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A Comparative Introduction to Japanese & (and) United States Wrongful Termination Law

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A Comparative Introduction to Japanese & United States Wrongful Termination Law

By S. Maya Iwanaga
Member of the Class of 1990

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I. INTRODUCTION

Business relations between Japan and the United States have led to an increasing exchange of workers. This exchange has created a practical need for a simple comparative presentation of the two employment systems, especially in the confusing area of wrongful termination. An examination of each country's approach to wrongful termination should serve as a useful guide for United States and Japanese citizens who work within each other's employment systems and are justifiably confused as to what actions are proper in the employee termination setting.

United States courts and legislators also can benefit from an examination of the two systems. The United States is fast adopting the em-
ployee-protective approach to wrongful termination embodied in the Japanese legal system. While United States courts are struggling with the tension between a traditional rule permitting employee discharges at-will and a "modern" rule requiring just cause for employee discharges, the Japanese strive to guarantee permanent or lifetime employment. As United States courts and legislators move toward a just cause standard, they can learn from the Japanese in shaping a new system.

This Note will present a brief overview of each system, then highlight the similarities and differences between the two countries' approaches to wrongful termination. Attorneys with a basic knowledge of how the two systems work will be better equipped to advise both Japanese and United States employers regarding their foreign employees.

II. UNITED STATES EMPLOYMENT LAW

The United States is the only major industrial nation in the world that does not offer employees some form of comprehensive protection against wrongful discharge. This stems, in part, from the fact that "[t]he ability of an employer in the United States to hire and fire employees has been considered part of the American 'free enterprise system' and a key to successful business control." Indeed, approximately "[seventy-five] percent of [the United States] one hundred million labor force is employed under contracts at-will."

Despite the lack of general statutory provisions protecting employees from wrongful discharge, most state jurisdictions have created judicial exceptions to the common-law right of employers to dismiss "at-will employees" using contract and tort theories. These jurisdictions vary, however, in their willingness to modify the traditional doctrine. For example, California has significantly modified the at-will doctrine, but New York and New Mexico have made few changes.

3. Mauk, supra note 1, at 204.
4. Brown, supra note 2, at 325.
6. Id.
7. Id. For example, the New York courts have been reluctant to create judicial exceptions to the employment-at-will doctrine. See, e.g., Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 301, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983) (Despite the trend in
The rapid and erratic development of employment law in the area of wrongful discharge has caused much confusion in lower courts and has left management uncertain about which employee termination actions are wrongful.\textsuperscript{8} As a result, a major issue in employment law today is whether federal and state legislation should directly address this area of the law, and if so, in what manner.\textsuperscript{9}

California has been at the forefront of those states which have modified the at-will doctrine\textsuperscript{10} and moved toward a just cause standard in wrongful termination cases. As such, California is a natural focus in discussions regarding where employment law is, and should be, heading. Accordingly, the following discussion of wrongful termination issues will emphasize California law.

A. A Brief History of United States Employment Law

During the colonial period, United States courts followed the traditional English rule: when faced with an indefinite employment period, the courts would presume the hiring was for one year and require reasonable notice before either party could terminate the employment relationship.\textsuperscript{11} This common law rule continued until the last quarter of the nineteenth century when United States law split from English law and developed the employment-at-will doctrine.\textsuperscript{12} Nineteenth century American law regarding hirings for an indefinite period of time thus lay somewhere between its Anglo-Saxon origins and a new but still confusing, inconsistent, and not fully articulated law.\textsuperscript{13}

H. G. Wood's 1877 treatise, \textit{Master and Servant},\textsuperscript{14} introduced what was to become the American employment-at-will doctrine.\textsuperscript{15} Specifically, the treatise stated that "a general or indefinite hiring [was] prima
facie a hiring at will" and added that the servant had the burden of demonstrating a yearly hiring. In short, employment for an indefinite term could be terminated at any time by either party to the agreement for any or no reason.

Once articulated, the rule was "adopted in the United States without much serious consideration of its theoretical support or potential impact. It was a legal anomaly, inconsistent with the developing general theory of contract." However, the doctrine spread and was generally adopted in every jurisdiction as a principle of common law. California went so far as to codify the rule in its state code.

B. The Erosion of the At-Will Doctrine

1. Legislative Exceptions

In the 1930s the United States Supreme Court began to open the door for legislative exceptions to the at-will doctrine. In NLRB v. Jones & Laughlin Steel Corp., the Supreme Court upheld provisions of the National Labor Relations Act which prohibited employer coercion or discrimination against employees because of union activity. Although the Court noted that it was creating only a limited, specific exception to the basic at-will rule, by upholding the Act "the Court effectively determined that Congress and the state legislatures [could] limit an employer's absolute freedom to discharge his employees . . . [; that is,] legislatures could limit . . . or modify the at-will rule." Since NLRB v. Jones & Laughlin, both the federal and state governments have enacted statutory limitations to the at-will doctrine. Feder
eral limitations include the National Labor Relations Act of 1935, Title VII of the Civil Rights Act of 1964, and the Federal Age Discrimination in Employment Act. State limitations include statutes prohibiting discharge based on political activity or affiliation, whistleblower protection acts prohibiting the discharge of employees who have reported their employers' violations of the law, and provisions prohibiting retaliatory discharge for filing worker's compensation claims. Currently, there is legislation pending in many states that will prohibit the dismissal of any employee without just cause.

Although the above statutory limitations illustrate a growing concern for employee protection, there is a general reluctance to abandon the at-will doctrine. Employers remain free to hire and fire employees so long as they do not violate a statutory provision specifically protecting that class of employees. Thus, approximately seventy-five million workers remain unprotected by a requirement that employers discharge them only for just cause. These are private sector employees who are not protected by either statutory law or the just cause provisions of a collective bargaining agreement.

2. Judicial Erosion of the At-Will Doctrine

Discharged at-will employees are taking their claims to court. A flood of litigation has been caused by the judicial erosion, over the past

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29. See, e.g., CAL. LAB. CODE § 1102 (West 1989).
31. See, e.g., ILL. REV. STAT. ch. 48, para. 138.4(h) (Supp. 1982).
32. A. HILL, supra note 5, at 16. In California, the proposed bills seek to establish a just cause standard for termination, but also address the major issues of whether to have mandatory arbitration requirements and what remedies should be available to plaintiffs. See, e.g., S. 282, introduced by Sen. Greene, Jan. 26, 1989 (Cal.); S. 222, introduced by Sen. Beverly, Jan. 19, 1989 (Cal.), amended July 20, 1989; S. 181, introduced by Sen. Torres, Jan. 12, 1989 (Cal.). The National Conference of Commissioners on Uniform State Laws has drafted an Employment Termination Act which would require just cause in terminations of employment for unspecified durations if the employee has been employed by the employer for more than one year and would provide for arbitration under the Uniform Arbitration Act.
33. A. HILL, supra note 5, at 8.
34. Id. at 9 (citing The Employment-At-Will Issue: A BNA Special Report, Daily Labor Rep. (BNA) No. 225, at 7 (Nov. 19, 1982)).
35. A. HILL, supra note 5, at 8-9.
36. Id. at 9.
fifteen years, of the traditional employment-at-will doctrine.\textsuperscript{37} The judiciary thus has been a driving force behind the erosion of the traditional at-will doctrine.

