing the legality of the NFL lockout of its players in 2011 is included in this chapter.
- **Chapter 17:** This chapter discusses the recent changes in the NLRB policy of whether to defer to arbitration on unfair labor practice complaints.
- **Chapter 18:** The chapter includes a discussion of employers' obligations to post information regarding employee rights under Executive Order 13496, as well as President Obama's controversial executive orders regarding fair pay for female workers and nondiscrimination protection for LGBT employees.

- **Chapter 19:** View significant labor law issues in an everyday, easy-to-relate-to setting with this chapter's updated material on national security and collective bargaining rights for federal employees and TSA airport screens. This chapter has expanded information on the National Security Personnel System, political action committees, the TSA, and current related cases.
- **Chapter 21:** Following market preferences, this chapter combines content on ERISA with that of employee welfare programs like social security, workers' compensation, and unemployment compensation.

Instructor Resources

Instructor's Manual

The Instructor's Manual provides an overview of the chapter, a lecture outline with page references, case synopses for each excerpted case, answers to the case questions, and answers to the end-of-chapter questions, case problems, and hypothetical scenarios.

Test Bank

The Test Bank includes true/false, multiple choice, short answer, and essay questions ready to use for creating tests. The Test Bank is available through Cognero.

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

- author, edit, and manage test bank content from multiple Cengage Learning solutions
- create multiple test versions in an instant
- deliver tests from your LMS, your classroom or wherever you want

PowerPoint® Slides

PowerPoint® slides offer a basic chapter outline to accompany class lecture. They also highlight the key learning objectives in each chapter—including slides summarizing each legal case and each The Working Law and Ethical Dilemma feature.

Textbook Companion Website

The companion website for this edition of Employment and Labor Law provides access to the Instructor's Manual, Test Bank, and PowerPoint® slides. The website also offers links to the following: a number of important employment and labor law statutes, important labor and employment law sites, labor and employment law blogs, legal forms and documents, free legal research sites (comprehensive and circuit-specific), help in the classroom, labor and employment law directories, departments, agencies, associations, and organizations.

Acknowledgments

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We also would like to thank all those who have contributed to the preparation and production of this ninth edition. In particular, we wish to acknowledge the contribution and assistance of our editors at Cengage Learning: Product Director Mike Worls, Associate Product Manager Tara Singer, Marketing Manager Katie Jergens, Associate Program Manager Divya Divakaran, and Content Developer Sarah Blasco for her guidance and insights during the revision of this edition.

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Troy University

Janette C. Waterhouse
University of Iowa

Curt M. Weber
University of Wisconsin—Whitewater

Kelly Collins Woodford
University of South Alabama.

Lastly, the authors wish to rededicate the book to the memory of their parents, John E. and Marian M. Cihon and James Ottavio and Catherine L. Castagnera.

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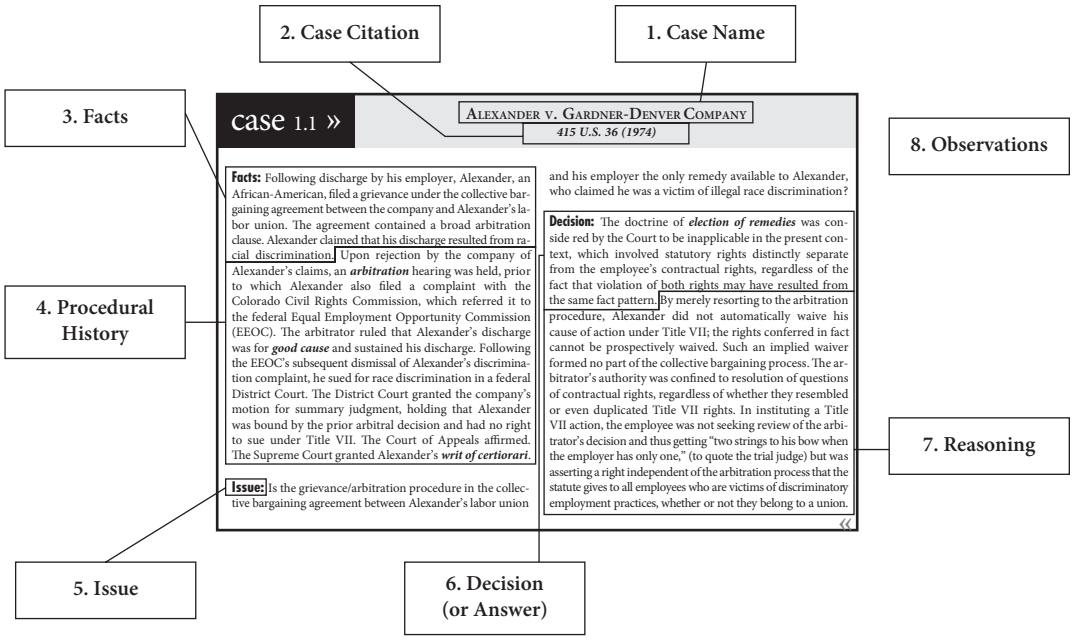
GUIDE TO BRIEFING CASES

Reading and understandings cases is required in order to understand and analyze the legal decisions forming the basis of the law. A case is a bit like a parable or a fable. It presents a set of facts and events that led two opposing parties into a conflict requiring resolution by a court or agency. The judge or adjudicator is guided by legal principles developed from statutes or prior cases in the resolution of the dispute. There may be competing legal principles that must be reconciled or accommodated. The case is a self-contained record of the resolution of the dispute between the parties, but it is also an incremental step in the process of developing legal principles for resolution of future disputes.

It is the legal principles—their reconciliation and development—and the reasoning process involved that justify the inclusion of the cases we have selected. The critical task of the reader, therefore, is to sift through the facts of a case and to identify the legal principles underlying that case. In analyzing a case you may find it helpful to ask, after reading the case, "Why was this particular case included at this point in the chapter? What does this case add to the textual material immediately preceding it?"

In analyzing the cases, especially the longer ones, you may find it helpful to "brief" them. Case briefing is a highly useful corollary to efficient legal research. A case brief is nothing more than a specialized outline. As such, a brief summarizes the main feature of a court opinion. A group of briefs, accurately and lucidly constructed, often forms the bridge between the relevant decisions identified by a lawyer's research, on one hand, and the memorandum of law, which is his or her final work product, on the other. The following template should prove useful in outlining the case excerpts published in this textbook.

How to Brief a Case



1. **Case Name:** The case name need not include a complete list of all the plaintiffs and defendants, where multiple parties were involved. Typically, a decision is identified by the last name of the first-named plaintiff and the last name of the first-named defendant. Organizations which are parties should be identified by their full names, except that terms such as "Corporation" may be abbreviated, for instance as "Corp."

   For the *Alexander* case presented here, the case name would be *Alexander v. Gardner-Denver Company.*

2. **Case Citation:** Published decisions are identified by the reporters in which they are published. Typical citations begin with the volume number, followed by the name of the reporter, and then the page number where the case begins. Following this information will be the date of the decision in parentheses.

   For example, in the *Alexander v. Gardner-Denver Company* case, the citation is 415 U.S. 36 (1974). This tells the reader that the case appears in volume 415 of the official Supreme Court reporter, starting on page 36, and that the Court announced this decision in 1974.

   Citations come in a dizzying variety of forms. They all have one thing in common: A proper citation provides sufficient information for the reader to know the precise place where the full text can be located, the court which issued the decision, and the date it was announced. The "Bible" of case citations is *The Bluebook: A Uniform System of Citation*, published by the editors of the *Harvard Law Review.* It is now available online at https://www.legalbluebook.com.

3. **Facts:** Here a concise summary of the main facts of the case are presented in no more than a couple of paragraphs. Only facts relevant and material to the court's decision should be included.

   In the *Alexander* case, the full legal case has been summarized into relevant facts for you already.

4. **Procedural History:** In a sentence or two the briefer presents an explanation of how the case made its way to the appeals court in which it is now under consideration.

   In the *Alexander* case, the history has been summarized for you already.

5. **Issue:** A critical portion of the brief, this section identifies the precise question that *this* court is being asked to answer. The issue is usually expressed in the form of a question. That question seldom is the ultimate question in the underlying case, such as whether the defendant in a criminal case is guilty, or whether the plaintiff in a civil suit is entitled to damages. Rather the issue before the appellate court is usually a more narrow legal point that is an essential step toward enabling the trial judge or jury to reach a correct decision on the ultimate issues of the lawsuit. The issue on appeal is almost always a question of law, not fact.

   For example, in *Alexander v. Gardner Denver Company*, the U.S. Supreme Court was required to tell the lower federal courts whether a union member (Alexander) was required to submit his discrimination case to a labor arbitrator exclusively or whether he could also pursue his rights under the federal antidiscrimination statutes. The Court was not asked to decide the ultimate issue of whether or not the plaintiff had meritorious discrimination claim.

6. **Decision (or Answer):** Here, in a very few words, the briefer records how the court answered the question that was posed to it.

7. **Reasoning:** The analysis underlying the court's decision should be summarized here. As with the "Facts," this analysis should be no more than a couple of paragraphs in length.

8. **Observations:** This optional section is where the briefer may choose to add his or her own reaction to the court's opinion, some notes on decisions which closely agree or sharply disagree with the outcome of the case, or any other observations that he or she thinks may be useful when it comes time to write the research paper, memorandum of law, or other work product at the end of this research product.

