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Notes

The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It

by

MICHAEL D. FABIANO*

Job security is unquestionably one of the greatest concerns of American workers.1 Employees in many workplaces today have a substantial measure of job security in that they are protected from arbitrary dismissal by either an express or an implied promise that they will not be terminated without "just cause" or "good cause." This promise, however, is often ill-defined, and necessarily so when it is based on an "implied contract" theory.2

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For the convenience of readers who do not have easy access to the Pacific Reporter, parallel citations to the California Supreme Court cases cited in this Note are as follows: Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal. Rptr. 211 (1988); Lagoe v. Duber Indust. Sec., Inc., 264 Cal. Rptr. 684 (1989); Rojo v. Kliger, 52 Cal.3d 65, 276 Cal. Rptr. 130 (1990).

1. Many recent public opinion surveys have found job security to be at or near the top of Americans' concerns about their lives. In one recent poll, conducted by the Roper Organization, 73% of the blue-collar workers surveyed and 71% of the white-collar workers surveyed said their biggest fear was being out of work. James Welsh, People Full of Worry, Poll Shows, NEW ORLEANS TIMES-PICAYUNE, Nov. 15, 1992, at F1. See also John M. Berry, Consumers' Pessimism Deepens: Index of Confidence Hits 18-Year Low on Job Loss Fears, WASH. POST, Feb. 26, 1992, at A1, A12.

2. Most American jurisdictions recognize that the traditional rule of at-will employment may be modified by promises inferred from the conduct of the parties. See, e.g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980) (holding that a provision providing that an employee shall not be discharged except for cause can become part of the employment contract by either express or implied agreement); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 924 (Ct. App. 1981) (holding that an employer's right to discharge may be limited by the express or implied terms of the employment agreement); Foley v. Interactive Data Corp., 765 P.2d 373, 384 (Cal. 1988) (concluding that Pugh correctly applied contract principles in the employment context, and noting a strong trend in other jurisdictions in favor of
One vexing problem with this lack of definition arises when an employer wants to terminate an employee based on disputed allegations of wrongdoing. For example, an employer may have received a sketchy report from a co-worker that an employee is regularly stealing valuable company property. Such a report may be based on rumor, on what the informant thought she saw, or on the idle observations and deductions of a busybody. Does this information alone provide a sufficient basis for an employer to terminate a just-cause protected employee? If not, how much more weighty or reliable must the information be? Does the answer depend on the nature of the allegations or the nature of the accused employee's job?

These questions are becoming relevant to increasing numbers of employees and employers. In 1987, Montana became the first and so far the only state to enact a wrongful discharge statute, which protects covered employees against discharge without "good cause."\(^3\) In 1991, the Uniform Law Commissioners adopted a Model Employment Termination Act, which would provide most nonunion, private-sector employees with protection against discharge without "good cause."\(^4\) Several other states, including California, Illinois, Michigan, and New York, have considered enacting a statutory reform of employment law that would include protection against termination without cause,\(^5\) and numerous commentators have advocated such a step.\(^6\)

Reforms such as these will, in the near future, bring protection against termination without cause for many employees that currently may be discharged "at will."\(^7\) It is estimated that 2,000,000 nonprobationary, nonunion, private-sector employees are discharged nationwide each year, and that of these, about 150,000 to 200,000 would have legitimate legal claims under a just-cause standard.\(^8\)

\(^3\) MONT. CODE ANN. §§ 39-2-904 to -914 (1989).
\(^4\) MODEL EMPLOYMENT TERMINATION ACT § 3(a) (1991).
\(^5\) Two bills that would have provided just-cause protection for many nonunion, private-sector employees were introduced in a recent session of the California Legislature, one supported by several groups of employers and the other backed by the ACLU and AFL-CIO. See Joseph Grodin, Toward A Wrongful Termination Statute for California, 42 HASTINGS L.J. 135, 141-42 (1990). The prefatory note to the Model Employment Termination Act states that "at least 14 states ... have undertaken to draft and/or consider legislation in this area." MODEL EMPLOYMENT TERMINATION ACT prefatory note (1991).
\(^7\) See infra Part I.
\(^8\) MODEL EMPLOYMENT TERMINATION ACT prefatory note (1991).
This Note examines what a nonunion, private-sector employer must demonstrate—good faith, reasonableness, actual misconduct, or something else—in order to lawfully terminate a just-cause protected employee. In answering this question, the employee's right to the job security she has been promised must be balanced against the employer's right to make business decisions and the employer's obligation to ensure safety in the workplace.

I. The Distinction Between Just Cause and At-Will Employment

Under the common law, at-will employment is the default position—an employment relationship is at will unless the parties otherwise modify it. The at-will employment rule has been held to mean that the relationship is terminable at any time by either party, regardless of motive, for good cause, bad cause, or no cause, and for any reason or no reason. In California, by statute, employment is presumed to be at will unless the parties to the relationship provide otherwise.

In many workplaces today, however, employees are protected from at-will termination by either an implied or an express promise that their employer will not dismiss them except for good cause. Some form of just-cause protection is written into almost every collective bargaining agreement, and nearly all civil service systems have just-cause

12. A recent study of 400 collective bargaining agreements found that "cause" or "just cause" was stated as grounds for discharge in 86% of the agreements studied. Bureau of National Affairs, Basic Patterns in Union Contracts 7 (12th ed. 1989).

The actual clauses may vary widely from contract to contract. The following example appeared in a paper industry collective bargaining agreement:

It is agreed that warning, disciplinary layoff, or discharge of an employee must be based on evidence that is clear and must be occasioned by a substantial, not merely technical, commission of a wrongful act and that full reason for such warning, suspension or discharge shall be recorded and stated in writing to the Union. Causes for immediate discharge are: [list of ten causes, including "gross insubordination," endangering the workplace by violating safety rules, felony conviction, leaving the premises during working time without permission, "deliberate destruction or removal" of company property, and fighting] . . . . Causes for warning, suspension and ultimate discharge are: [list of ten causes, including "inefficient work of . . . low standard," "bringing or having intoxicants" on company premises, abusing intoxicants or reporting for work while intoxicated, unexcused absence or tardiness, and "running, scuffling, horseplay or throwing things."]