As of June 1987, forty-two states recognized an exception to the at-will doctrine and were allowing employee suits for wrongful discharge.\textsuperscript{38} Ironically, despite California’s codification of the at-will doctrine, California courts have been the most progressive in forging actionable exceptions to the employment-at-will doctrine.\textsuperscript{39} California Labor Code section 2922 provides that “[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.”\textsuperscript{40} This section creates a presumption that an employment relationship is terminable at the will of either party regardless of whether just cause for the termination exists.\textsuperscript{41} Despite this presumption, California law has become highly protective of the employee, and California juries have been awarding increasingly large damages to those wrongfully discharged.\textsuperscript{42}

Judicial exceptions have been created through judicial interpretations of common-law contract and tort theories although courts have been ambiguous in distinguishing whether actions lie in contract or in tort.\textsuperscript{43} This has led to some confusion regarding the elements of proof that are necessary to state a cause of action, the types of defenses available, and the measure of damages that are available.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.} at 55.
  \item \textsuperscript{40} \textsc{Cal. Lab. Code} § 2922 (West 1989).
  \item \textsuperscript{41} \textit{See, e.g., Pugh v. See’s Candies, 116 Cal. App. 3d 311, 320, 171 Cal. Rptr. 917, 921 (1981).}
  \item \textsuperscript{42} \textit{See Gould, Stemming the Wrongful Discharge Tide: A Case for Arbitration, 13 Employment Rel. L.J. 404, 405-06 (1987). Gould states that “[a]lthough there are no precise statistics available, it is clear that wrongful discharge litigation, which was hardly known in the 1970s, is increasing geometrically. . . . The cost of law-suits that respond to a discharge, as measured by jury awards and settlements, has also increased geometrically and is beginning to draw concern from the business community.” Id. at 405. He goes on to note that “[i]n California, between 1982 and 1986, employees won more than 70 percent of the cases tried before juries. The average total award was $652,100” with some awards as high as $4.77 million and $2.337 million. Id. at 405-06 (citation omitted). Gould also cites to a survey compiled by the San Francisco labor and employment law firm of Schachter, Kristoff, Ross, Sprague and Curiale that illustrates that plaintiff-employees in California wrongful termination suits have received punitive damage awards averaging $494,000. Id. at 406. Moreover, “the total award in these cases were 1,403 percent higher than the defendant’s or the company’s last settlement offer.” Id. Perhaps more significant, the awards exceeded the employees’ lawyers’ settlement demands by 187 percent. Id.}
  \item \textsuperscript{43} \textit{A. Hill, supra note 5, at 16.}
  \item \textsuperscript{44} \textit{Id.} at 17.
\end{itemize}
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(a) Contract Theories.—Some courts recognize an implied-in-fact covenant of good faith and fair dealing in the employer-employee relationship and impose contract liability on employers. These courts find sufficient oral or written representations to be convinced that a contractual obligation exists to terminate only with good cause. This implied obligation takes the employment contract out of the at-will category.

The central issue in these cases is the source of the implied promise. Several courts have found that contracts may arise from personnel handbooks or manuals. These courts find the promises, conditions, and benefits addressed by employers in handbooks, personnel manuals, and application forms to be contractually binding to the benefit of the employee. The theory of employer liability is that the oral and written statements of the personnel policy lead to a legitimate expectation of benefits. Thus, the policy is legally enforceable even though the employment relationship is technically of an indefinite term.

Other courts have extended the implied promise reasoning, and have held employers to a just cause standard even when no such protection

45. Brown, supra note 2, at 327. Jurisdictions that have recognized exceptions based upon contract theories include California, Alabama, Washington, Minnesota, and Michigan. See, e.g., Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 729-33 (Ala. 1987) (implied promise to abide by employee manual guidelines contractually enforceable); Pugh, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927 (employer conduct may give rise to an implied promise by the employer to discharge plaintiff-employee only for cause); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 613-17, 292 N.W.2d 880, 892-93 (1980) (“contractual obligations can be implicit in employer policies and practices”); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1087-88 (1984) (en banc) (If an employer “creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job” those promises are enforceable.).

46. Bakaly, supra note 24, at 73.

47. Id.

48. A. Hill, supra note 5, at 19-21. See also Toussaint, 408 Mich. 579, 292 N.W.2d at 880 (holding that the Blue Cross personnel manual, stating it was Blue Cross policy to discharge only for just cause, was sufficient to create an enforceable promise that plaintiff would not be terminated except for just cause); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985) (holding that a pharmaceutical company was bound by the provisions of its personnel policy manual which allowed terminations of its employees only for cause); Duldulao v. St. Mary of Nazareth Hosp. Center, 115 Ill. 2d 482, 505 N.E.2d 314 (1987) (holding that an employee handbook or other policy statement creates enforceable contract rights if it contains a promise clear enough to give an employee a reasonable belief that an offer has been made, if it is distributed so the employee knows of its contents and reasonably believes it to be an offer, and the employee accepts the offer by beginning or continuing to work after learning of the policy statement).

49. See A. Hill, supra note 5, at 21.

50. Id. at 19.

appears in the company's personnel materials. These courts find implied promises in the employer's oral assurances of continued employment as long as the employee performs satisfactorily. They look at factors such as the employee's length of service, commendations and promotions, and established industry practices of retaining senior employees when reducing the workforce.

Another line of contract theory cases applies the principle of an implicit promise to act in good faith in the employment at-will setting. Although recognition of the covenant of good faith and fair dealing in employment contracts seems to abolish the at-will doctrine completely, some courts limit the application of the covenant by recognizing that application of the doctrine must be balanced with the right of the employer to serve his own legitimate business interests. Under this theory, not every discharge without cause is a breach of the implied covenant of good faith and fair dealing. The employee must present evidence of the employer's misconduct such as fraud, deceit, or misrepresentation. A showing of bad faith is required, and a mere showing of lack of good cause is insufficient to establish a cause of action for wrongful termination. Courts may also limit the application of the covenant to certain types of employment contracts.