PART 1

COMMON-LAW EMPLOYMENT ISSUES

CHAPTER 1

First the Forest, Then the Trees: An Overview of Employment and Labor Law

Employment and labor are, arguably, as old as recorded history. In the New Testament's parable of the laborers in the vineyard, we find those workers who began picking grapes at dawn complaining to the owner because those he hired at noon received the exact same wage as they got. "What business is it of yours, if I choose to be generous?" he inquires rhetorically.

The parable is a rare recorded case of employer largesse. More often workers' complaints have involved too little pay, lack of benefits, unreasonably long hours, or unsafe workplace conditions. When such complaints have typically been addressed, it was by the workers themselves or the government.

For example, in the Middle Ages—when many Europeans believed the earth was flat—craftsmen formed guilds according to their respective trades. But by the 14th century, as one famous historian has explained, "Once united by a common craft, the guild masters, journeymen, and apprentices had spread apart into entrepreneurs and hired hands divided by class hatred. The guild was now a corporation in which the workers had no voice."[1] Dissatisfaction led to working-class revolts, which in turn resulted in brutal reprisals by the upper classes.[2]

employment-at-will
both the employee and the employer are free to unilaterally terminate the relationship at any time and for any legally permissible reason, or for no reason at all

common law
judge-made law, as opposed to statutes and ordinances enacted by legislative bodies

The Black Death, a plague that first decimated Europe's population in the mid-14th century, actually benefited those workers who survived. The labor shortage encouraged demands for higher wages and better conditions. Rulers' responses were swift and severe. In 1339, Britain's king issued a proclamation that required everyone to accept the same wages that they had received two years earlier. The new labor law also established stiff penalties for refusing to work, for leaving a job in search of higher pay, and for an offer of higher wages by an employer. Parliament reissued the proclamation as the Statute of Laborers in 1351, not only denouncing workers who had the temerity to demand higher wages, but especially decrying those who chose "rather to beg in idleness than to earn their bread in labor."[3]

The Industrial Revolution in 19th-century England and America witnessed the rise of the **employment-at-will** doctrine in the **common law**. At-will employment—covered in depth in Chapter 2—meant, in theory, that either the employer or the worker could terminate their

[1] Barbara W. Tuchman, *A Distant Mirror: The Calamitous 14th Century* (New York: Alfred A. Knopf, 1978), p. 39.

[2] *Ibid.*, pp. 383–91.

[3] *Ibid.*, pp. 125–26.

relationship at any time for any reason. In reality, the employers had all the bargaining power; real negotiation of terms and conditions of employment was, for the most part, a myth.

To put the relationship more nearly into balance, workers banded together into labor unions. The reaction of the American judiciary, drawn almost exclusively from the upper, propertied class, was negative. Early court cases concluded that labor organizations were criminal conspiracies.[4]

Labor, however, persisted. The unions' first breakthrough came in 1842, when the Supreme Judicial Court of Massachusetts held that unionized workers could be indicted only if either their means or their ends were illegal, and that the "tendency" of organized labor to diminish the employer's gains and profits was not in itself a crime.[5] Progress was slow but more or less steady thereafter, highlighted by such federal legislation as the Federal Employers Liability Act (1908) and the Railway Labor Act (1926), which allowed for alternative methods of dispute resolution, first in the railroad, and later in the airline industry.

1-1 The New Deal and the Rise of the Modern American Union

Still, nearly a century would elapse before the Great Depression and the subsequent New Deal of President Franklin D. Roosevelt resulted in the enactment of the major federal employment and labor laws, which govern the fundamental features of the employment relationship and unionization to this very day. These statutes include:

- The Social Security Act (1935), which provides modest pensions to retired workers
- The National Labor Relations Act (1935) (NLRA), which sets the ground rules for the give and take between labor unions and corporate managers
- The Walsh-Healy Act (1936), the first of several statutes to set the terms and conditions of employment to be provided by government contractors
- The Merchant Marine (Jones) Act (1936), which provides remedies for injured sailors
- The Fair Labor Standards Act (1938), which sets minimum wages, mandates overtime pay, and regulates child labor

Before these statutes could revolutionize the American workplace, FDR's New Deal had to survive constitutional challenge in the Supreme Court. In the early years of Roosevelt's presidency (1933–1936) the justices repeatedly refused to enforce New Deal legislation, consistently declaring the new laws unconstitutional. Only after FDR threatened to "pack" the court with new appointments from the ranks of his New Deal Democrats did the high court reverse course and declare a piece of labor legislation to be constitutionally legitimate.

In *West Coast Hotel Company v. Parrish*,[6] the challenged law was actually a state statute. Elsie Parrish, a chambermaid working at the Cascadian Hotel in Wenatchee, Washington (owned by the West Coast Hotel Company), sued her employer for the difference between what she was being paid and the $14.50 per 48-hour work week mandated by the state's Industrial Welfare Committee and the Supervisor of Women in Industry, pursuant to a state

[4] See, e.g., *Commonwealth v. Pullis*, 3 Commons & Gilmore (Philadelphia Mayor's Court 1806).

[5] *Commonwealth v. Hunt*, 44 Mass. (4 Met.) 111 (1842).

[6] 300 U.S. 379 (1937).

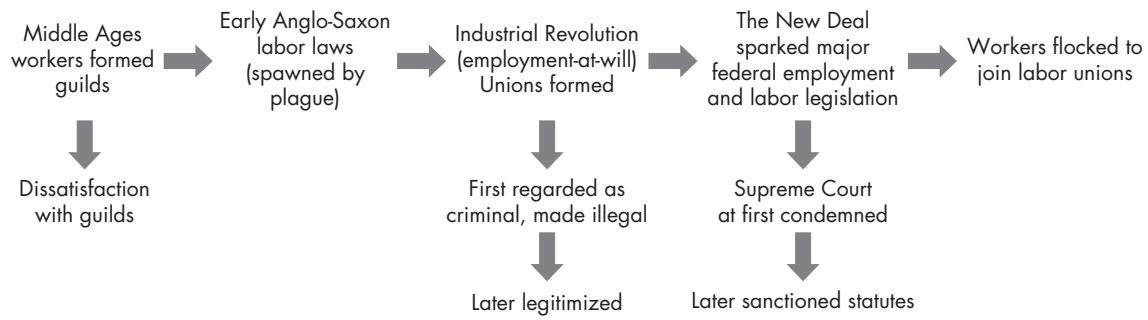
law. The trial court held for the defendant. The Washington Supreme Court, taking the case on a direct appeal, reversed the trial court and found in favor of Mrs. Parrish. The hotel appealed to the U.S. Supreme Court. In a decision that clever pundits labeled "the switch in time that saved the nine" (because it forestalled the president's court-packing plan), the justices asked, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"

The Court majority answered those questions by stating that the legislature of the state was clearly entitled to consider the situation of women in employment, that they were in the class receiving the least pay, that their bargaining power was relatively weak, and that they were the ready victims of those who would take advantage of their necessitous circumstances. Furthermore, continued the Court, the legislature was entitled to adopt measures to reduce the evils of what was known as "the sweating system," which referred to the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living. Deferring to the judgment of the state lawmakers, the Court majority conceded that the legislature had the right to consider that its minimum wage requirements would be an important component of its policy of protecting these highly vulnerable workers. The opinion pointed to the prevalence of similar laws in a growing number of states as evidence of a broadening national consensus that (1) sweatshops were evil and (2) these kinds of laws significantly contributed to their eradication.

While this ruling was directly applicable only to state minimum wage laws—and arguably, only to such statutes as they applied to women—the broader impact was essentially to sweep away judicial opposition to the flood of legislation at both federal and state levels, which was overwhelmingly favorable to workers and their labor organizations. One result was a rush by workers to join labor unions, which organized with legal impunity. Corporations that resisted were charged with unfair labor practices under the NLRA—covered in depth in Part 3—and compelled by the National Labor Relations Board (NLRB) to recognize and bargain with organized labor.

Concept *Summary* 1.1

Labor Disputes Are as Old as Recorded History



1-2 The Post-War Decline of Organized Labor

Several significant issues and trends combined to cause the gradual decline of organized labor in America from its peak in the 1950s, when one in three private-sector employees belonged to a union, to only about seven out of every 100 eligible private-sector workers being unionized in 2010.[7]

Several factors contributed to this precipitous decline. First, many policy makers, especially in the conservative camp, became concerned about labor leaders' abuse of power. One of the worst examples occurred when John L. Lewis, president of the United Mine Workers, violated a "gentlemen's agreement" with the Roosevelt administration during World War II. Sullivan called a strike at the height of the war, making his miners look unpatriotic and selfish in the public eye. Critics, especially politicians aligned with "Big Business," believed the combined American Federation of Labor/Congress of Industrial Organizations (AFL-CIO) had grown to be far too potent. The upshot in 1947 was the Taft-Hartley Act, a federal statute that enacted unfair labor practices for which unions might be punished, such as coercing workers to join against their will.