Donald P. Rothschild et al., Collective Bargaining and Labor Arbitration 536-37 (2d ed. 1979) (excerpt from agreement between National Carbon Coated Paper Co. and Local 1032, United Papermakers and Paperworkers).
Courts in most states, including California, have held that implied contract terms may limit an employer’s power to discharge an employee at will. Forty-one United States jurisdictions now recognize implied contract exceptions to the employment-at-will rule. Implied contract terms may be ascertained from factors “including the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.” Courts have held that “such implied-in-fact contract terms ordinarily stand on equal footing with express terms.” Thus, an employee may be protected from dismissal without cause either by an express contractual provision or by terms implied by the conduct of employer and employee.

Part II of this Note examines the amount of protection afforded by a just-cause clause when an employer wants to discharge an employee based on allegations of misconduct that the employee denies. The view that just cause requires only that the employer act in good faith, or reasonably and in good faith, is discussed in Part II.A. The notion that an employer should have greater latitude in safety-sensitive situations is discussed in Part II.B. The view that just cause requires an employer to prove actual misconduct by the employee is examined in Part II.C. Part III addresses the policy considerations that are relevant to deciding which of the alternatives examined in Part II should be incorporated into a common-law just-cause standard, and concludes that when an employer discharges a just-cause protected employee based on disputed allegations of misconduct, the definition of just cause should include a requirement that the employer’s decision to discharge be reasonable, in

15. Perriitt, supra note 9, §§ 1.12-1.63 (summarizing implied contract cases state-by-state).
16. Foley, 765 P.2d at 387 (quoting Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925 (Ct. App. 1981)). One common way in which employees may receive protection from at-will termination is through provisions in company-written and -distributed employee handbooks. See, e.g., Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087-88 (Wash. 1984); Toussaint, 292 N.W.2d at 892 (holding employer's statements of policy may give rise to contractual rights in employees); Fine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (concluding that personnel handbook provisions may be enforceable as part of an employment contract).
17. Foley, 765 P.2d at 385; see also Toussaint, 292 N.W.2d at 885 (for-cause provision may become part of the contract “either by express agreement or as a result of employee’s legitimate expectations grounded in employer’s policy statements”).
good faith, and based on substantial evidence. As Part III explains, courts could also justifiably require a showing that the misconduct actually occurred, but given a substantial evidence requirement, this would affect only a very small number of the cases in which disputed allegations of misconduct are at issue.

II. Theories of the Meaning of Just Cause

The issue of how much latitude an employer has, or should have, in deciding whether to terminate a just-cause protected employee suspected of misconduct has long been addressed within collective bargaining agreements and civil service regulations, as well as by many courts, commentators, and arbitrators.

There are two primary rationales for not requiring an employer to prove actual misconduct before discharging a just-cause protected employee. One is that such decisions are properly the province of the employer; the other is that workplace safety considerations may make it desirable, if not imperative, for an employer to have flexibility in deciding whether to discharge a suspect employee. While there is, or can be, overlap between these rationales, they will be considered separately in this Note.

A. Relying on the Employer's Judgment and Good Faith

One school of thought holds that just cause should be interpreted in harmony with a policy of great deference to the employer's decisionmaking. Under this theory, an employer who has promised just-cause protection to an employee has not breached that promise in terminating the employee so long as the employer acts in good faith. In this context, an employer acts in "good faith" when she believes that the employee's conduct provides sufficient grounds for discharge and is not using the alleged misconduct as a pretext for discharge on some other ground. Many courts would add the requirement that the employer act reasonably.\(^\text{18}\)

Several states have adopted this deferential approach.\(^\text{19}\)


(1) Deference to the Employer

A leading case advocating deference to the employer's decisionmaking in just-cause termination is Simpson v. Western Graphics Corp. 20 In Simpson, the Oregon Supreme Court upheld a lower court's finding that the plaintiffs, who were discharged for allegedly threatening violence against a co-worker, had been discharged for just cause. 21 The Oregon Supreme Court held that when an employer has unilaterally granted just-cause protection 22 to an employee, the employer retains its "fact-finding prerogative" (the right to make the ultimate factual determination) in the absence of any evidence of an express or implied agreement to the contrary. 23 Thus, when reviewing an employer's decision to discharge a just-cause protected employee, a court need only find that the employer based its decision on a determination that there were facts constituting just cause for discharge. The court need not, however, find that those facts actually existed. 24 The Simpson court arrived at this result by positing that a just-cause provision "suggests two distinct questions: 1) what is the meaning of just cause; and 2) who makes the requisite factual determination." 25

It could be argued, however, that these two questions are not distinct. Whether the employer or an independent factfinder such as a court or arbitrator makes the factual determination is really just a part of the meaning of just cause. The nature and magnitude of the cause (e.g., being late for work regularly, or embezzling money from the company), 26 or what an employer must show in order to justify a dismissal of a protected employee, is also integral in determining how much protection an employee has from arbitrary termination. A more precise way of stating the issue, synthesized from several cases and commentaries, 27 is to ana-