In contrast, California courts have expressly held that all employ-

52. A. Hill, supra note 5, at 21.
53. See Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (plaintiff's justifiable reliance on employer's oral promise not to fire him if he did a good job is evidence that plaintiff would not be terminated without good cause).
54. Mauk, supra note 1, at 224; see also Pugh, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Plaintiff's 30 years of service and advancement from potwasher to vice president were among the factors supporting employer's implied promise not to terminate without good cause.).
55. See Brown, supra note 2, 45, 46, 116, at 326-27.
56. See, e.g., Magnan v. Anaconda Indus., 37 Conn. Supp. 38, 41, 429 A.2d 492, 494 (1980) ("The application of this doctrine must...be balanced with the right of an employer to serve his own legitimate business interests. Accordingly not every discharge made without cause [is] a breach of the implied covenant...[T]o be a breach...the [employer's conduct] must constitute 'an aspect of fraud, deceit, or misrepresentation.' ").
57. Id.
58. Id.
59. Bakaly, supra note 24, at 77.
60. See, e.g., Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 104-05, 364 N.E.2d 1251, 1257 (1977) (Good faith requirement is not necessarily implicit in every contract for employment at will, but there is a breach of the good faith requirement when a "principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing [a] sale...[In that case,] the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent [citation omitted]. The same result obtains where the principal attempts to deprive the agent of any portion of a commission due the agent.").
ment contracts contain an implied covenant of good faith and fair dealing.\textsuperscript{61} Recently, however, in \textit{Foley v. Interactive Data Corp.}, the California Supreme Court limited the recovery in cases claiming breach of the covenant of good faith and fair dealing to contract damages.\textsuperscript{62} In so ruling, the \textit{Foley} Court disapproved the numerous lower court cases that had allowed tortious recovery for breach of the implied covenant.\textsuperscript{63}

A few courts also use the related contract theory of promissory estoppel\textsuperscript{64} to provide for equitable recovery in wrongful discharge actions.\textsuperscript{65} Under promissory estoppel, employers are liable for wrongful discharge when their employees have detrimentally relied on a promise or offer by their employers.\textsuperscript{66} This theory generally has been applied when an employee resigns from a job in reliance on alternative employment, and either the offer of new employment is withdrawn or the employee is terminated shortly after his move.\textsuperscript{67} The promissory estoppel argument has been successful in only a few jurisdictions.\textsuperscript{68}

(b) Tort Theories.—The use of tort theory in at-will cases is based on the principle that important public policies supersede the right to terminate employment-at-will contracts.\textsuperscript{69} The courts use tort theory to impose duties on employers from the "outside," as a matter of law,\textsuperscript{70} rather than from the "inside," as express or implied agreements between the parties. In short, the courts allow an employee to recover tort damages

\textsuperscript{61} See \textit{Foley v. Interactive Data Corp.}, 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211, 227 (1988) (quoting \textit{Restatement (Second) of Contracts} § 205 (1981) ("Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement."). ("The duty to act in good faith has been recognized in the majority of American jurisdictions, the Restatement, and the Uniform Commercial Code.").

\textsuperscript{62} See id. at 700 n.42, 254 Cal. Rptr. at 240 n.42.

\textsuperscript{63} Id. 254 Cal.Rptr at 240 n.42. Specifically, the court disapproved Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), and its progeny insofar as they permitted a cause of action seeking tort remedies for breach of the implied covenant of good faith and fair dealing.

\textsuperscript{64} Brown, \textit{supra} note 2, 45, 46, 116, at 328.

\textsuperscript{65} A. HILL, \textit{supra} note 5, at 25.

\textsuperscript{66} Id. at 19.

\textsuperscript{67} Id. at 25 (citing Mauk, \textit{supra} note 1, at 224). In Mauk's article, he cites to Grouse v. Group Health Plan, 306 N.W.2d 114 (Minn. 1981) (plaintiff entitled to the opportunity to perform duties to employer's job satisfaction when employee had resigned former job in reliance on offer of new employment that was revoked prior to commencement), and McMath v. Ford Motor Co., 77 Mich. App. 721, 259 N.W.2d 140 (1977). \textit{See also} McIntosh v. Murphy, 52 Haw. 112, 469 P.2d 177 (1970).

\textsuperscript{68} A. HILL, \textit{supra} note 5, at 25. States recognizing the promissory estoppel argument include Alabama, Alaska, Arkansas, Connecticut, Hawaii, Illinois, Minnesota, North Carolina, and Ohio. \textit{See id.} app. A.

\textsuperscript{69} Bakaly, \textit{supra} note 24, at 67; Brown, \textit{supra} note 2, at 329.

\textsuperscript{70} Bakaly, \textit{supra} note 24, at 67; Brown, \textit{supra} note 2, at 329.
for a discharge that violates public policy.71

The initial problem for courts has been determining an acceptable definition of the term "public policy."72 Petermann v. International Brotherhood of Teamsters,73 the first and most influential case in this area, gives some guidance. In Petermann, a union employee was asked by the union to perjure himself before a legislative investigatory committee. When the employee gave truthful testimony he was fired. The court held that the defendant-employer’s right to terminate an at-will employee was limited by public policy considerations.74 The court stated: "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . [;] whatever contravenes good morals or any established interests of society is against public policy."75

Although the Petermann court found the wrongful discharge to be a breach of contract, courts have extended Petermann to tort, making punitive damages available to plaintiffs.76

Cases following Petermann provide some additional guidance regarding the sources of public policy.77 According to these cases, public policy may be found in legislative enactments; administrative agencies' rules, regulations, or decisions; and judicial decisions.78 More specifically, these cases find liability based on discharges in retaliation for refusing to commit illegal acts,79 for exercising statutory rights,80 and for

71. A. Hilt, supra note 5, at 26.
72. Brown, supra note 2, at 328.
73. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). Note that this court found the public policy violation to be a breach of contract. Id. See Frampton v. Central Ind. Gas Co., 26 Ind. 249, 297 N.E.2d 425 (1973), for a case which held the public policy violation to be a tort.
75. Id., 344 P.2d at 27.
76. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980) ("As the Petermann case indicates, an employer’s obligation to refrain from discharging an employee who refuses to commit a criminal act . . . reflects a duty imposed by law upon all employers to implement the fundamental public policies embodied in the state’s penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action.").
78. Brown, supra note 2, at 328; see also A. Hilt, supra note 5, at 27. Ethical standards may also provide a source of public policy. See, e.g., Pierce, 84 N.J. at 72, 417 A.2d at 512.
79. See, e.g., Tameny, 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839.
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threatening to reveal employers’ illegal conduct (whistleblowing). However, courts usually do not find sufficient public policy when a dismissal is for protesting company policies.