As the Cold War developed between the U.S. and the U.S.S.R., perceived communist influences in some large and powerful unions, notably the International Longshoremen's Association, placed organized labor in the gun sights of such so-called Red Hunters as the infamous Senator Joseph McCarthy. Similarly, alleged organized-crime ties of other huge unions, especially Jimmy Hoffa's Teamsters, attracted the attention of politicians, ranging from Senator Estes Kefauver in the 1950s to Attorney General Robert F. Kennedy in the early 1960s.

globalization
the integration of national economies into a worldwide economy, due to trade, investment, migration, and information technology

Most destructive of all to organized labor, however, has been **globalization**. American industry's stranglehold on major manufacturing sectors, such as autos and steel, was successfully challenged immediately after World War II—first by a reconstructed Japan, then subsequently by many other Asian and European competitors. The manufacturing sector was the bedrock of unionism. When it declined, organized labor inevitably followed. As in the Middle Ages, the earth is once again flat.[8]

individual employee rights
rights enjoyed by workers as individuals, as against collective rights secured by unionization; sources are statutes and court decisions

Meanwhile, among the many political and social trends of the 1960s was the rise of **individual employee rights**. Leading the way was the Civil Rights Act of 1964. Title VII[9]—covered in detail in Part 2—declared employment discrimination illegal if based on race, sex, religion, or any of several other "protected categories." Other laws and court decisions followed in relatively quick succession, seemingly in inverse proportion to the steady decline of collective bargaining under the auspices of organized labor. Other major examples of individual employee rights laws and legal concepts include the Age Discrimination in Employment Act (1967) and the generalized recognition of theories of wrongful discharge (see Chapter 2) and related employment-related torts (see Chapter 3) in American common law.

These new laws and common-law legal theories have often supplanted labor unions as the main source of legal protection for American workers. In fact, sometimes they actually have conflicted with the legal remedies available to workers under

[7] Jerry White, "US trade union membership at lowest level in more than a century," *World Socialist Web Site*, February 3, 2010, available at http://www.wsws.org/en/articles/2010/02/unio-f03.html.

[8] See Thomas L. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Strauss and Giroux, 2005).

[9] 42 U.S.C. Sec. 2000e *et seq.*

collective bargaining agreements. For example, under Title VII, an employee alleging illegal discrimination has the right to file a complaint with the Equal Employment Opportunity Commission (EEOC). If he or she is a union member, that same employee has not only a right but an obligation to pursue any such wrong as a grievance under the collective agreement with his or her employer, apparently as the exclusive remedy.

In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), the Supreme Court was called upon to reconcile this clash between individual and collective worker rights within a decade of Title VII's enactment. The employer wanted to limit the aggrieved employee's remedy to the grievance/arbitration procedures in the collective bargaining agreement that Gardner-Denver had with Alexander's union. More to the point, the company wanted to cut off Alexander's access to Title VII. The Court refused to allow this to happen, holding that the doctrine of **election of remedies** was inapplicable in the present context, which involved statutory rights distinctly separate from the employees' collective contractual rights, regardless of the fact that violation of both rights may have resulted from the same fact pattern. By merely resorting to the arbitration procedure, Alexander did not automatically waive his cause of action under Title VII; the rights conferred in fact could not be prospectively waived. Such an implied waiver formed no part of the collective bargaining process. The arbitrator's authority was confined to resolution of questions of contractual rights, regardless of whether they resembled or even duplicated Title VII rights. It would take 35 years for the high court to reverse this rule in two stages.

election of remedies
the requirement to choose one out of two or more means afforded under the law for the redress of an injury to the exclusion of the other(s)

In *Alexander*, the Supreme Court established a critical distinction between individual and collective employee rights. Perhaps it was not the Court's intention, but the decision had the effect of further undermining the rapidly eroding influence of labor unions in the American workplace. If union members are able to effectively pursue their rights outside of the labor–management relationship, then why should they bother to pay dues to a labor organization?

1-3 The Resurrection of the Arbitration Remedy

The proliferation of individual employee rights soon swamped the state and federal courts. By the 1980s, for example, employment law cases dominated the federal District Court dockets across the country. In their heyday, labor unions diverted much of this court business into their grievance/arbitration processes. The decline of organized labor combined with the Supreme Court's ruling that individual rights—at least those derived from antidiscrimination, **whistleblower**, and other such statutes—could not be automatically ceded to the labor–management dispute-resolution process contributed significantly to the litigation tsunami.

whistleblower
an employee who reports or attempts to report employer wrongdoing or actions threatening public health or safety to government authorities

In 1991, in *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme Court revisited the issue of whether an agreement to arbitrate employment disputes could ever trump an employee's right to pursue his or her claims under a federal statute that enabled the aggrieved employee to file a complaint with an agency and/or in court. The case involved a standard employment contract that almost all employees in the financial-services industry are required to sign.

Gilmer's impact upon the federal common law was profound. The U.S. trial and appellate courts extended its reach to virtually all types of employment discrimination cases. Simultaneously, federal agencies also embraced alternative dispute resolution (ADR).

CASE 1.1

GILMER V. INTERSTATE/JOHNSON LANE CORPORATION

500 U.S. 20 (1991)

Facts: Gilmer was required by his employer to register as a securities representative with, among others, the New York Stock Exchange (NYSE). His registration application contained an agreement to arbitrate when required to by NYSE rules. NYSE Rule 347 provided for arbitration of any controversy arising out of a registered representative's employment or termination of employment. The company terminated Gilmer's employment at age 62. He filed a charge with the EEOC and brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The company moved to compel arbitration, relying on the agreement in Gilmer's registration application. The court denied the company's motion, based on *Alexander v. Gardner-Denver Co*. In *Alexander*, the court held that an employee's suit under Title VII of the Civil Rights Act of 1964 was not foreclosed by the prior submission of his claim to arbitration under the terms of a collective bargaining agreement. It concluded that Congress intended to protect ADEA claimants from a waiver of the judicial forum. The Court of Appeals reversed the decision, and the company took the case to the Supreme Court, which agreed to hear it.

Issue: Should the rule of *Alexander v. Gardner-Denver Co.* apply to an arbitration provision in an individual contract as opposed to a collective bargaining contract?

Decision: In the opinion, which took many knowledgeable observers by surprise, the Court said it saw no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to arbitrate age-discrimination claims. While arbitration focuses on specific disputes between the parties involved, so too does judicial resolution of claims. Just the same, both can further broader social purposes, and with equal force. The justices pointed out that various other laws, including antitrust and securities laws and the civil provisions of the **Racketeer Influenced and Corrupt Organizations Act (RICO)**, are designed to advance equally important public policies, and yet claims under them are considered by Congress to be appropriate for arbitration. Nor were the majority of justices persuaded that allowing arbitration would somehow undermine the EEOC's role in ADEA enforcement, because an ADEA claimant remained free under the Court's holding to file an EEOC charge. However, claimants were precluded from instituting suit—not an insignificant limit on the rights they would otherwise have had under the statute. This limitation didn't trouble the Court, primarily because it perceived that the ADEA already reflected a flexible approach to claims resolution, such as by permitting the EEOC to pursue informal resolution methods. This suggested to the justices that out-of-court dispute resolution is consistent with the statutory scheme, and that arbitration is consistent with Congress's grant of concurrent jurisdiction over ADEA claims to state and federal courts.

Racketeer Influenced and Corrupt Organizations Act (RICO)
a federal law designed to criminally penalize those that engage in illegal activities as part of an ongoing criminal organization (e.g., the Mafia)

THE WORKING LAW

At the close of 2014, the EEOC sent a sharp signal that the outer limits of deferral to arbitration had been reached and that, indeed, the trend required a strong push in the opposite direction. On September 22, 2014, the discrimination watchdog issued the following press release:

> Restaurant Franchiser Unlawfully Barred New Hires from Filing Discrimination Charges, Federal Agency Charges
>
> MIAMI - Doherty Enterprises, Inc., a regional company that owns and operates over 140 franchise restaurants, including Applebee's and Panera Bread locations scattered throughout Florida, Georgia, New Jersey and New York, unlawfully violated its employees' right to file charges of

discrimination with the Equal Employment Opportunity Commission (EEOC), the federal agency charged in a lawsuit filed yesterday.

According to the EEOC, Doherty requires each prospective employee to sign a mandatory arbitration agreement as a condition of employment. The agreement mandates that all employment-related claims—which would otherwise allow resort to the EEOC—shall be submitted to and determined exclusively by binding arbitration. The agreement interferes with employees' rights to file discrimination charges, the agency says.

Interfering with these employee rights violates Section 707 of Title VII of the Civil Rights Act of 1964, which prohibits employer conduct that constitutes a pattern or practice of resistance to the rights protected by Title VII. Section 707 permits the EEOC to seek immediate relief without the same presuit administrative process that is required under Section 706 of Title VII, and does not require that the agency's suit arise from a discrimination charge.

The EEOC filed suit in the U.S. District Court for the Southern District of Florida (*EEOC v. Doherty Enterprises, Inc.*, Civil Action No. 9:14-cv-81184-KAM). The suit has been assigned to U.S. District Judge Kenneth A. Marra.

"Employee communication with the EEOC is integral to the agency's mission of eradicating employment discrimination," explained EEOC Regional Attorney Robert E. Weisberg. "When an employer forces all complaints about employment discrimination into confidential arbitration, it shields itself from federal oversight of its employment practices. This practice violates the law, and the EEOC will take action to deter further use of these types of overly broad arbitration agreements."