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20. 643 P.2d 1276 (Or. 1982).
21. Id. at 1279.
22. In this case, both parties agreed that Western Graphics Corporation had granted just-cause protection to its employees through terms of its employee handbook. Id. at 1278.
23. Id. at 1279.
24. Id. at 1278.
25. Id. A more recent intermediate court decision in Oregon held that an employer does not have a unilateral right to decide what just cause means in the absence of specific contract language giving the employer that right. Fleming v. Kids & Kin Head Start, 693 P.2d 1363, 1366 (Or. App. 1985).
27. See Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 896 (Mich. 1980); Sanders, 911 F.2d at 196-97 (Reinhardt, J., concurring); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 930 (Ct. App. 1981); Crosier v. United Parcel Serv., 198 Cal. Rptr. 361, 366 (Ct. App. 1983) (balancing employee's contractual right to "good cause" protection against employer's interest in operating business efficiently and in compliance with the law); Note, Employer Opportunism and the Need for a Just Cause Standard, 103 HARV. L. REV. 510 (1989); cf. PER-
lyze just-cause disputes by using a two-part test. The first question is whether the employer or an independent factfinder makes the ultimate factual determination of the employee's "guilt" or "innocence." If the appropriate factfinder has determined that the employee has committed some misconduct, the second inquiry is whether that misconduct is sufficient in nature to warrant discharge for cause.

Simpson and this Note address the first part of this test. The Simpson court's holding does not require an employer to meet an objective standard for the reasonableness of its termination decision. As discussed below, this means that employees who dispute the stated reasons for their discharge have substantially less just-cause protection than they would under a rule requiring employers to meet an objective standard when discharging employees for cause.

(2) Holding the Employer to an Objective Standard

A more stringent standard for employers was set forth by the Washington Supreme Court in Baldwin v. Sisters of Providence in Washington, Inc.28 The employer in Baldwin, a hospital, had discharged an employee based on allegations that the employee sexually assaulted a patient. The trial court instructed the jury that "'just cause' means that under the facts and circumstances existing at the time the decision is made, an employer had a good, substantial and legitimate business reason for terminating the employment of a particular employee."29 The jury then found for the plaintiff-employee.30 The Washington Supreme Court reversed, holding that "[a] discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true."31

The Baldwin standard is comparable, at least on paper, to a test frequently employed by arbitrators in interpreting the just-cause clauses of collective bargaining agreements.32 This seven-part test, developed by arbitrator Carroll R. Daugherty, requires fair investigation and "substan-
tial evidence or proof that the employee was guilty as charged." In practice, however, it seems that this requires proof of actual cause in nearly all cases. Daugherty's test is frequently cited in cases in which the employee's conduct is in dispute.

The recently proposed Model Employment Termination Act includes a definition of just cause that requires the employer to act reasonably, but does not impose the Baldwin requirement of substantial evidence. The comments to the relevant section of the Act suggest, however, that courts should look to the body of decisions on just cause developed by labor arbitrators interpreting collective bargaining agreements. If this suggestion is followed, the likely effect would be that employers would be required to demonstrate, at a minimum, that for-cause discharge decisions were based on substantial evidence.

Both the Baldwin and Simpson courts reasoned that the termination decision is properly left to the employer, rather than the court. While it would undoubtedly be bad public policy to leave personnel decisions in the hands of the courts, a good-faith-only rule would reduce a promise not to terminate except for just cause to a promise not to terminate in bad faith. This is arguably inconsistent with the expectation of employers and employees as to the meaning and effect of just-cause provisions.

On this point, the Baldwin rule provides substantially more protection for the employee, because it holds the employer to an objective standard of reasonable conduct based on substantial evidence. The requirement of substantial evidence is particularly important because it protects employees from an employer who would argue that exigent circumstances, such as immediacy or safety considerations, required the employer to act before accumulating substantial evidence.

35. Id. at 24-26 (citing numerous cases).
1) "Good cause" means:
   (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record .
37. Id. § 1(4) cmt. to Para. (4).
38. See supra notes 28-35 and accompanying text.
41. See Sanders v. Parker Drilling Co., 911 F.2d 191, 196-97 (9th Cir. 1990) (Reinhardt, J., concurring), cert. denied, 111 S. Ct. 2014 (1991). Judge Reinhardt's concern was that a good-faith-only rule would make the worker's actual conduct irrelevant, and thus make a promise not to terminate except for cause equally irrelevant. Id.; see also Simpson, 643 P.2d at 1279 (Lent, J., dissenting).
One could argue that the "reasonableness" requirement means that an employer must demonstrate a reasonable decisionmaking process.\textsuperscript{42} This might well require a pretermination hearing of some sort. A reasonable decisionmaking process should certainly require something more than an on-the-spot decision, especially when the evidence does not yield an absolutely reliable conclusion.

In many cases, an employer has expressly or impliedly promised that she will use specified procedures in making a discharge (or other disciplinary) decision. Many states hold employers to their stated termination procedures even in an otherwise at-will employment relationship.\textsuperscript{43} Professor Paul Weiler has suggested that an employer's revocation of her stated termination process could be held unconscionable.\textsuperscript{44} Presumably, invalidating the revocation of the employer's stated process might have the effect of making an employer liable in a wrongful discharge action for failing to abide by her stated process.\textsuperscript{45}

B. Giving an Employer Greater Latitude in Safety-Sensitive Workplaces

Another rationale for not requiring the employer to prove actual misconduct to the fact-finder in order to uphold a for-cause discharge is that employers must have latitude, and indeed have an obligation, to protect their workplace and its surroundings from mishaps caused by dangerous workers. Strong public policy considerations support granting management greater latitude with respect to safety as opposed to other workplace concerns. Management has a public duty to ensure safety in the workplace, but its interest in preventing embezzlement, for example, is wholly private. Courts and legislatures would thus be acting in the public interest, it could be argued, in giving employers more discretion to carry out their obligations to the public at large.

This employer obligation to the public may collide with just-cause protection when an employer believes a worker has committed misconduct that endangers the safe operation of the workplace. In addition to the problem of deciding whether to dismiss an employee on less-than-

\textsuperscript{42} The meaning of "reasonable" in this context has apparently not been directly considered by reported court or arbitration decisions. It appears to have been an underlying issue in the minds of the Ninth Circuit judges in Sanders. See 911 F.2d at 195 (opinion of the court, by Trott, J.); \textit{id.} at 200 n.11 (Reinhardt, J., concurring); \textit{id.} at 215-17 (Kozinski, J., dissenting).