Although some courts define public policy, others defer this determination to the legislature or jury. A majority of the courts recognize a middle ground and limit the public policy exception to the at-will doctrine to clear expressions of public policy by the legislature. In Foley, the California Supreme Court left open the question “whether a tort action alleging a breach of public policy . . . may be based only on policies derived from a statute or constitutional provision or whether nonlegislative sources may provide the basis for such a claim.” However, Foley did assert that when a “statutory touchstone” has been claimed, the court must still inquire whether the discharge “is against public policy and affects a duty which inures to the benefit of the public . . . rather than to a particular employee.”

A few courts also recognize claims for intentional or negligent infliction of emotional distress when the discharge is outrageous, and some allow recovery based on theories of traditional tort negligence.

C. Current Issues in United States Employment Law

United States employment law has become increasingly complex as different states have recognized or refused to recognize various exceptions to the traditional employment-at-will doctrine. As California examples illustrate, the situation within the individual states is not much clearer. As a result, proposals for both federal and state legislation are currently being debated. The questions which arise in this context include: whether to impose a just cause standard on employee termina-

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81. See, e.g., Sheets, 179 Conn. 471, 427 A.2d 385.
82. Brown, supra note 2, at 329.
83. Bakaly, supra note 24, at 71-72. New York is a jurisdiction which explicitly rejects the public policy exception. See Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 302, 448 N.E.2d 86, 89-90, 461 N.Y.S.2d 232, 235-36 (1983) (Whether to recognize such tort liability and how to define it if it is recognized are issues “best and more appropriately explored and resolved by the legislative branch of our government.”).
84. See Bakaly, supra note 24, at 72-73; see also Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1974) (employee could not be terminated for refusing to perform an act “that would require a violation of a clear mandate of public policy”).
86. Id., 254 Cal. Rptr. at 217.
87. See, e.g., Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (punitive damages allowed when a managerial agent’s use of a racial epithet was outrageous, was stated with knowing and unreasonable intent to inflict mental distress, and was used positively to humiliate the plaintiff).
tions, whether to require mandatory arbitration in wrongful termination disputes, and whether to allow for punitive damages. The difficulty lies in establishing a system which is acceptable to employers who wish to retain as much control over their enterprises as possible and to employees who have become accustomed to significantly increased protection from arbitrary discharge.

A knowledge of foreign systems has become increasingly valuable as United States legislators and courts attempt to revise the employment system. Japan's employment system, for example, addresses issues being contemplated in the United States. Specifically, at a time when American employers are confused as to how much protection employees should receive, the United States can learn from Japan's highly employee-protective system.

III. JAPANESE EMPLOYMENT LAW

Japan has created a system described as guaranteeing lifetime employment. The Japanese Constitution, Parliament, and courts have each contributed to the highly employee-protective atmosphere of the Japanese employment system. Cultural background has also had a profound influence on the system's emphasis on employee security.

The Japanese system is relatively new, however, so there is some confusion among the Japanese courts and people as to the boundaries of proper termination procedures.

A. Background of Japanese Employment Law

Generally, Japanese labor law applies to all employees as a matter of principle, regardless of the employer or type of work involved. However, labor law is normally divided into two separate but frequently overlapping areas: individual labor law and collective labor law. Japan's individual labor law can be compared to what is called employment law in the United States because it addresses the individual relationships be-

89. See supra note 32.
92. See id. at 27; Brown, supra note 2, at 324.
93. T. Hanami, supra note 91, at 51.
95. T. Hanami, supra note 91, at 33.
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between employers and employees. Its concerns include the different categories of employees, the individual employment contract (that is, its form and content), the parties' rights and duties, remuneration, job security, and protection against discrimination. Japan's collective labor law focuses on the labor unions and regulates the union-employer relationship. As such, only individual labor law is relevant to the following discussion of wrongful discharge.

Another important distinction in Japanese employment relationships exists between regular, or permanent, employees and temporary employees. Regular employees are employed under a contract for an indefinite term but are expected to stay with the employer until retirement. They are recruited annually from university and secondary school graduates. However, there has also been a growing tendency to employ persons who have worked for other companies as regular employees. Regular employees "enjoy job security, guaranteed steady advancement in rank and wages, the required training for a given job and . . . a generous sum as a retirement allowance."

Temporary employees help employers cope with normal business fluctuations. They are generally experienced workers but may also be recruited directly from school. They are employed for either a definite or an indefinite term but are not expected to stay in the enterprise for long. Temporary employees do not have "permanent" status and are the first to be dismissed in the event of a labor surplus, even though in practice temporary employees may stay with the enterprise for a considerable period of time and, at the employer's discretion, may eventually be promoted to regular status. Temporary employees have the same legal protection against dismissal as regular employees. In general, how-

96. Id. at 33. See Kristoff, From Labor to Employment Law: The Evolution of a Practice, 10 BARCLAYS CAL. L. MONTHLY, at ii (Aug. 1988), for a discussion of American employment law's development from a "mini-speciality" within labor law to a "mega-segment of the legal practice."

97. T. HANAMI, supra note 91, at 33-34.

98. Nishimura, supra note 94, § 1.01[2], pt. 12, ch. 1, at 9.

99. T. HANAMI, supra note 91, at 36.

100. Id.

101. Id.

102. Id.

103. Id.

104. Id.

105. Id.

106. Id.

107. Id.

108. Id.

109. Id.
ever, most large companies still have a steady base of lifetime employees who enjoy higher status and better working conditions than their temporary counterparts.\textsuperscript{110}

**B. Sources of Japanese Labor Law**

Japanese statutory law states that an employer may discharge an employee at will when the employment contract does not specify a definite term of employment.\textsuperscript{111} More specifically, article 627 of the Civil Code provides:

If no period for the service has been fixed by the parties, either party may at any time give notice to the other party to terminate the contract; in such case the contract . . . shall come to an end upon the expiration of two weeks after such notice has been given.\textsuperscript{112}

This provision has been interpreted "to permit an employer to terminate [an employment contract] for any reason, or for no reason at all, when a contract is general or for an indefinite term."\textsuperscript{113} Article 627 bears a strong resemblance to California's codification of the United States at-will rule.\textsuperscript{114} However, the Japanese system has been described as offering, and even guaranteeing, lifetime or permanent employment,\textsuperscript{115} referred to as \textit{shushin koyo} by the Japanese.\textsuperscript{116} The Japanese permanent employment system "guarantees employment until somewhere between the ages of fifty-five and sixty."\textsuperscript{117}