EEOC District Director Malcolm Medley added, "Preserving access to the legal system is one of the EEOC's six strategic enforcement priorities adopted in its Strategic Enforcement Plan. When an employer seeks to deter people from exercising their federally protected Title VII rights, the EEOC is uniquely situated to seek an end to such unlawful practices, and to ensure the necessary safeguards are in place to allow employees to participate in the EEOC's charge filing process."[10]

Supreme Court Allows Arbitration Clause in Labor Contract to Trump

The EEOC's 2014 policy pronouncement in *Doherty Enterprises* appears to pose a challenge to the Supreme Court's reconsideration of *Alexander* five years earlier. On April 1, 2009, by a vote of 5–4, the Court held that where a provision of a collective bargaining agreement clearly and unmistakably requires union members to arbitrate ADEA claims, the federal courts will enforce this provision. Writing in dissent, Justice Stevens complained, "Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior decisions based on its changed view of the merits of arbitration.... [T]he Court in *Gardner-Denver* held that a clause of a collective bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims.... Today the majority's preference for arbitration again leads it to disregard our precedent."[11]

However, in 2012, the NLRB, dominated by Obama appointees, signaled that they intended to interpret the *14 Penn Plaza* holding very narrowly. Thus, at least so long as a

[10] "EEOC Sues Doherty Enterprises over Mandatory Arbitration Agreement," *JDSUPRA Business Advisor*, September 22, 2014, available at http://www.jdsupra.com/legalnews/eeoc-sues-doherty-enterprises-over-manda-72282.

[11] *14 Penn Plaza LL.C. v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009) is excerpted and discussed in greater depth in Chapter 9.

Democrat occupies the White House (which may be no more than another year and a half as this edition goes to press), the EEOC and NLRB appear to be of one mind where substitution of private ADR remedies for statutory rights and recourse to federal courts and agencies are concerned. This view is essentially opposed to that of the five conservative justices who made up the majority view in *Pyett*.

CASE 1.2

IN RE D. R. HORTON, INC.

357 NLRB No. 184 (2012)

Facts: D. R. Horton, Inc. is a homebuilder with operations in more than 20 states. In January 2006, the company began to require on a corporate-wide basis that each new and current employee execute a "Mutual Arbitration Agreement" (MAA) as a condition of employment. The MAA provides in relevant part:

> *that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration, that the arbitrator "may hear only Employee's individual claims" "will not have the authority to consolidate the claims of other employees" and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding", and that the signatory employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."*

In sum, pursuant to the MAA, all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived. Stated otherwise, employees are required to agree, as a condition of employment, that they will not pursue class or collective litigation of claims in any forum, arbitral or judicial.

Charging party Michael Cuda was employed by the firm as a superintendent from July 2005 to April 2006. Cuda's continued employment was conditioned on his signing the MAA, which he did. In 2008, his attorney, Richard Celler, notified Horton that his firm had been retained to represent Cuda and a nationwide class of similarly situated superintendents. Celler asserted that respondent Horton was misclassifying its superintendents as exempt from the protections of the Fair Labor Standards Act (FLSA), and he gave notice of intent to initiate arbitration. The respondent's counsel replied that Celler had failed to give an effective notice of intent to arbitrate, citing the language in the MAA that bars arbitration of collective claims.

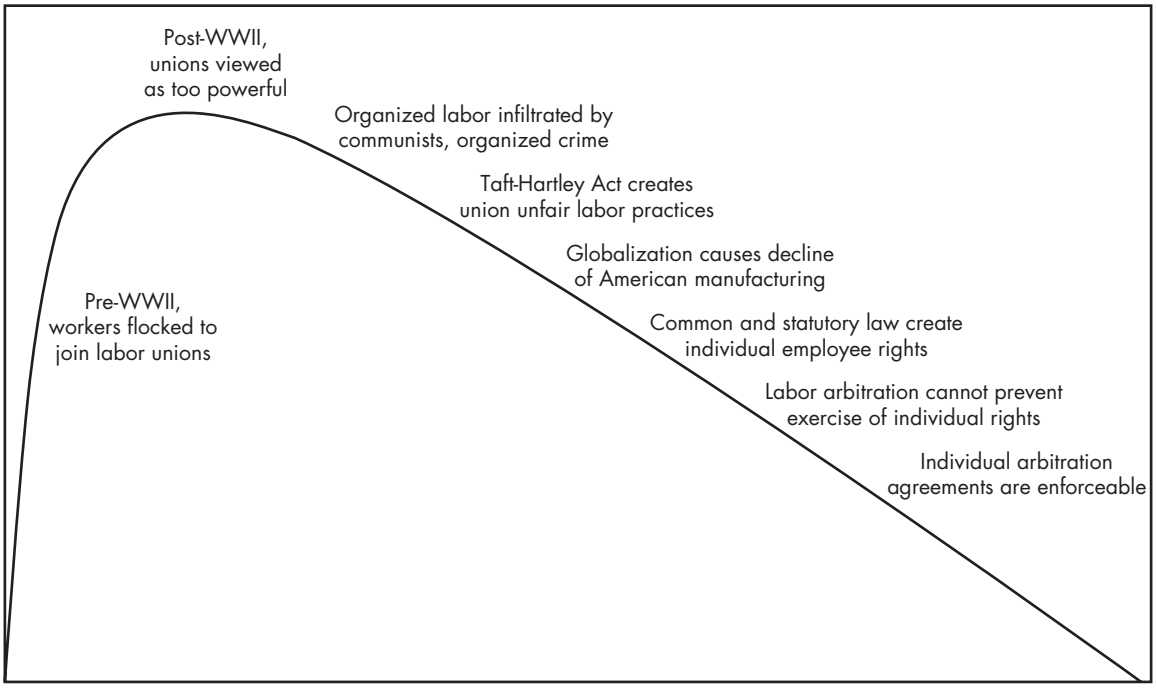
Cuda filed an unfair labor practice charge, and the general counsel issued a complaint alleging that the respondent violated Section 8(a)(1) by maintaining the MAA provision stating that the arbitrator "may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding." The complaint further alleged that the respondent violated Sections 8(a)(4) and (1) by maintaining arbitration agreements requiring employees, as a condition of employment, "to submit all employment related disputes and claims to arbitration. thus interfering with employee access to the [NLRB]."

Issue: In light of *Gilmer* and *14 Penn Plaza*, can an arbitration clause cut off employees' collective access to the rights and remedies of the NLRA?

Decision: The board panel found that a class action constitutes protected concerted activity. Therefore, the arbitration clause violated the NLRA. However, the panel was careful to emphasize "the limits of our holding and its basis. Only a small percentage of arbitration agreements are potentially implicated by the holding in this case. First, only agreements applicable to 'employees' as defined in the NLRA even potentially implicate Section 7 rights."

Concept *Summary* 1.2

Decline of Labor Unions and Rise of Individual Rights



1-4 Employee Health, Safety, and Welfare

In the preceding section, we charted a sort of "bell curve" in the rise and fall of labor unions. American workers first banded together to increase their bargaining power and improve their working and living conditions. They then turned (or were driven) increasingly away from unions and toward a panoply of individual rights, ranging from statutory prohibitions of employment discrimination to common-law wrongful discharge decisions, all of which is discussed in detail in the chapters that follow.

Also covered thoroughly in their own sections of this text are the major aspects of employee health, safety, and welfare, as they are embodied in our federal and state laws. These include:

- The federal Occupational Safety and Health Act (OSHA) and its many state-law counterparts
- Workers' compensation and unemployment insurance statutes, which are a part of virtually every state's statutory safety net for injured and out-of-work workers
- The U.S. Social Security system, which includes both pensions and support payments for permanently disabled workers who are still too young to retire

- The Employee Retirement Income Security Act (ERISA), which is intended to protect and preserve employee pensions
- The Family and Medical Leave Act (FMLA) and its numerous state and local counterparts, which increasingly require employers to grant leaves of absence (in some states, even paid leaves) for an ever-increasing range of personal issues
- Worker Adjustment and Retraining Notification (WARN) acts, both federal and state, which are aimed at letting employees know when a plant closing or mass layoff is in the offing
- The Patient Protection and Affordable Care Act (PPACA), commonly called Obamacare after the president during whose first term it was enacted. This act dramatically revised the American health care system, notably by mandating that all Americans buy health insurance or pay a tax penalty.

As extensive as this web of federal, state, and local laws may seem to be, some notable gaps, which are very troubling to many people, remain in the American labor and employment law system. No national statute requires private employers to provide their employees with either health insurance or a pension plan, for example (although Obamacare ensures that all Americans now have access to some form of health insurance).

THE WORKING LAW

From 2011 to 2015 Public-Employee Labor Unions, the Remaining Strongholds of Labor's Power in the United States, Have Been Targeted by Conservative Governors, Legislators, and the U.S. Supreme Court

After the November 2010 mid-term elections, the switch from liberal Democrats to conservative Republicans in many governors' mansions saw several states move toward ending collective bargaining by public employees. This initiative, most visible and confrontational in Wisconsin and Ohio, led the American Federation of State, County and Municipal Employees (AFSCME) to issue the following comment: "The radical proposals by the governors in Wisconsin and Ohio would not just gut public services and jobs, they would take away the rights of workers to collectively bargain and the basic freedom to join a union—effectively eliminating public employee unions. The goals of these efforts are simple: reduce the tax bills of the ultra-rich, privatize public services and deflect blame away from corporations for the reckless behavior that caused the economy to tank."[12]

The Wisconsin Case

On March 11, 2011, Wisconsin's governor Scott Walker signed the 2011 Wisconsin Act 10, a controversial bill that limits the collective bargaining power of the state's public employees (except for firefighters, police, and State Patrol troopers) and requires state employees to pay more for their health care and pensions. The new law is labeled "An Act relating to: state finances, collective bargaining for public employees, compensation and fringe benefits of public employees, the state civil service system, the Medical Assistance program."