\textsuperscript{43} See Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 890 (Mich. 1980) (holding that employer's policy manual established employee's contractual right "to be disciplined and discharged only in accordance with the procedures there set forth"); Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 735 (Ala. 1987); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (concluding that provisions in employee handbook may become part of contract); Rulon-Miller v. IBM, 208 Cal. Rptr. 524, 529-30 (Ct. App. 1984) (employee has right to the benefit of rules and regulations adopted by company for employee's protection).

\textsuperscript{44} PAUL C. WEILER, GOVERNING THE WORKPLACE 54-55 (1990).

\textsuperscript{45} \textit{Id.} at 53.
certain evidence, an employer may be faced with the danger of leaving a suspected employee on the job in a dangerous situation. This might occur in a situation such as that of Baldwin, in which a therapist working in a hospital was suspected of sexually assaulting a patient in her hospital room. A hospital that allowed such an employee to remain on the job after receiving allegations of such misconduct might subject its patients to an intolerable risk of harm and expose itself to massive civil liability. This dilemma occurs more frequently when an employee in a safety-sensitive workplace is suspected of drug use, and the employer must decide whether to discharge the employee based on scant evidence or to allow the suspected employee to remain on the job.

In Sanders v. Parker Drilling Co., four men who worked on an oil rig on Alaska's North Slope were fired after their employer received, from co-workers, allegations that indicated the men had smoked marijuana while working on the rig. The fired employees, who had just-cause protection, denied the allegations and sued for wrongful discharge. The United States District Court, applying Alaska law, instructed the jury that the just-cause provision required the employer to prove that the plaintiffs had smoked marijuana on the rig. The jury awarded the plaintiffs $360,000, finding in a special verdict that Parker Drilling did not have just cause to dismiss. A divided Ninth Circuit panel affirmed the verdict, holding that it was based on substantial evidence and that the trial court's instructions correctly applied Alaska law.

Judge Kozinski vehemently dissented, calling the court's decision "a result so preposterous it would be laughable if it were not so scary." Kozinski argued that requiring employers to prove actual cause would dangerously inhibit an employer's ability to remove suspected workers from safety-sensitive positions:

Is this the type of decision we want to take out of the hands of management and give to a jury? Is it fair (or safe) to put company officials to a choice between risking an environmental catastrophe and a crushing jury verdict? It seems to me that the most we can reasonably ask of managers under these difficult circumstances is that they act responsibly and in good faith. Whatever may be the rule when dealing with employees who are not in safety-sensitive positions, it seems to me that substantial deference is owed to managers who discharge employees

46. 911 F.2d 191 (9th Cir. 1990).
47. Id. at 193.
48. Id.
49. Id. at 198 (Reinhardt, J., concurring).
51. Sanders, 911 F.2d at 194.
52. Id. at 193-94.
53. Id. at 215 (Kozinski, J., dissenting).
out of a legitimate, good-faith belief that they are acting to preserve
life, limb, property and the environment.\textsuperscript{54}

In his call for "substantial deference" to managers in hazardous
workplaces, Judge Kozinski invoked an early implied contract just-cause
case, \textit{Pugh v. See's Candies, Inc.}\textsuperscript{55} The \textit{Pugh} court distinguished the
determination of good cause in implied-contract cases from the determina-
tion of good cause when an employee has an express contract.\textsuperscript{56} The
court then held that in implied-contract cases, "[c]are must be taken . . .
not to interfere with the legitimate exercise of managerial discretion . . . .
[W]here, as here, the employee occupies a sensitive managerial or confid-
etial position, the employer must of necessity be allowed substantial
scope for the exercise of subjective judgment."\textsuperscript{57} Kozinski suggested that
the reasoning of \textit{Pugh} with respect to "sensitive managerial or confiden-
tial positions" should be applied to safety-sensitive positions in order to
provide managers with flexibility to ensure that hazardous workplaces
can be kept free of possibly dangerous workers.\textsuperscript{58}

This rationale, however, must not be taken too far. Since this excep-
tion to just-cause protection is designed to keep dangerous workers out of
hazardous positions, it should apply only to forms of misconduct that are
potentially hazardous. An oil rig worker with just-cause protection
could, under this rationale, be terminated on suspicion of drug use; it
would, however, be silly to argue that safety considerations justify termi-
nation of the same worker on suspicion of falsifying an expense account
report.

One significant danger of the hazardous workplace exception is that
a "safety-sensitive" exception to the evidentiary requirement\textsuperscript{59} in the
just-cause standard could easily become the rule rather than the excep-
tion, resulting in the erosion or elimination of the protection of just-cause
provisions for innumerable workers.\textsuperscript{60} Employers and courts could de-
fine myriad workplaces and occupations as sufficiently "safety-sensitive"
to justify suspension of employees' just-cause protection. The "safety-
sensitive" rationale has been used by employers and courts to justify ran-
dom or mandatory drug testing for employees. In \textit{National Treasury
Employees Union v. Von Raab},\textsuperscript{61} the United States Supreme Court held