The constitutional basis for Japanese labor law appears in the 1946 Constitution's provisions guaranteeing workers' rights as fundamental human rights.\textsuperscript{118} As fundamental rights, workers' rights are inviolable and cannot be altered by agreement of the parties.\textsuperscript{119} Moreover, funda-

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{The Civil Code of Japan}, art. 627, para. 1, in 2 EHS \textsc{Law Bulletin Series: Japan}, at FA 104 (1981) [hereinafter \textit{Civil Code}].
  \item \textsuperscript{113} Matsuda, \textit{supra} note 90, at 456. The "at any time" language in Article 627 is limited by the rest of the article which dictates proper notice of termination. Matsuda notes that in Japanese, "at any time" may sometimes mean "on whatever occasion" or "in whatever case may be." As such, Article 627 says, in effect, that termination is acceptable for any or no reason. \textit{Id.} at n.2.
  \item \textsuperscript{114} \textit{See supra} notes 40-41 and accompanying text.
  \item \textsuperscript{115} \textit{See}, e.g., Matsuda, \textit{supra} note 90, at 455.
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} T. \textsc{Hanami}, \textit{supra} note 91, at 34.
  \item \textsuperscript{119} \textit{Id.}
\end{itemize}
mental rights constitute public policy.\textsuperscript{120}

Article 27, section 1 of the Constitution guarantees the right to work.\textsuperscript{121} It is the most fundamental legal source of Japanese labor law because it gives a constitutional basis to legislation regarding employment security.\textsuperscript{122} Section 2 requires that standards of working conditions be fixed by law, providing another solid ground for protective labor law.\textsuperscript{123} Article 28 guarantees the right to organize, bargain, and act collectively.\textsuperscript{124}

Together, the above constitutional provisions "ensure fairly favourable treatment of workers as against employers."\textsuperscript{125} Indeed, "the very nature of the Constitution provides a favourable atmosphere for labour law in Japan."\textsuperscript{126}

To protect employees' constitutional rights, the Japanese Parliament enacted legislation shortly after World War II.\textsuperscript{127} This legislation, the Labor Standards Law, modifies article 627 of the Civil Code.\textsuperscript{128} It limits an employer's right to discharge an employee by protecting constitutional freedoms such as the right to work, by placing employee contracts under the Rule of Employment and collective bargaining agreements, and by establishing public policies against discriminatory treatment.\textsuperscript{129} When an employer violates a provision of the Labor Standards Law in discharging an employee, the discharge is invalidated.\textsuperscript{130} Additionally, an employer who violates the Labor Standards Law exposes himself to criminal penalties.\textsuperscript{131} The provisions also cover basic working conditions, including working hours, rest periods, holidays, and vacations.\textsuperscript{132} Employers entering into agreements setting standards lower than those prescribed by the Labor Standards Law will have those standards rendered null and void and may be punished by fines.\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{120} Id. at 35.
  \item \textsuperscript{121} \textit{The Constitution of Japan and Criminal Statutes} 8 (1958) ("All people shall have the right and the obligation to work.").
  \item \textsuperscript{122} T. Hanami, \textit{supra} note 91, at 49.
  \item \textsuperscript{123} \textit{The Constitution of Japan and Criminal Statutes}, \textit{supra} note 121, at 8.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} T. Hanami, \textit{supra} note 91, at 49.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Matsuda, \textit{supra} note 90, at 456 n.1.
  \item \textsuperscript{129} See generally Nishimura, \textit{supra} note 94, § 1.03[1][a], pt. 12, ch. 1, at 59-60.
  \item \textsuperscript{130} Matsuda, \textit{supra} note 90, at 459.
  \item \textsuperscript{131} Nishimura, \textit{supra} note 94, § 1.03[1][a], pt. 12, ch. 1, at 59-60; \textit{see also} Labor Standards Law, art. 13, in \textit{8 EHS Law Bulletin Series: Japan}, \textit{supra} note 112, at EA 2 (1983).
  \item \textsuperscript{132} Nishimura, \textit{supra} note 94, § 1.03[1][a], pt. 12, ch. 1, at 59.
  \item \textsuperscript{133} Id. at 59-60; \textit{see also} T. Hanami, \textit{supra} note 91, at 35. The civil law rules regarding contracts of employment also cover individual employer-employee relationships. \textit{Id.} at 33.
\end{itemize}
The Labor Standards Law encompasses nearly all employed persons, except for civil servants, family businesses, and a few other limited exceptions. It also applies to the foreign managers and foreign employees of foreign companies registered in Japan.

In short, the Labor Standards Law attempts to eliminate exploitative practices that impede the formation of equitable employment relationships. The overall effect of the Labor Standards Law is that, "while it may appear otherwise, the employer has no real freedom to discharge employees."

Case law is necessary to fill out those generally abstract legislative provisions that tend to prescribe only fundamental rules. However, the relative newness of both the theory and practice of labor law in Japan has caused confusion in the case law. Almost any legal argument will be heard by the court, with young judges tending to adopt new theories.

However, courts generally follow rules that have been firmly established in reported cases, and judges pay close attention to scholarly legal work and reviews of court decisions published in legal journals. Thus, even though there is no notion of binding precedent or stare decisis in Japanese law, Japanese case decisions have some predictive value.

It is important to note that Japanese culture substantially influences the tone of Japanese employment law. Japan is a country which retains "traditional social values such as respect for the aged, diligence, sensibility, and modesty, and combine[s] them with the modern democratic ideas [of western culture, such] as the freedom of the individual... and the guarantee of fundamental human rights." In addition, "[t]he Japanese system of loyalty and cooperation tends to promote job stability

However, labor laws modify or replace contract rules to such an extent that the contract rules apply to only a few exceptional employment relationships. Kitagawa, *Contract Law In General*, in 3 *Doing Business in Japan*, supra note 94, § 1.06[7][a], pt. 2, ch. 1, at 73.22.

134. Nishimura, supra note 94, §§ 1.01[3][a], 1.03[1][b], pt. 12, ch. 1, at 9, 60.
135. Id. § 1.01[1][b], at 60.
136. Id. § 1.03[1][a], at 59-60.
137. Matsuda, supra note 90, at 455.
138. T. HANAMI, supra note 91, at 51.
139. Id. This newness also explains the relatively small number of judicial decisions concerning labor law. See Nishimura, supra note 94, § 1.01[3][c], pt. 12, ch. 1, at 10.
140. T. HANAMI, supra note 91, at 51.
141. Id.
142. Id.
143. Id.
144. See infra notes 145-146 and accompanying text.
145. T. HANAMI, supra note 91, at 27.
and, to a certain degree, permanent employment."\textsuperscript{146} The resulting employment system is extremely protective of employee rights.