[12] AFSCME, http://www.afscme.org.

Simultaneously canceling 1,500 scheduled public employee layoffs, Governor Walker remarked, "While tough budget choices certainly still lie ahead, both state and local units of government will not have to do any mass layoffs or direct service reductions because of the reforms contained in the budget repair bill. The reforms contained in this legislation, which require modest health care and pension contributions from all public employees, will help put Wisconsin on a path to fiscal sustainability."

On March 18, 2011, Dane County Circuit judge Maryann Sumi granted a restraining order, temporarily preventing the Wisconsin secretary of state from publishing the law, which remained the subject of bitter controversy and litigation as this edition went to press.

On June 14, 2011, the Supreme Court ordered the reinstatement of Governor Walker's bill. The Court overruled the restraining order granted by Sumi, finding that the legislature did not violate the Wisconsin Constitution; the committee of lawmakers was not subject to the state's open meetings law and therefore did not violate that law when it approved the governor's bill and allowed the Senate to take it up. The Court ruled that Sumi's ruling exceeded her jurisdiction and was *void ab initio*, or "invalid from the outset."

While Republicans praised the Court's decision, Democrats decried it for the Court's finding that lawmakers do not have to follow the open meetings law, as the committee did not give the required 24-hour notice prior to the meeting, essentially saying that the legislature is above the law.

As a result of the new bill, the city projected savings of at least $25 million a year—and as much as $36 million in 2012—from health care benefit changes it didn't have to negotiate with unions. Still, in March 2012 union supporters from around the world gathered in Wisconsin to rally for the governor's recall, and a record number of educators retired after the bill was signed into law. The Wisconsin state pension fund received 18,780 retirement applications from state and local governments and school districts in 2011, representing a 79 percent increase from the average in each of the previous seven years.

Less than a year later, the governor was faced with an unprecedented recall election. On March 30, 2012, the state's election commission ruled that the governor's adversaries had met the requirements for the recall vote, which was scheduled for June 2012. Come June, the voters allowed the governor to remain in office.

Meanwhile, the legal challenge to the law continued. On April 25, 2013, a Wisconsin appellate court held the state in contempt of the trial court's partial summary judgment in favor of the union and urged the state's supreme court to review the case.[13]

Responding to the appellate court's plea, the Wisconsin Supreme Court reviewed the case. In a November 2013 opinion, the high court held that the appellate court's contempt order impermissibly interfered with the Supreme Court's own jurisdiction. Opined the majority, "We are mindful of the pressures a circuit court can face from aggressive litigation in high-profile cases. However, when the appeal of a circuit court's prior decision is pending before this court, the circuit court must take care to avoid actions that may interfere with the pending appeal. Once an appeal had been perfected, the circuit court should not have taken any action that significantly altered its judgment. Accordingly, in order to assure the orderly administration of justice in the pending appeal, we elect to apply our superintending authority and vacate the circuit court's contempt order."

[13] *Madison Teachers, Inc. v. Walker*, 2013 WL 1760805 (Wis. App. Apr. 25, 2013).

Two dissenting justices retorted, "The order today essentially serves as a backdoor ruling on a substantive matter with no mention of the far-reaching effects of its order. The order creates a springboard for future uncertainty and litigation. Three glaring questions stand out: how will this affect (1) the unions that did not follow WERC's rules, relying on the declaratory judgment, (2) the unions that *did* follow WERC's rules, and (3) the contempt proceeding pending at the court of appeals?... The court's order today fails to grapple with these unknown practical and legal implications. The per curiam reaches its result. Satisfied, the opinion foregoes any consideration of the collateral damage it has wrought."[14]

In December 2013, under the requirements of the new law, some 400 school-district unions—mostly representing teachers, but also some custodial staff—sought recertification. About 80 of these locals failed to secure majorities and therefore were decertified.

The Ohio Case

On March 3, 2011, the Ohio legislature passed a massive revision of the state's public sector collective bargaining act. The chief changes are described as follows:

1. S.B. 5 places significant restrictions on the subjects that can be brought to the bargaining table for public employees. Specifically, bargaining will not be permitted about health insurance benefits, employer assistance toward the employee share of pension contributions, privatization of public services, staffing levels, and certain other management rights.
2. S.B. 5 prohibits strikes by all public employees. Previously, Ohio collective bargaining law prohibited strikes only by police officers, firefighters, and other specified employees whose jobs have a direct impact on public safety. S.B. 5 makes it illegal for all public employees to strike and imposes extraordinary penalties if public employees do strike. Striking employees can be terminated and can be subjected to substantial financial penalties.
3. S.B. 5 establishes a new procedure for dispute resolution in bargaining. Under existing law, if contract negotiations reach a stalemate, the parties typically first have a hearing before a neutral "fact-finder." The fact-finder issues recommendations for resolving the dispute, but either the union or the employer can reject those recommendations. In the case of police, firefighters, and other specified safety employees who are prohibited from striking, the dispute then goes to a hearing before another neutral person whose decision is binding. The theory is that since those employees do not have the leverage of the threat of a strike, there has to be a neutral person to break the deadlock in the bargaining. S.B. 5 eliminates the binding arbitration step and prohibits all employees from striking. In cases where bargaining reaches a stalemate, the fact-finding proceeding will be followed first. If either party rejects the fact-finder's report, the employer's last best offer and the union's last best offer will be presented to the legislative body (i.e., City Council in the case of a municipality), which will conduct a public hearing and then vote to accept either the last best offer of the union or the last best offer of the employer.

[14] *Madison Teachers, Inc. v. Walker*, 351 Wis.2d 237, 839 N.W.2d 388 (2013).

On November 8, 2011, Ohioans voted to repeal the law, with 63 percent of voters against the bill, and a union-backed committee that formed to repeal the law raised approximately $30 million for the effort. This marked a major setback for Ohio governor John Kasich and those with similar initiatives.

However, not to be entirely dissuaded, in the wake of an NLRB regional director's ruling in early April 2014 that Northwestern University's Division I football players were employees eligible to organize and strike, the Ohio House of Representatives moved to enact legislation that would forestall any such organizing effort by student athletes at Ohio public universities, such as Ohio State.[15]

The Supreme Court Case

In June 2014, overruling a longstanding legal precedent, the U.S. Supreme Court held in yet another 5—4 split between conservative and liberal justices that public employees who do not choose to join the union that represents their bargaining unit need not necessarily pay their "fair share" contributions to that labor organization—even though they inevitably benefit from the favorable terms and conditions of employment won by the union. The decision[16] is widely viewed as a major setback to public-employee unions in states where membership is a matter of choice, rather than a requirement, for employees in the units that such unions represent.

ethical DILEMMA

Is President Obama's "Go It Alone" Strategy Constitutional?

In 2010 the Republican Party won control of the House of Representatives in the mid-term national elections. In 2014, the GOP also (more narrowly) wrested control of the Senate from Democrats. These reversals of fortune presented President Obama with the prospect of being unable to win passage of any of his legislative agenda. Even achieving Senate consent for his presidential appointments became problematic. The president increasingly has sought to circumvent this congressional roadblock by "going it alone," that is, using his ability to issue executive orders to outmaneuver his opponents. The following are examples, most notably in the employment law arena:

- An April 2014 executive order forbids government contractors to discipline employees who discuss their wages and benefits among themselves. An accompanying memorandum explains that the order is intended to assist female workers, especially women of color, to close the gender gap in employee compensation.

[15] See Emily Rorris, "College Athletes Are Not Employees Under Ohio State Law," April 8, 2014, available at http://woub.org/2014/04/08/college-athletes-are-not-employees-under-ohio-state-law.

[16] *Harris v. Quinn*, 134 S.Ct. 2618 (2014).

- In July 2014, a second such order extended job-discrimination protection under federal government contracts to lesbian, gay, bisexual, and transgender (LGBT) employees.

Most controversial of all is the president's late 2014 executive actions on immigration, summarized by the U.S. Citizenship and Immigration Service as follows:

> *On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.*
>
> *These initiatives include:*
>
> - *Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years*
> - *Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks*
> - *Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens*
> - *Modernizing, improving and clarifying immigrant and nonimmigrant visa programs to grow our economy and create jobs*
> - *Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee.*[17]

Congressional opponents immediately saw this executive action as an attempt to cut them out of immigration-reform initiatives that all parties seem to agree are necessary. Many also saw it as a usurpation of congressional power. Most significantly, in December 2014 a 25-state coalition, led by Texas Attorney General (now governor) Greg Abbott, sued the president.

> Attorney General Ken Paxton: President Obama's Amnesty for Illegal Immigrants Tramples on U.S. Constitution
>
> *AUSTIN – Texas Attorney General Ken Paxton today issued the following statement after Texas led a 25-state coalition at a hearing in U.S. District Court in Brownsville on the states' enforcement action against President Barack Obama's unilateral execution action on immigration:*
>
> *"No individual is above the law, not even the President of the United States. President Obama's brazenly lawless action in November trampled on the U.S. Constitution. It is a clear violation of the Take Care Clause and federal statutory law. As the President himself had repeatedly admitted, he lacks the authority to impose this unilateral amnesty. The President's action makes clear that he has decided that the rule of law no longer applies to his Administration. President Obama's action violates the separation of powers and goes beyond prosecutorial discretion to the point of unilaterally creating and enforcing legislation—bypassing the people's duly-elected representatives in Congress entirely."*
>
> *The multistate coalition led by Texas includes: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.*[18]

Undeterred, as this edition went to press, President Obama promised that 2015 would be another "Year of Action."