\textsuperscript{54} Id. (Kozinski, J., dissenting).
\textsuperscript{55} 171 Cal. Rptr. 917 (Ct. App. 1981).
\textsuperscript{56} Id. at 928 (" 'Good cause' in this context is quite different from the standard applicable
in determining the propriety of an employee's termination under a contract for a specified
term.").
\textsuperscript{57} Id. (citation omitted).
\textsuperscript{58} \textit{Sanders}, 911 F.2d at 212 n.11 (Kozinski, J., dissenting).
\textsuperscript{59} I would define "evidentiary requirement" here to mean what an employer must
demonstrate, whether it is proof of actual misconduct or substantial evidence thereof, to sup-
port a for-cause termination.
\textsuperscript{60} \textit{Sanders}, 911 F.2d at 201-02 (Reinhardt, J., concurring).
that mandatory drug testing for Customs Service employees satisfied the Fourth Amendment reasonableness requirement not only for employees who were armed or involved in drug interdiction, but also for those who handled “truly sensitive” information.\(^6\) In one recent drug-testing case, the District of Columbia Circuit upheld the classification of nearly 30,000 of the 62,000 employees in the United States Department of Transportation as “safety-sensitive.”\(^6\) Twenty different job classifications were included in the “safety-sensitive” category.\(^6\)

Both the “safety-sensitive exception” approach and the “deference” approach discussed above are subject to the criticism, raised by Judge Reinhardt, that when a worker has secured a promise to not be terminated unless she commits some misconduct, it would be a breach of this promise to terminate her employment if she has not committed any misconduct.\(^6\) As noted above, analysis of this point requires us to consider both express and implied just-cause provisions.

The parties’ intent and expectations are, or should typically be, more apparent when considering an express promise not to terminate except for cause. An employer that tells an employee, orally or in writing, “If you do your job and don’t break company rules, you will not be discharged,” has, it would seem, promised that the employee will be discharged only if she actually breaks a rule, not if the employer suspects she has broken a rule. Under these circumstances, a discharge on the basis of the employer’s mistaken suspicions would be a breach of contract.

Analysis of this situation is not, however, as simple as it seems. Employers’ promises, outside of collective bargaining agreements, are not likely to be explicit or crystal clear. Indeed, their vagueness may often be

\(^{62}\) Id. at 678. Justice Scalia, dissenting, sharply criticized the Court’s decision and noted that its rationale could easily be extended to subject vast numbers of public and private employees to the “needless indignity” of drug testing. Id. at 685-86 (Scalia, J., dissenting).

\(^{63}\) American Fed’n of Gov’t Employees v. Skinner, 885 F.2d 884, 887 (D.C. Cir. 1989), cert. denied, 495 U.S. 423 (1990). Many of the Department of Transportation positions not in this category were classified as “sensitive” and subject to some drug testing, albeit in fewer situations. Id.

\(^{64}\) Id. at 889. The purpose of the “safety-sensitive” classification was to allow the Department of Transportation to subject these workers to “random and periodic” drug testing. Id. at 887. The D.C. Circuit upheld the testing program as constitutional under the Fourth Amendment reasonableness standard. Id. at 890-91.

\(^{65}\) Id. at 196-97 (Reinhardt, J., concurring).

\(^{66}\) Collective bargaining agreements are clearly a special case for several reasons. First, there exists a lengthy written and negotiated agreement of which a just-cause clause is a part. Second, courts and arbitrators interpret these agreements based on over fifty years of interpretation of similar clauses in similar agreements between similar companies and similar unions in similar industries—in short, “just cause” is not ill-defined in the collective bargaining setting. Finally, the “terrain” is far different in a unionized setting, either private or public, than it is in the nonunion private sector. (Just a few examples of relevant distinctive features in the unionized workplace: Mandatory, established grievance and arbitration proceedings; union repre-
intentional, and it is not unreasonable to suggest that only the public policies enunciated by courts in recent years have put teeth into these often vague assurances. Furthermore, the distinction between express and implied just-cause provisions is not one observed by courts that have considered just-cause provisions, or in the modern law of contracts generally. Thus, the parties' intent will likely prove to be elusive, making it difficult to determine precisely what employer X and employee Y intended at the inception of their employment relationship.

Although this task is difficult in individual cases, it should be possible to define broadly a general “intent of the parties” regarding just-cause provisions and to couple this with an analysis of policy considerations in order to enunciate a rule that will apply to all just-cause cases in which the meaning of the provision is not clearly and explicitly spelled out. A good place to begin is with the long-standing assumption in contract law that parties intend each substantive promise to have “business efficacy.” To this may be added the public policy considerations that inform, or should inform, judicial interpretation of the employment relationship. An articulate synthesis of these principles may be found in the Michigan Supreme Court's opinion in Toussaint v. Blue Cross & Blue Shield:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's presentation of any worker with a grievance; and the common use of reinstatement as a remedy for wrongly terminated workers.) See Weiler, supra note 44, at 48-55.

In his concurrence in Sanders, Judge Reinhardt analyzed just-cause protection while making little distinction between its effect in the unionized workplace and its effect in the nonunion, private-sector workplace. 911 F.2d at 196-204 (Reinhardt, J., concurring). This confuses the issue. Actually, one might argue that because the nonunion, private-sector employee lacks the protections against arbitrary treatment enjoyed by union employees, the common-law standard for just cause should be more protective of employee rights than the collective bargaining standard.

67. See Perritt, supra note 9, §§ 7.17-7.18.
68. No court in any of the states that recognize implied-contract exceptions to the at-will employment rule has made a distinction between the enforceability of implied and express provisions. See, e.g., Foley v. Interactive Data Corp., 765 P.2d at 385 (holding that implied and express contractual provisions in employment relationships “stand on equal footing”).
70. See infra Part III.
72. See infra Part III.
cies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “instinct with an obligation.”

This leads naturally into a discussion of the rule for a just-cause evidentiary standard enunciated in the Toussaint case, which requires an employer to demonstrate actual cause in order to support a for-cause termination.

C. Requiring Actual Cause to Discharge a Protected Employee

The rationale behind requiring actual misconduct before a just-cause protected employee may be lawfully discharged is that this is what the employee has been promised—that she will be terminated only if she has committed some wrongdoing. Under this standard, in addition to having actual cause, the employer must act in good faith and must not use the purported actual cause as a pretext for unlawful discrimination or any other insufficient cause, and must act equitably (i.e., may not selectively enforce its work rules).