C. Wrongful Discharge In Japan

Article 27 of the Constitution, which makes the right to work a fundamental right of Japanese citizens, "make[s] the promotion of job security a matter of public order."\textsuperscript{147} Japanese courts usually hold that employers "must respect this public order and not abuse their rights of dismissal."\textsuperscript{148} That is, the courts do not favor dismissal and often require just cause even for dismissal with notice.\textsuperscript{149} Additionally, there are a number of specific statutory restrictions on the employer's power to discharge employees.\textsuperscript{150} In short, the Constitution, courts, and statutes reflect the "extraordinary nature of the dismissal of regular employees under the life-time employment system."\textsuperscript{151}

The Labor Standards Law, discussed above, provides that an employer cannot discriminate against an employee by discharging him because of his nationality, beliefs, or social status.\textsuperscript{152} It also prohibits employers from retaliating against employees by dismissing them for exercising their right to file complaints against their employers.\textsuperscript{153} Moreover, the Labor Standards Law dictates that there are certain periods during which an employer may not discharge an employee.\textsuperscript{154} For example, an employer may not dismiss a female employee while she is on leave for pregnancy,\textsuperscript{155} or an employee that is undergoing medical treatment for a work related illness or injury, or within thirty days after such treatment ceases.\textsuperscript{156} However, it remains an open question whether an employer may discharge an employee who commits misconduct during one of these periods.\textsuperscript{157}

\textsuperscript{146} Brown, supra note 2, at 324.
\textsuperscript{147} T. Hanami, supra note 91, at 85.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} See infra notes 152-161 and accompanying text.
\textsuperscript{151} T. Hanami, supra note 91, at 85.
\textsuperscript{152} Labor Standards Law, supra note 131, art. 3, at EA 2.
\textsuperscript{153} Id. art. 104, para. 2, at EA 28.
\textsuperscript{154} Nishimura, supra note 94, § 1.03[10][b][iii], pt. 12, ch. 1, at 112.
\textsuperscript{155} Labor Standards Law, supra note 131, arts. 19, 65, at EA 7, EA 16.
\textsuperscript{156} Labor Standards Law, supra note 131, art. 19, at EA 7.
\textsuperscript{157} Nishimura, supra note 94, § 1.03[10][b][ii], pt. 12, ch. 1, at 112. Nishimura notes that one case has held that disciplinary discharge during this period is impermissible, but that it is permissible to give notice of intent to discharge during the period when discharge is impermissible. Id. (citing Judgment of Sept. 13, 1956, Chisai (District Court), Japan, 7 Rōminshū 1048). Such a discharge would become effective once the period prescribed for notice of discharge after the restriction has passed. Id.
Significantly, an employer must give an employee at least thirty days advance notice of discharge.\textsuperscript{158} Dismissal may be oral or in writing.\textsuperscript{159} The lack of any required form for notice has given the courts some trouble in determining the date of the notice.\textsuperscript{160} Employers are most protected if they give notice in writing, accompanied with the reason for the dismissal.\textsuperscript{161}

The period of notice may be reduced by paying the discharged employee an allowance in proportion to the amount of days cut off from the thirty-day requisite period.\textsuperscript{162} Accordingly, an employer who only gives twenty days notice must pay an allowance of ten days wages to the discharged employee. The practice of shortening the notice period can be controversial.\textsuperscript{163} For example, when an employer dismisses an employee with neither proper notice nor the average wages for thirty days of work, the courts have been unclear as to whether the dismissal is void or whether the contract is ended after thirty days, leaving the employee with a claim for thirty days’ wages.\textsuperscript{164} According to administrative interpretation,\textsuperscript{165} immediate discharge without cause becomes actionable once the period prescribed for notice of discharge has passed, or upon payment of allowance in lieu of notice, whichever occurs first.\textsuperscript{166} Some commentators feel the discharge should be void. Others feel that the discharged employee can either claim the discharge is void due to the absence of notice or demand payment of the allowance in lieu of the notice.\textsuperscript{167} A number of court decisions have adopted the latter view.\textsuperscript{168}

The Labor Standards Law does not specifically require that the thirty day notice be accompanied by a reason for discharge.\textsuperscript{169} However, Japanese courts are strict in requiring reasons for dismissal, regardless of whether the employer has given proper notice to the employee.\textsuperscript{170}

\textsuperscript{158} Labor Standards Law, supra note 131, art. 20, para. 1, at EA 7.
\textsuperscript{159} T. HANAMI, supra note 91, at 87.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Labor Standards Law, supra note 131, art. 20, para. 1, at EA 7.
\textsuperscript{163} T. HANAMI, supra note 91, at 87.
\textsuperscript{164} Id.
\textsuperscript{165} Nishimura, supra note 94, § 1.03[10][b][iv], pt. 12, ch. 1, at 114. The term “administrative interpretation” describes directives from the upper levels of labor ministries and administrative organs regarding policies for the interpretation and application of statutes and administrative orders. Id. § 1.01[3][b], at 10.
\textsuperscript{166} Id. § 1.03[10][b][iv], at 114.
\textsuperscript{167} Id. at 115.
\textsuperscript{168} Id. (citing Judgment of Apr. 23, 1966, Chisai (District Court), Japan, 17 Rōminshū 627).
\textsuperscript{169} T. HANAMI, supra note 91, at 87.
\textsuperscript{170} Id.
There are specific instances when the time restrictions on discharge do not apply. An employer may discharge an employee without notice or payment of an allowance when it has become impossible to continue business because of some natural disaster, emergency, or other inevitable reason, or when discharge is based upon a cause for which the employee is responsible. The "inevitable reason" must be beyond the employer's control and must occur so suddenly that he cannot avoid it under normal circumstances and cannot give proper notice. As for a discharge for which an employee is responsible, proper grounds include theft, misappropriation of funds, infliction of injury upon another employee, commission of other criminal acts at the workplace, disruption of order at the workplace, and exertion of bad influence upon other employees. Before the employer acts under any of these exceptions, he or she must obtain approval from the Labor Standards Office. Without approval, the dismissal is null and void. Many reported decisions hold, however, that such discharges are effective without Labor Standards Office certification if cause did indeed exist.