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[17] "Executive Actions on Immigration," U.S. Citizenship and Immigration Services, available at http://www.uscis.gov/immigrationaction.

[18] "Attorney General Ken Paxton: President Obama's Amnesty for Illegal Immigrants Tramples on U.S. Constitution," The Attorney General of Texas, January 15, 2015, available at https://www.texasattorneygeneral.gov/oagnews/release.php?id=4928.

Concept *Summary* 1.3

Employee Health, Safety, and Welfare

- The web of federal and state laws includes:
  - OSHA
  - ERISA
  - FMLA
  - WARN
  - PPACA
- Gaps:
  - Pensions (protected but not mandated by ERISA)
  - Health care (if the Supreme Court invalidates the PPACA)

CHAPTER REVIEW

» Key Terms

employment-at-will	3	**individual employee rights**	6	**Racketeer Influenced and Corrupt Organizations Act (RICO)**	8
common law	3	**election of remedies**	7		
globalization	6	**whistleblower**	7		

» Summary

- Anglo-American labor and employment law can be traced back at least to 14th-century England. Laws tended to be heavily pro-employer well into the 19th century, when courts decriminalized labor unions and workers were able to combine and thus counterbalance corporate power.
- While some federal and state labor and employment reforms occurred prior to 1930, the first era of significant pro-employee legislation was the New Deal of the Great Depression. The National Labor Relations Act and the Fair Labor Standards Act were among the many statutes enacted by Congress during the 1930s. As a result, labor unions proliferated and prospered.
- After World War II, unions went into a slow but inexorable decline due to unfavorable legislation, the decline of American manufacturing, and the rise of individual employee rights. The Supreme Court decided in the 1970s that union grievance and arbitration procedures could not strip union members of their individual rights, especially where federal antidiscrimination laws were concerned.

- In the 1980s, as the federal courts were deluged with employment cases, the Supreme Court reversed course somewhat, endorsing the use of arbitration clauses in individual employment contracts. The Court in 2009 extended this endorsement to cover arbitration provisions in collective bargaining agreements, provided the parties expressly state their intent to preclude court and agency remedies.
- Employee health, safety, and welfare laws have proliferated at the federal and state levels, notably OSHA, ERISA, FMLA, and WARN. The PPACA (Obamacare) mandates the purchase of health insurance by all Americans by 2014 but may be invalidated by the Supreme Court. A gap remains in the area of mandatory pensions, which are not required under U.S. law.

» Problems

» Questions

1. Can you think of any public policy reasons why the courts developed the concept of employment-at-will in 19th-century America? In thinking about this question, consider that the U.S. Congress made huge land grants to companies willing to undertake the building of the nation's railroads. Can you see how both employment-at-will and public financial support of private enterprise might rise from the same underlying policy considerations?
2. How did new technologies combine with the arrival of millions of unskilled immigrants from Ireland, and later southern and eastern Europe, to impact the relative bargaining power of capitalists and workers in 19th-century America? What do you think were some reasons why the courts at first tended to support capital against labor? Why do you think that view gradually changed?
3. Imagine that the Supreme Court during the 1930s had staunchly refused to change its view and continued to declare almost all New Deal labor and employment laws to be unconstitutional, as the Court did at first. What do you think might have been some of the results of such intransigence on the Court's part?
4. Granting that organized labor has been guilty of abusing its power, and that when it was on top, some unions were aligned at times with the Mafia or with the American Communist Party, on balance do you think that labor unions are a blessing or a curse to American society?
5. Explain the Supreme Court's attempts in the *Alexander*, *Gilmer*, and *Pyett* cases to balance private arbitration with public legal remedies, such as government agency and court cases. Do you think the Court has struck the right balance? If not, do you favor the EEOC/NLRB approach? Why? Or do you believe that the policy considerations at stake here are trumped by political interests, that is, conservatives (represented by the five right-leaning Supreme Court justices) versus liberals (as embodied in the Obama administration's bureaucracy)?
6. One reason that U.S. workers, especially in the manufacturing sector, have a hard time competing with competitors in China, Southeast Asia, and India is wage differentials. And one reason (though not the only one) that labor costs are so much lower in some of America's major competitors, such as Japan and Korea, is that the governments of these countries provide substantial pensions for workers, so that the employers do not need to bear this expense. While providing such a pension (which would have to be significantly larger than current Social Security retirement benefits) would not address wage differentials between the U.S. and its many competitors in Asia and Latin America, this would help level the playing field with others, such as Japan, Korea, and perhaps some of the European Union nations. Should the U.S. Congress consider enacting such an expanded federal pension benefit? What are the pros and cons? Alternatively, should Uncle Sam *require* U.S. employers to establish employee pension plans? What are the pros and cons of doing this?

7. Putting aside partisan politics, what are the pros and cons of attempts by the governors and legislators in Ohio and Wisconsin to eliminate public employees' collective bargaining rights and decertify their labor unions? In answering this question, consider the current fiscal pressures under which many, if not most, states are suffering. Consider, too, that public employees enjoy protections under the 14th Amendment to the U.S. Constitution, which do not apply to private-sector employees.
8. Explain the roles that the courts play in creating and/or implementing labor and employment law. Do any of the roles you can identify amount to unreasonable intrusions into the roles of Congress and the state legislatures? Private enterprise?
9. Having considered and, hopefully, discussed the ethical dilemma posed by President Barack Obama's aggressive use of executive orders to achieve policy goals in the face of congressional roadblocks, do you feel that the separation of powers, so carefully crafted by the nation's founders in the U.S. Constitution, has become too much an impediment to progress in the "Flat Earth" environment in which America (and American workers) must compete? If so, how would you amend the Constitution to deal with this governmental gridlock?
10. Along these same lines, do you believe, as do many conservatives, that labor unions have outlived their usefulness in our "Flat Earth" economic environment? Or, alternatively, do you believe they still play an important role in the American democracy? If so, what would you do to encourage more American workers to rally to organized labor?

CHAPTER 2

Employment Contracts and Wrongful Discharge

This chapter and the one that follows are a survey of several major areas of the law where the federal and state legislatures have not fully populated the field with statutes and, therefore, the courts are still, by and large, sovereign. This type of law is referred to as common law. These include employment-at-will and wrongful discharge, as well as express and implied employment contracts.

2-1 Employment-at-Will and Its Exceptions

employment-at-will both the employee and the employer are free to unilaterally terminate the relationship at any time and for any legally permissible reason, or for no reason at all

To appreciate how far the courts have come, it is necessary to look back to where they were just decades ago. In the 19th century, virtually every state court subscribed to the doctrine of **employment-at-will**. In its raw form, employment-at-will holds that an employee who has not been hired for an express period of time (say a year) can be fired at any time for any reason—or for no reason at all.

State and federal laws have narrowed this sweeping doctrine in many ways. The National Labor Relations Act (NLRA) forbids firing employees for engaging in protected concerted activities. Title VII forbids discharge on the basis of race, color, gender, creed, or national origin. The Age Discrimination in Employment Act (ADEA) protects older workers from discriminatory discharge. The Occupational Safety and Health Act (OSHA) makes it illegal to fire an employee in retaliation for filing a safety complaint.

Although employers may complain that employment regulation is pervasive, these laws leave broad areas of discretion for private-sector employers to discharge at-will employees. Although federal government workers are protected from such discrimination, there is no federal law that specifically outlaws workplace discrimination on the basis of sexual orientation in the private sector (i.e., the law allows an employer to discharge an employee if the company does not approve of an employee being homosexual or transgender). However, a growing number of states have enacted laws that prohibit sexual-orientation discrimination in both public- and private-sector jobs. Furthermore, some cities and counties prohibit discrimination on the basis of sexual orientation on a local level. And in 2014, President Obama issued an executive order forbidding LGBT discrimination by federal government contractors and subcontractors.

whistleblower employee who reports or attempts to report employer wrongdoing or actions threatening public health or safety to government authorities

Whistleblowers—employees who bring intra-organizational wrongdoing to the attention of the authorities—have often been fired. This has frequently occurred in spite of ostensible legal protection for whistleblowers. However, as we shall see later in this chapter, much tougher protections were put into place by the U.S. Congress in the wake of one of the financial-industry debacles of the 21st century. Sometimes an employee gets fired simply because the boss does not like him or her. In such situations, the employee is not covered by any of the federal and state labor laws previously discussed. Should the employee be protected? If so, how?

Advocates of the employment-at-will doctrine defend it by pointing out that

- the employee is likewise free to sever the working relationship at any time and
- in a free market, the worker with sufficient bargaining power can demand an employment contract for a set period of time if so desired.

The trouble with the second point, in the view of most workers, is that as individuals they lack the bargaining power to command such a deal. This is one reason that in this age of globalization, labor unions continue to claim a role in securing workers' rights and job security, despite a plethora of federal and state statutes. Unless and until a federal statute creates a "just cause" requirement (discussed later in the chapter) for all employment terminations—something that is not even on the national agenda—many workers' best bet for job security is unionization. Indeed, making unionization easier is a priority item on the Obama administration's legislative agenda.