A leading case establishing this rule is Toussaint v. Blue Cross & Blue Shield. In Toussaint, the Michigan Supreme Court held that a promise of continued employment absent cause for termination could be implied from an employer's stated policies and established procedures. The court went on to hold that “where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review.”

74. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239-40 (1989) (sex, race, religion and national origin must be irrelevant to employment decisions, even if “legitimate” factors are also part of the motivation for the employer's decision); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (employer cannot use employee's misconduct as a pretext for discriminatory discharge).
75. See, e.g., Toussaint, 292 N.W.2d at 895-96; Rulon-Miller v. IBM, 208 Cal. Rptr. 524, 533 (Ct. App. 1984) (finding that employer, in bad faith, used an untrue actual cause to legitimate the termination of an employee; employer was thus liable for wrongful discharge).
76. Toussaint, 292 N.W.2d at 897.
77. Id. at 895-97.
78. Id. at 885, 890.
79. Id. at 895. At the end of its opinion, the court held that “the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution” such as binding arbitration. Id. at 897.
The courts of several states, including California, are in accord with this rule. In *Wilkerson v. Wells Fargo Bank*, the California Court of Appeal explicitly framed the issue in terms of breach of contract:

[An employer's subjective belief it possessed good cause does not dispose of a wrongfully discharged employee's claim for breach of contract. Such employee is entitled to recover for breach of contract notwithstanding the employer's state of mind.]

If an employer claims that the employee was discharged for specific misconduct, and the employee denies the charge, the question of whether the misconduct occurred is one of fact for the jury. The California Supreme Court has implied its approval of the *Wilkerson* rule by remanding a contrary court of appeal decision for reconsideration in light of *Wilkerson*.

Civil service regulations for federal employees also require a showing of actual cause for discharge. The Federal Civil Service Reform Act of 1978 guarantees procedural steps and requires a nexus between misconduct and "efficiency of the [civil] service" for removal, demotion, or suspension of federal employees. Under the Act, judicial review is based only on reasonableness of the agency's and the Merit Systems Protection Board's decisions. Most state civil service regulations are similar, providing for scrutiny of discharge decisions by a review board. Most public employees are covered by civil service termination procedures.

Courts that have proposed an actual-cause requirement for just-cause provisions in nonunion, private-sector workplaces argue that anything less would severely weaken the promised just-cause protection.

80. 261 Cal. Rptr. 185 (Ct. App. 1989).
81. Id. at 192-93.
82. Lagoe v. Duber Indus. Sec., Inc., 782 P.2d 1140, 1140 (Cal. 1989); see also McLain v. Great Am. Ins., 256 Cal. Rptr. 863, 869-70 (Ct. App. 1989) (affirming jury verdict that employee did not in fact violate the company rules as alleged by employer, and thus employer breached implied contract to not terminate employee except for cause).
85. 5 U.S.C. § 7703 (1988 & Supp. I 1989). The courts will affirm rational decisions to dismiss federal employees if applicable procedures were followed and substantial evidence supports the Board's decision. Risner v. FAA, 677 F.2d 36, 37-38 (8th Cir. 1982); Beard v. GSA, 801 F.2d 1318, 1332 (Fed. Cir. 1986); Jones v. Farm Credit Admin., 702 F.2d 160, 162 (8th Cir.), cert denied, 463 U.S. 1212 (1983).
86. PERRETT, supra note 9, § 6.5.
87. Id. Non-civil-service or at-will public employees are guaranteed minimal due process protections (notice and a hearing) if covered by the U.S. Supreme Court's property or liberty interest decisions. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39, 547 n.13 (1985); Perry v. Sindermann, 408 U.S. 593, 597-603 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573-74, 578 (1972). For a discussion of the distinction between union and nonunion workplaces, see *supra* note 66.
The *Toussaint* court stated that its requirement of judicial review is necessary because

[a] promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the employer's decision if the cause contract is to be distinguished from the satisfaction contract.89

Judge Reinhardt's concurrence in *Sanders v. Parker Drilling* expressed a similar sentiment in criticizing Judge Kozinski's position90 that an employer should, at least in hazardous workplaces, have substantial discretion to discharge a just-cause protected employee:

Were the dissent to prevail, the focus in employment law in this country would be drastically altered: the focus would no longer be on whether a violation of company policy actually occurred; it would shift entirely to an examination of the employer's subjective state of mind. [The protection of just-cause provisions] would disappear, to be replaced by the posing, in all potential discharge cases, of a single, radically different question: Was a supervisor's erroneous belief that an employee violated company policy held in good faith? The actual facts of the case would become insignificant—only the employer's mental state would matter.91

Judge Reinhardt also emphasized the breach-of-contract rationale for this rule:

It is elementary that "just cause" for discharge means that the employer must show that the employee committed an act which warrants his discharge. The employer must have a sound basis—a reasonable ground—for his decision to terminate the employee. But the employer does not have a reasonable ground if the beliefs or assumptions on which he bases his decision are incorrect. If the employer cannot prove that the employee engaged in some misconduct which constitutes cause for discharge, he does not have just cause for firing the employee. It is simply not enough for an employer to show that he was well intentioned, that his heart was pure or that if the employee had committed an improper act he would be free to discharge him.92

Enforcement of an "actual cause" rule necessarily contemplates some review of the employer's decision to discharge, whether it is by a court, an arbitrator, or a hearing board.93 Thus, one must consider whether it would be unworkable to have an independent factfinder second-guess termination decisions on a large scale.94 Judge Kozinski's dissent in *Sanders* attacks the actual-cause rule on this basis:

90. *See supra* notes 53-57 and accompanying text.
92. *Id.* at 197 (Reinhardt, J., concurring).
94. *See Perrit*, supra note 9, § 4.51 (criticizing the decision of the Ninth Circuit panel
If . . . we adopt the Toussaint rule [requiring employers to prove actual cause], state and federal courts will soon be in the business of reviewing employment discharge decisions on a wholesale basis. Given the number of jobs where, arguably, the employer has adopted a just cause requirement, the courts will become Merit Systems Protection Boards for all private employment relationships.95

The rule might also be criticized as dangerous, as discussed above, if it prevents employers from removing potentially hazardous employees from a safety-sensitive position.96

The unworkability concerns may be overstated. Obviously, not all disputed discharges result in litigation, regardless of the law or rule that governs a particular situation. Any law results in some litigation; the question is: What is an appropriate amount of litigation generated by this rule? It does not appear that the law, as it stands today in California,97 for example, has generated an avalanche of litigation.98 Furthermore, the Model Employment Termination Act proposes the use of arbitration in adjudicating wrongful discharge disputes;99 if such a system were legislatively enacted and implemented, it might prove to be quite workable.100

More importantly, what will be the effect of the rule, and the large or small potential for litigation, on real workplaces and real discharge decisions? The most desirable rule is the one that best gives effect to the employer’s promise to terminate only for cause without imposing an unwarranted burden on the legal system. When evaluating the actual-cause requirement, the relevant inquiry is whether the rule is necessary to en-

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95. Sanders, 911 F.2d at 211 (Kozinski, J., dissenting). Judge Kozinski, incidentally, previously served on the Merit Systems Protection Board for the federal civil service system.
96. See id. at 204-05 (Kozinski, J., dissenting); see also supra notes 53-57 and accompanying text.
97. See supra notes 80-82 and accompanying text.
98. Unfortunately, the most recent studies of wrongful discharge litigation in California covered only cases preceding the state supreme court’s decision in Foley v. Interactive Data Corp., 765 P.2d 373 (1988), which radically altered the California wrongful-discharge landscape. Since Foley, this landscape has been further altered by the supreme court’s expansion of the public-policy exception to the bar on recovery of punitive damages in wrongful-discharge cases. See Rojo v. Kliger, 801 P.2d 373, 388-90 (Cal. 1990) (holding that there is a fundamental public policy against harassment and discrimination, allowing plaintiff alleging sexual harassment and discrimination to state a claim for wrongful discharge in violation of public policy).
100. Montana’s Wrongful Discharge from Employment Act provides that parties may resolve their dispute by final and binding arbitration if they sign a written agreement to that effect and follow the procedures enumerated in the Act. MONT. CODE ANN. § 39-2-914(1) (1989). If one party offers to arbitrate and the other declines, the offering party, should she prevail in a legal action under the Act, is entitled to reasonable attorney’s fees incurred subsequent to the date of the offer. MONT. CODE ANN. § 39-2-914(4) (1989).
sure that employers will honor their promise not to terminate without cause.

III. Sorting Through the Options

In deciding which rule is preferable, several factors should be considered. These include the need to give effect to the just-cause protection itself, the potential costs of any rule, and whether to defer to managerial decisions, either as a matter of general policy or for workplace safety considerations.

If just-cause promises are to have any substance at all, it is clear that the just-cause standard must be objective. A subjective standard would reduce a promise to terminate only for cause to a promise not to terminate only if the employer is subjectively satisfied, as noted by the *Toussaint* court.101

Thus a "good-faith-only" standard, under which an employer would only have to act in good faith in discharging "for cause," is clearly inadequate. Whether or not courts should defer to the employer's decision, as the *Simpson* court advocated,102 employers must act according to an objective, measurable standard. The minimum objective requirement is that an employer act reasonably and in good faith.

What is "reasonable" in this context, however, is not well defined at this point, as noted above.103 Clearly, reasonableness would require a rational determination, based on facts and circumstances. Some sort of process—investigation, consultation among management personnel, a hearing, or other aspects—should be expected from a "reasonable" employer who has promised a worker not to discharge her without cause.

A requirement of "reasonableness," without more, might be both a virtue and a vice. It would have the advantage of giving a manager some discretion in exigent circumstances; if a situation required a prompt decision, one could argue, it might be reasonable to make a less considered decision than the employer would otherwise make.104 This would allow

103. See supra Part II.A.

To wait any longer or look any closer would have been reckless; the dangers being what they were, the company had no responsible choice but to act decisively. By affirming the jury verdict against Parker, we are saying that management erred grievously by failing to send the employees back onto the oil rig after receiving three eyewitness reports that they were observed regularly abusing drugs on the job, and that the company must now pay hundreds of thousands of dollars for its mistake.

This strikes me as a result so preposterous it would be laughable if it were not so scary.
an employer to avoid keeping a suspected worker in a hazardous position when it would be reckless to do so.\textsuperscript{105}

The vice of a "reasonableness" standard, without more, is the uncertainty of what is required. Allowing a jury to determine what is reasonable, in the largely uncharted waters of wrongful termination litigation, might result in wildly different results.\textsuperscript{106} This would lead to widespread uncertainty among employers and employees with regard to what is required. As with the "workability" issue, however, a legislatively-enacted regime of arbitration would greatly ameliorate this concern.

Adding a substantial evidence requirement provides more definition to the reasonableness standard. Viewed in the context of requiring both reasonableness and substantial supporting evidence, "reasonable" decisionmaking can be seen to include careful consideration of substantial evidence—i.e., a discharge decision based on substantial evidence is presumptively reasonable, and failure to base such a decision on substantial evidence makes that decision presumptively unreasonable. The substantial evidence requirement would not make a reasonableness requirement redundant, however; a reasonable discharge decision would still have to include consideration and procedure appropriate to the circumstances surrounding the discharge, as noted above, in addition to a basis in substantial evidence.