Employment rules are another significant aspect of the Japanese wrongful termination system. Employment rules are regulations providing for the terms and conditions of employment. The "employment rules play an overwhelmingly important role in Japan in the establishment of terms and conditions of employment and in the maintenance of order at the workplace." All employers with ten or more employees are required to establish such rules. Employers must file the rules with administrative agencies and make the contents of the rules known to em-

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171. Nishimura, supra note 94, § 1.03[10][b][ii], pt. 12, ch. 1, at 112-13.
172. Labor Standards Law, supra note 131, art. 19, para. 1, at EA 7. Article 628 of the Civil Code allows an employer to terminate an employment contract immediately and without notice for "unavoidable cause." The Labor Standards Law requirement of an "inevitable reason," as compared to the Civil Code requirement of an "unavoidable cause," has been interpreted to be a much narrower and tighter restriction on an employer's ability to terminate without notice. An "inevitable reason" is said to be a bit broader than an act of God but much narrower than traditional notions of just cause. See T. HANAMI, supra note 91, at 57, 87-88; Matsuda, supra note 90, at 457.
174. T. HANAMI, supra note 91, at 88.
175. Nishimura, supra note 94, § 1.03[10][b][iv], pt. 12, ch. 1, at 114.
176. T. HANAMI, supra note 91, at 88.
177. See Nishimura, supra note 94, § 1.03[10][b][iv], pt. 12, ch. 1, at 113-14 (citing Labor Standards Law, supra note 131, art. 20, para. 3, at EA 7).
178. Id. at 114-15.
179. Id. § 1.03[9][a], at 105-06.
180. Id. at 106.
181. Id. § 1.03[9][b].
ployees. The rules "must not controvert provisions of statutes or administrative orders or the collective agreement." Any provisions in a labor contract fixing terms and conditions of employment which are inferior to the standards set forth in the employment rules are void and substituted by the standards set forth in the employment rules.

Significantly, "virtually all employers include a dismissal clause in their 'rules of employment,' which specify the conditions for which an employee may be discharged." Since rules of employment "are required for every firm with ten or more employees . . . most employees are protected by such [dismissal clauses.]" Usually, these clauses not only specify causes for discharge, but describe behavior giving rise to disciplinary charges as well. The rules are generally considered both self-imposed limitations on employers' power to discharge their employees and specified grounds for disciplinary action by employers. Indeed, a majority of courts hold that discharge for causes not enumerated in the rules of employment is impermissible.

Another protection afforded Japanese employees is found in the Civil Code's proscription upon abuse of rights. The majority of commentators and reported cases hold that the prohibition upon abuse of rights curtails the right to discharge, even though technically the employer may discharge employees as long as statutory and nonstatutory restrictions are followed. Under this view, an employer's exercise of his right to discharge must not be abusive. "The [Japanese] Supreme Court has announced that even when cause for discharge exists, discharge is void as an abuse of right when it is markedly unreasonable and cannot be approved in the concrete circumstances of the case under notions prevailing in society." Thus, although Japan lacks a statute re-

182. Id. § 1.03[9][a].
183. Id. § 1.03[9][e], at 108.
184. Id. § 1.03[9][f], at 108-09.
185. Matsuda, supra note 90, at 461.
186. Id.
187. Id.
188. Id. at 461-62.
189. T. HANAMI, supra note 91, at 89.
190. See Matsuda, supra note 90, 113, at 462 n.25; see also Nishimura, supra note 94, § 1.03[10][e][ii], pt. 12, ch. 1, at 115.
191. See Civil Code, supra note 112, art. 1, para. 3, at FA 1 ("No abusing of rights is permissible."). The Civil Code is unclear as to which rights it addresses. It is safe to assume, however, that one may not abuse those rights guaranteed in the Japanese Constitution.
192. Nishimura, supra note 94, § 1.03[10][e][iii], pt. 12, ch. 1, at 116.
193. Id.
194. Id. (citing Judgment of Jan. 31, 1977, Saikosai (Supreme Court), Japan, 268 Rō Han 17).
quiring just cause for dismissal with notice, legal theory has firmly established strict rules concerning dismissal with notice, e.g. that discharges inappropriate under prevailing societal norms will be an abuse of right.\textsuperscript{195} Simplified, when an abusive exercise of an employer’s power to discharge is at issue, the abuse consists of a violation of public policy, a violation of good faith, and abuse in a narrow sense.\textsuperscript{196}

“In sum, [Japanese] law uses two approaches to restrict employers’ dismissals of employees: it prohibits [employers’] abuse of [their] discretion to discharge, and it encourages [them] to discharge only for reasons stated in the rules of employment.”\textsuperscript{197} The employer will generally be obligated to give some reasonable or just cause sufficiently justifying the dismissal.\textsuperscript{198} As shown,

unless an employer can provide a justifiable reason, a discharge for cause other than [those] included in the rules of employment shall be invalidated as an abuse of the employer’s power to discharge. Yet, even when a discharge is within the terms of the rules of employment, it will be held invalid if such a cause is found either unreasonable or contrary to public policy, or if an application or an interpretation of the rule is found unreasonable.\textsuperscript{199}

D. Remedies

Once a court finds an employee has been invalidly dismissed, it will declare the dismissal null and void and may order the continuance of the employment contract.\textsuperscript{200} Accordingly, a Japanese employee who has

\textsuperscript{195} Id.; see also T. HANAMI, \textit{supra} note 91, at 88-89. Note, however, that “the predictive value of reported decisions is limited” because of subtle distinctions made by the courts. Nishimura, \textit{supra} note 94, § 1.03[10][c][iii], pt. 12, ch. 1, at 116. For example, courts have found abuses of the right to discharge when a female employee was discharged because she made erroneous entries in account books and had personal telephone conversations during work hours and when a salesman went to a coffee shop during work hours; however, other courts have found no abuse of right when an employee was discharged for misrepresenting his education in a statement of his personal history and when an instructor in a mission school was discharged for not participating in required worship services. \textit{Id.} at 117-18 (citing Judgment of Nov. 20, 1967, Chisai (District Court), Japan, 617 Hanji 72; Judgment of Oct. 9, 1970, Chisai (District Court), Japan, 617 Hanji 92; Judgment of June 11, 1969, Chisai (District Court), Japan, 569 Hanji 85; Judgment of Mar. 31, 1966, Chisai (District Court), Japan, 17 Rominshu 347.

\textsuperscript{196} Matsuda, \textit{supra} note 90, at 461 n.22 (citing Konishi, \textit{Freedom of Discharge Hogaku Kyokai Zasshi}, [86 No. 9] HOGAKU KYOKAI ZASSHI 1028).

\textsuperscript{197} Id. at 462.