The first of these arguments is not so easily dismissed. If the employee is free to quit at any time with or without notice, why should the employer be denied the same discretion in discharging employees? One answer to this troublesome question—an answer given by a majority of the state courts at this time—is, "The firing of an at-will employee is permitted, except if the discharge undermines an important public policy."

2-2 Wrongful Discharge Based on Public Policy

public policy exception although the employee is employed at-will, termination is illegal if a clear and significant mandate of law (statutory or common) is damaged if the firing is permitted to stand unchallenged

The most commonly adopted exception to the pure employment-at-will rule (the employee can be fired at any time for any reason) is the **public policy exception**. If a statute creates a right or a duty for the employee, he or she may not be fired for exercising that legal right or fulfilling that legal duty. A widely adopted example is jury duty. The courts of most states agree that an employer cannot fire an employee who misses work to serve on a jury (provided, of course, that the employee gives the employer proper notice).

Many courts accepting this exception, however, have kept it narrow by holding that the right or duty must be clearly spelled out by statute. For instance, in the seminal case of *Geary v. United States Steel Corporation*,[1] the Pennsylvania Supreme Court upheld the dismissal of a lawsuit brought by a salesman who was fired for refusing to sell what he insisted to management was an unsafe product. The court noted, "There is no suggestion that he possessed any expert qualifications or that his duties extended to making judgments in matters of product safety." Most courts applying *Geary* have required the plaintiff-employee to point to some precise statutory right or duty before ruling the discharge wrongful.

[1] 456 Pa. 171, 319 A.2d 174, 115 L.R.R.M. (BNA) 4665, Pa., March 25, 1974.

Additionally, if the statute itself provides the employee with a cause of action, the courts are reluctant to recognize an alternative remedy in the form of a lawsuit for wrongful discharge. Thus, several Pennsylvania courts agree that an employee fired on the basis of gender or race discrimination in Pennsylvania has, as his or her exclusive state law remedy, the Pennsylvania Human Relations Act (PHRA), which requires that the employee initially seek redress with the commission created by that act. If the employee fails to file with the commission, thus losing the right of action under the PHRA, that person cannot come into court with the same grievance claiming wrongful discharge. Many other states' courts have reached similar conclusions regarding their states' antidiscrimination, workers' compensation, and work safety laws.

tort
a private or civil wrong or injury, caused by one party to another, either intentionally or negligently

By contrast, California courts are willing to entertain a wrongful-discharge **tort** claim that is grounded in a plaintiff's allegation of sexual harassment. The question tackled in a 2014 Court of Appeals decision was whether the burden of proof placed on the plaintiff should parallel the standard set out in discrimination cases.

CASE 2.1

Mendoza v. Western Medical Center Santa Ana

222 Cal. App. 4th 1334, 166 Cal.Rptr.3d 720 (2014)

A jury voted 9–3 to award $238,328 to plaintiff Romeo Mendoza, who claimed he was fired in retaliation for reporting allegations of sexual harassment. The court instructed the jury with the 2012 version of CACI No. 2430 and a special verdict form consistent therewith. Case law issued subsequent to the judgment leads us to conclude the court committed prejudicial error in doing so. We reject, however, defendants' contention that they are entitled to a defense judgment as a matter of law. Accordingly, we reverse the judgment for a new trial.

First hired as a staff nurse in 1990, Mendoza was employed at a hospital for more than 20 years. By 2010, Mendoza was an intermediate-level supervisor on the overnight shift and even filled in periodically as the person in charge at the hospital ("House Supervisor"). By all accounts, and as reflected by his long term of service and march up the ranks of authority, Mendoza was an excellent nurse. As defense counsel stated during a pretrial hearing, "we will stipulate he was a fine employee, he was performing his job competently, he received awards, he received commendations.... This is not a case where Mr. Mendoza was terminated because he performed his job in a substandard manner[,] because he made medical errors or anything of that nature."

In late October 2010, Mendoza reported to a House Supervisor that he was being sexually harassed by Del Erdmann, a per diem House Supervisor hired by defendants in April 2010. Whenever Mendoza and Erdmann worked the same shift, Erdmann was Mendoza's supervisor. After the complaint was passed up the chain of command, the matter was referred to the human resources department and an investigation ensued.

Mendoza and Erdmann are both gay men. The gist of Mendoza's accusation was that Erdmann, on numerous occasions, harassed Mendoza on the job with inappropriate comments (e.g., "I know you want me in your ass"), physical contact (e.g., Erdmann blowing air in Mendoza's ear), and lewd displays (e.g., Erdmann showing his genitals to Mendoza). According to Mendoza's testimony, this behavior began in August 2010 with words and culminated in October with Erdmann exposing himself. Mendoza denied he consented to Erdmann's behavior. Mendoza denied he had ever willingly engaged in flirtatious or lewd conduct with Erdmann. Mendoza told Erdmann to stop. Mendoza admitted that he violated defendants' policy by not immediately reporting Erdmann's behavior. Mendoza ultimately complained about Erdmann's conduct after a second incident in which Erdmann exposed himself and said, "I know you want this in your ass."

Erdmann, on the other hand, testified (and stated during defendants' investigation) that Mendoza consented to Erdmann's conduct and participated in other mutual interactions (e.g., Mendoza would bend over provocatively in front of Erdmann, Mendoza requested that Erdmann display his genitals, Mendoza assisted Erdmann in exposing his genitals). Indeed, Erdmann claimed he was a reluctant participant in conduct initiated by Mendoza. At both the investigation stage and at trial, Mendoza and Erdmann were the only two individuals identified with personal knowledge of what occurred between them at the hospital.

Mendoza's expert witness took issue with the quality of the investigation process. Defendants did not prepare a formal investigation plan. Defendants did not take written statements from Mendoza or Erdmann. Defendants did not immediately interview Erdmann, and suspended the investigation while Mendoza missed work for several weeks following a bicycle accident. When Mendoza returned to work, Mendoza and Erdmann were interviewed simultaneously rather than separately. Defendants did not interview anyone other than Mendoza and Erdmann (such as coworkers who might provide insights as to the credibility of the two men). The individual charged with completing the investigation was not a trained human resources employee, but was instead the supervisor of Erdmann and Mendoza. On cross-examination, Mendoza's expert conceded he was unaware of any specific information that would have been uncovered had defendants conducted a proper (in the expert's view) investigation. But a subsequent witness (an employee who conducted Erdmann's orientation) testified that he noticed Erdmann making sexual innuendos during the orientation.

Upon the completion of the investigation, defendants fired both Mendoza and Erdmann on December 14, 2010. The written notice of termination provided by defendants to Mendoza cited "unprofessional conduct" as the reason for Mendoza's dismissal. According to their testimony, the individuals participating in the decision concluded that both Mendoza and Erdmann were complicit in inappropriate and unprofessional behavior. There is a progressive discipline system in place at the hospital, subject to which an employee could be verbally warned, warned in writing, suspended, or terminated. Defendants claim to have considered but rejected a lesser punishment for Mendoza.

Mendoza sued defendants for wrongful termination in violation of public policy. Answering a special verdict form, the jury found defendants liable for wrongful termination in violation of public policy. The jury determined that Mendoza suffered $93,328 in past economic loss and $145,000 in past emotional distress. The court subsequently entered judgment in favor of Mendoza and against defendants in the total amount of $238,328, plus interest from the date of judgment and costs. Defendants filed a timely notice of appeal.

Analysis

With one exception, the elements of Mendoza's claim are undisputed by the parties on appeal. Mendoza was discharged by his ex-employers, defendants, after Mendoza accused a supervisor, Erdmann, of sexual harassment. The public policy invoked by Mendoza supports his claim in the abstract (i.e., a common-law wrongful termination action may be based on the firing of an employee because the employee reports sexual harassment to the employer). Mendoza suffered harm as a result of his termination (and the amount of damages awarded by the jury is not challenged on appeal).

The crux of the case is causation, a slippery concept in tort law generally and employment law in particular.

Mendoza claims his report of sexual harassment caused defendants to fire him. In other words, defendants retaliated against Mendoza for accusing his superior (Erdmann) of sexual harassment. On the other hand, defendants cite their belief that Mendoza willingly participated in sexual misconduct on the job as their motivation for firing Mendoza. From defendants' perspective, Mendoza's report only "caused" his firing in the sense that it alerted defendants to Mendoza's misconduct. Defendants concede it is against public policy to fire employees because they report actual sexual harassment. But defendants posit it is not against public policy for employers to fire employees after the employer determines in good faith that the employee actually participated in sexual misconduct on the job.

On appeal, defendants attack the judgment by pointing to alleged instructional error with regard to the element of causation. Defendants also assert there is insufficient evidence in the record to support the jury's causation findings.

Prejudicial Instructional Error Occurred Requiring Reversal

Initially, defendants obtained a very favorable jury instruction and special verdict form on the issue of causation. The jury was instructed as follows: "3. That Romeo Mendoza's report of sexual harassment by Del Erdmann was the motivating reason for Romeo Mendoza's discharge." This instruction included a slight (but important) modification of the 2012 version of CACI No. 2430 ("the motivating reason" rather than "a motivating reason"). The special verdict form submitted to the jury was even starker: "Was Romeo

Mendoza's report of sexual harassment by Del Erdman the reason for [defendants'] decision to discharge Romeo Mendoza." This differed from the special verdict language used in the 2012 version of CACI No. VF–2406 ("a motivating reason"). A jury tasked with deciding whether the report of sexual harassment was "the motivating reason" or "the reason" might logically conclude that this element could only be satisfied if there were only one reason motivating the decision to fire Mendoza.

In the midst of its deliberations, the jury submitted the following question about the causation interrogatory on the special verdict form: "Does this question ... imply that the report was the only reason for the termination? Does this mean they retaliated?" Over defendants' objection, the court submitted a written response to the jury's inquiry: "Pursuant to the Jury Instruction ..., the plaintiff must prove that his report of Sexual Harassment was a motivating reason for his discharge. (That instruction incorrectly refers to 'the motivating reason'. It should say 'a motivating reason'). Please consider this answer in any vote or deliberations." The jury marked out the word "the" and inserted the word "a" on both the relevant jury instruction and the special verdict form.

Defense counsel opposed the court's response to the jury on the grounds that the initial instruction and special verdict form were correct. Defense counsel added that "the clarification would, at a minimum, have to say, 'a primary reason. A substantial motivating reason.'" The court responded, "[i]f CACI is right, then we are right."

The 2012 versions of CACI Nos. 2430 and VF–2406 were not right, at least in the view of the Judicial Council in 2013. Effective June 2013, CACI No. 2430 provides the following with regard to causation: "That [insert alleged violation of public policy ...] was a substantial motivating reason for [name of plaintiff]'s discharge." The corresponding special verdict form also inserted updated language ("a substantial motivating reason").

These changes were inspired by *Harris*, a February 2013 case in which the plaintiff alleged her employer fired her because she was pregnant. Our Supreme Court held that CACI No. 2500 (the FEHA disparate treatment/discrimination instruction) did not accurately state the law in calling for the jury "to determine whether discrimination was 'a motivating factor/reason' for Harris's termination.... [T]he jury should instead determine whether discrimination was 'a substantial motivating factor/reason.'" "Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a substantial factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Ibid.*) *Harris* makes clear (at least with regard to CACI No. 2500) that the initial instruction in this case ("the motivating reason") and the court's amended instruction ("a motivating reason") were incorrect.

Even more recently, an appellate court held "that the trial court prejudicially erred in instructing the jury with the former versions of CACI Nos. 2430, 2500, 2505, and 2507 because the proper standard of causation in a FEHA discrimination or retaliation claim is not 'a motivating reason,' as used in the [former] CACI instructions, but rather 'a substantial motivating' reason, as set forth in Harris." Following her termination, the Alamo plaintiff (who had recently taken a "pregnancy-related leave of absence") sued under a variety of theories, including wrongful termination in violation of public policy. The Alamo court rejected the contention "that a jury in an employment discrimination case would not draw any meaningful distinction between 'a motivating reason' and 'a substantial motivating reason' in deciding whether there was unlawful discrimination [because] the Supreme Court reached a contrary conclusion in Harris."

The directions for use included with the current version of CACI No. 2430 state that "[w]hether the FEHA standard [as explicated in *Harris*] applies to cases alleging a violation of public policy has not been addressed by the courts." But the Alamo case, issued in August 2013, has answered this question in the affirmative. We agree with Alamo. It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA. Mendoza tries to distinguish the instant case from Alamo by noting that he abandoned his statutory FEHA claims before the case was submitted to the jury. This is a distinction without a difference for purposes of crafting appropriate jury instructions.

It is therefore clear that the court erred in its instruction of the jury. The court should have instructed the jury to determine whether Mendoza's report of sexual harassment was a substantial motivating reason for Mendoza's discharge. Following Harris and Alamo, we conclude this error was prejudicial. The jury's verdict in favor of Mendoza was extremely close (a nine to three vote). No other instructions provided to the jury could have cured the erroneous instruction with regard to the contested element. Viewing

the evidence "in the light most favorable" to defendants, there is a reasonable probability that the instructional error prejudicially affected the verdict.

Holding

There is sufficient evidence in the record for the jury to conclude that a substantial motivating reason for Mendoza's firing was his report of sexual harassment. Defendants terminated an excellent, long term employee soon after he reported sexual harassment by a recent hire, Erdmann. Accepting Mendoza's testimony as true (as we must for this purpose), Mendoza was not complicit in sexual misconduct at the hospital. Instead, Erdmann harassed Mendoza while Erdmann was acting as Mendoza's supervisor at the hospital. After being confronted by defendants, Erdmann confirmed part of Mendoza's story (i.e., that improper activity occurred) but accused Mendoza of being the instigator and willing participant. With nothing to go on besides their respective statements, defendants claim they chose to believe Erdmann's characterization of the incidents rather than Mendoza's complaint.

Importantly, in combination with the foregoing facts, Mendoza's expert witness testified that there were numerous shortcomings in the investigation conducted by defendants following Mendoza's complaint. The lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of the truth so much as a way to clean up the mess that was uncovered when Mendoza made his complaint. Defendants point to the expert's concession that additional facts would not necessarily have been discovered had the alleged flaws in the investigation been addressed. But the question for the jury was defendants' subjective motivation in deciding to fire Mendoza, not whether defendants actually had all available material before them. Moreover, a more thorough investigation might have disclosed additional character and credibility evidence for defendants to consider before making their decision.

In sum, substantial evidence supports the judgment. Thus, on remand, it will be up to a jury to decide whether the expert's characterization of the investigation is accurate and whether to infer from that characterization that defendants had retaliatory animus. Similarly, it will be up to a jury to determine whether defendants' termination of Mendoza was substantially motivated by improper considerations.

The judgment is reversed. In the interests of justice, the parties shall bear their own costs incurred on appeal.

Case Questions

1. Explain the California court's ruling. Did it find in the employer's favor? If yes, how so?
2. Why did the court rule that the plaintiff had to show that discrimination was a substantial motivating factor rather than simply a motivating factor? Explain the difference between the two.
3. In its opinion, the court states, "The crux of the case is causation." Explain that statement and how it relates to the court's ruling.

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Concept *Summary* 2.1

Employment-at-Will and Wrongful Discharge

- Justifications for at-will employment:
  - Freedom of contract
  - Free enterprise in a competitive marketplace
- Problems with at-will employment:
  - Disparities of bargaining power between employer and employee
  - Potential for unfair treatment falling outside statutory protections
- Exceptions to at-will employment:
  - Statutory exceptions, such as antidiscrimination laws
  - Employment contracts containing set lengths of employment
  - Public policy exception

2-3 Express and Implied Contracts of Employment

express contract a contract in which the terms are explicitly stated, usually in writing but perhaps only verbally, and often in great detail. In interpreting such a contract, the judge and/or the jury is asked only to determine what the explicit terms are and to interpret them according to their plain meaning

implied contract a contractual relationship, the terms and conditions of which must be inferred from the contracting parties' behavior toward one another

Some employees have express contracts of employment, usually for a definite duration. Others fall within the coverage of a collective bargaining agreement negotiated for them by their union. Most workers, however, have no express agreement as to the term of their employment, and some were given an oral promise of a fixed term in a state in which the statute of frauds requires that contracts for performance extending for a year or more be written. Such employees have sometimes tried to convince the courts that they have been given implied promises that take them outside the ranks of their at-will coworkers. An **express contract** has terms spelled out by the parties, usually in writing. **Implied contracts** are contracts that the courts infer from company policies (such as those published in employee handbooks) and the behavior of the parties, or that are implied from the law.

If a company provides its employees with a personnel handbook, and that handbook says that employees will be fired only for certain enumerated infractions of work rules, or that the firm will follow certain procedures in disciplining them, a worker may later argue that the manual formed part of his or her employment contract with the firm. An increasing number of state and federal courts agree.

Many employers in turn have responded by adding clauses to their employee handbooks that reserve the firm's right to make unilateral changes or to vary the application of particular policies to fit the unique circumstances of each new situation. The following cases involve determinations of if and when an employer can withdraw a unilaterally promulgated policy or employment agreement and replace it with another, thus unilaterally altering the employment relationship or deviate from a policy's particular terms in a specific instance.

CASE 2.2

SERRI V. SANTA CLARA UNIVERSITY
226 Cal. App. 4th 830, 172 Cal.Rptr.3d 732 (2014)

Facts: A university's former director of affirmative action, Conchita Franco Serri, brought her action against the university and the university's officers and attorneys for breach of her employment contract, among other claims, after being terminated from her position. The university claimed it terminated her employment because she failed to produce Affirmative Action Plans for three consecutive years, even though her job required that she produce an Affirmative Action Plan annually. The university also terminated her employment because she allegedly made misrepresentations about the plans that she had failed to prepare.

Issue: Serri's fourth cause of action for breach of contract alleged that she was not an at-will employee and that her employment contract with the university was "partially oral, partially written in the form of [the university's] Staff Policy Manual." Serri alleged that her employment contract contained promises that she would not be discharged except for good cause and that she would be afforded progressive discipline or remediation if there were problems with her job performance. She alleged that the university breached her employment contract when it terminated her without good cause and without an opportunity to correct any improper conduct.

Decision: Based on all of the admissible evidence in the case, the court concluded that the university met its burden of establishing that it acted in good faith and had reasonable grounds for believing Serri engaged in gross misconduct, when it decided to terminate her and that its decision was based on "fair and honest reasons." It could not be reasonably asserted that termination for misrepresenting the status of an important report that impacted the work of other university departments was "trivial, arbitrary or capricious" or unrelated to the university's business needs or goals. Thus, the university was within its rights in not affording the plaintiff progressive discipline.