\textsuperscript{198} Id.

\textsuperscript{199} Id. (emphasis in original).

\textsuperscript{200} T. HANAMI, \textit{supra} note 91, at 85.
been invalidly discharged may be reinstated unless he chooses instead to claim damages. Most employees choose to be reinstated, in part because the Japanese lifetime employment system carries with it the idea that a second job is inferior to the first and also because of the need of Japanese employees to "save face" with their former employers.

If the employer refuses to reinstate the employee, the question arises whether the employee has a cause of action against the employer for reinstatement or for damages. The majority of commentators argue that the employee has no right to demand reinstatement unless such remedy is provided for in the collective agreement, employment rules, or labor contract. Still other commentators hold that employees have the right to demand reinstatement because the "labor contract is a continuing contractual relationship which is governed by the principles of fidelity and good faith."

Aside from these remedies, the Civil Code mandates the retroactive payment of wages for the time the employer wrongfully refused to accept the employee's services. The reasoning behind this remedy is that when the dismissal is invalid, the employee has never legally left the employer's payroll. However, some Japanese scholars are skeptical of this remedy, believing that a damages award is more consistent with the principle of freedom of termination of an employment contract.

Although Japan does not have specific labor courts, the courts have developed a provisional disposition procedure which caters specifically to employer-employee disputes. An order resulting from the provisional disposition procedure preserves a claim by ordering specific action to be taken or by fixing the parties' legal status until a formal court

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201. Matsuda, supra note 90, at 464.
202. T. HANAMI, supra note 91, at 85.
203. Id. Hanami questions the effectiveness of the reinstatement remedy, noting that reinstated workers often move on to new jobs because of the damage done to their relationships with management and fellow employees. Id.
204. Nishimura, supra note 94, § 1.03[10][f], pt. 12, ch. 1, at 121.
205. Id. at 121-22.
206. Id. at 122.
207. Matsuda, supra note 90, at 464-65 (citing The Civil Code of Japan, supra note 112, art. 536, para. 2, at FA 89).
208. Id. at 465.
209. Id. at n.35. Critics of the retroactive wage remedy also point to the problems inherent in trying to distinguish between legal and effective termination of an employment contract. Id. at n.36. Moreover, these critics feel that damages are more practical since an employee cannot seek court enforcement of an invalidation of discharge. Id. at n.37.
210. Matsuda, supra note 90, at 465. Note that the resolution of industrial disputes involves different machinery, such as the Labor Relations Commission. See T. HANAMI, supra note 91, at 152-62.
Wrongful Termination Law

The provisionary disposition proceeding is thus subordinate to a full consideration of a case on its merits. The party seeking a provisionary disposition must show that he or she will suffer irreparable damage if forced to wait for a decision on the merits and that the prima facie case is strong enough to suggest that the ultimate decision will be in the party's favor.

The majority of the Japanese courts, in provisionary disposition proceedings, tend to grant orders that both restore the plaintiff's employee status and require the employer to pay wages to the employee. Employees are therefore more likely to petition for provisionary orders than to file suits alleging wrongful discharge. Furthermore, although a court action on the merits can overrule a provisionary disposition order, the provisionary proceeding is simpler, faster, and cheaper than a court action. Courts now tend to grant provisionary disposition orders that automatically invalidate discharges without stating any reasons for the invalidations, partly in response to the ideal of voluntary dispute resolution.

Some courts, however, are unwilling to issue provisionary disposition orders that completely satisfy the employee thus making further litigation unnecessary. Unless the procedure appears urgent, these courts usually reject petitions for provisionary orders to pay wages, choosing instead to grant orders suspending the discharge in question, thereby tentatively restoring the employee's status under the employment contract. To a discharged Japanese employee, the provisionary order restoring his status in the company is still important because it lessens the social disgrace involved and allows the worker to claim benefits in addition to wages. Moreover, the courts, expecting the employer's voluntary compliance, believe that such a result promotes dispute resolution.

212. Matsuda, supra note 90, at 465.
213. Id. at 465-66.
214. Id. at 467.
215. Id.
216. Id. at 467-68.
217. Id. at 468.
218. Id. at 466.
219. Id.
220. Id. at 466-67.
221. Id. at 467.
222. Id.
IV. COMPARATIVE ANALYSIS

Basic similarities between the Japanese and United States employment systems make the Japanese system a good predictive tool for evolving United States law. Both systems have developed considerably in the decades since the end of World War II.223 Although the Japanese system favors lifetime employment over an at-will presumption, Japan, like the United States, lacks explicit statutory or constitutional authority for a just cause requirement for employment termination.224 Japanese courts have imposed this limitation on the employers' right to discharge workers.225 Similarly, in California, the courts have moved toward a just cause standard.226 In short, the United States view of the employer-employee relationship is moving closer to a Japanese perspective in that United States courts are increasingly concerned with employee protection against wrongful discharge.

Despite the similarities, differences between the two countries' approaches to disputes in general make it unlikely that the systems will become mirror images of each other. For example, in Japan "many matters which in Western nations are dealt with within the framework of the regular machinery of the law are left... to work themselves out outside this machinery."227 This is due, in part, to the Japanese preference for extrajudicial, informal means of settling controversies.228 To the Japanese, litigation admits that a dispute exists and leads to a decision independent of the wills of the disputants.229 Because of this approach to disputes, "the Japanese are still adjusting to the American victim's tendency to litigate and to seek punitive as well as compensatory damages."230

A difference in the historical backgrounds of the United States and Japanese legal systems also leads to differences in the two employment
systems. United States law "is in large part a result of the people's efforts from the colonial period to develop an official scheme for solving disputes among themselves." By contrast, "Japanese law is basically a means developed by the rulers to rule the people." As such, the Japanese courts were considered machinery for the ruler to rule the people and not forums for the people to rectify wrongs committed against them.

The Japanese system, however, is still of theoretical value to the United States. By observing Japan's lifetime employment system at work, United States lawmakers can better evaluate the desirability of a similar system in the United States. Similarly, by identifying those areas where confusion has persisted in Japanese law, United States lawmakers will be better equipped to avoid the same results.

V. CONCLUSION

Apart from any similarities or differences between the United States and Japanese employment systems, the American and Japanese peoples continue to conduct business with one another. Given the confusing state of United States employment law and the unique aspects of Japanese employment law, a basic knowledge of each other's employment systems has become a practical necessity to those employers and employees who find themselves in the other's employment systems. As Japanese and American employers' knowledge and understanding of each other's systems increases, so will the efficiency and strength of their existing and future business relationships.

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232. Id.
233. Id.
234. Id.