The Baldwin rule,\textsuperscript{107} which requires any discharge of a just-cause protected employee to be reasonable, in good faith, and based on substantial evidence, would provide certainty while still conceding that the ultimate decision should be in the hands of the employer. There would, however, be a significant and desirable check on the employer's discretion in the substantial evidence requirement. This requirement would allow the employer to make the ultimate decision only if that decision is clearly reasonable—i.e., not so arguably unreasonable as to allow the discharged employee to state a cause of action.\textsuperscript{108}

The plaintiff's burden of proof is an important issue to consider in deciding how best to ensure the adequacy of just-cause protection. It may be the most important practical effect of whichever rule applies.\textsuperscript{109} If an employee-plaintiff can survive a defendant's motion for summary judgment, she has a very good chance of getting a settlement or a favorable jury verdict.\textsuperscript{110}

\textsuperscript{105} Id.

\textsuperscript{106} This contrasts with allowing a jury to determine what is "reasonable" conduct in, for example, a personal injury lawsuit involving a minor automobile accident.


\textsuperscript{108} In a sense, then, when the employer's conduct is unreasonable or at least questionable, the employer forfeits her right to be the ultimate fact-finder in the case.

\textsuperscript{109} See supra notes 66-73 and accompanying text.

\textsuperscript{110} From 1982 through 1986, plaintiffs in wrongful discharge cases in California that went to trial won nearly 75\% of the time. William B. Gould IV, The Idea of the Job as
Thus, the Baldwin rule is, from the employee's point of view, a vast improvement over a simple reasonableness rule. The substantial evidence requirement would allow many plaintiffs to defeat a motion for summary judgment, since they would only have to show a genuine issue of fact as to whether or not the employer's decision was based on substantial evidence.

Typically, if a plaintiff establishes a prima facie case of wrongful discharge, the burden of production then shifts to the employer to prove that the discharge was in fact lawful. Clearly, the Simpson rule provides employers with a substantially smaller, if not almost trivial, burden of production compared to the Baldwin or Toussaint rules.

Would there be much of a practical, real-world difference, in most cases, between the Baldwin and Toussaint rules? Probably not, especially if we assume that the crucial effect on litigation comes at the summary judgment stage. Either rule would make it more likely for a plaintiff to defeat an employer's motion for summary judgment than would a good-faith-only or good-faith-plus-simple-reasonableness rule. The most noticeable difference would occur at the trial stage in very close cases. The number of such cases relative to the number of private-sector employees protected by a just-cause provision is surely very small.

The only significant difference between the Baldwin rule and the Toussaint rule appears when an employer, having substantial evidence that an employee has committed misconduct that would justify a discharge for cause, determines that the employee did commit the misconduct. Under the Baldwin rule, a discharge in this case would not be wrongful, whether or not the employee actually committed any wrongdoing. Under the Toussaint rule, if the employee did not actually commit the misconduct, the discharge would be wrongful, since there would have been no actual cause for discharge.

Thus, the difference is that Toussaint imposes strict liability on an employer in this type of case if there is no actual cause for discharge. If this "strict liability case" is to apply at all, it would make sense to limit it

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112. Under the Simpson rule, the court will defer to the employer's decision absent an express provision in the employment relationship to the contrary. Simpson v. Western Graphics Corp., 643 P.2d 1276, 1278-79 (Or. 1982).


114. See supra notes 107-110 and accompanying text.

115. See Baldwin, 769 P.2d at 304.

116. See Toussaint, 292 N.W.2d at 895.
to situations in which an employee has been expressly promised that she will not be terminated unless she commits some misconduct. This is really just a non-negligent breach of contract. If $A$ promises to pay $B$ in exchange for $B$'s promise to paint $A$'s house, for example, and $B$ fails to paint the house, $B$ has breached even if $B$'s failure is not negligent, reckless, or intentional, assuming $B$ has no legally valid excuse for non-performance. Thus, "strict liability" here is really only an application of ordinary principles of contract law.

If we were to closely examine the *Toussaint* rule, we might consider whether the damages available in cases in which the employer has acted negligently, recklessly, or intentionally should also be available in strict-liability cases. One possible variation would be to limit recovery in cases in which employers, for policy reasons, should have "substantial scope" or latitude to discharge a suspect employee.

While a discussion of available damages is beyond the scope of this Note, numerous commentators have discussed whether compensatory (pain and suffering) or punitive damages or attorney's fees should be recoverable in wrongful discharge cases. The trend appears to be disfavoring punitive damages, but favoring recovery of attorney's fees. In California, recovery of punitive damages in breach of employment contract cases is not allowed, unless there is a violation of public policy. Most states appear to be in accord with California on the issue of punitive damages. Certainly, limiting recovery in "strict liability cases" beyond this would, for almost all employees, render the remedy not worth the trouble.

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117. But see Foley v. Interactive Data Corp., 765 P.2d 373, 386 (Cal. 1988) (implied-in-fact contract terms ordinarily stand on equal footing with express terms). When the implied term is something like, "employee will not be discharged without just cause," however, there is no reason to assume that the implied term "just cause" will be further interpreted consistently with *Toussaint* rather than *Baldwin*. If the implied term is "employee will not be discharged without actual cause," then the *Foley* rule would require just such an interpretation consistent with *Toussaint*, which is entirely reasonable.


121. Foley, 765 P.2d at 395-97.


123. If the only available damages for a strict liability cause of action were back pay, the remedy would prove illusory for virtually every employee. At the very least, attorney's fees would have to be provided along with back pay. Even so, if the contract principle of mitigation applied, most awards would be reduced to a vanishingly small amount. Several commen-
Conclusion

To ensure that just-cause protection for workers is meaningful, an employer must be required to satisfy an objective standard in discharging an employee for cause. An employee who has been promised that she will not be discharged without cause should at the very least be assured that she will not lose her job unless her employer has substantial evidence that she has committed some wrongdoing. Both the *Baldwin* rule and the *Toussaint* rule provide just cause with the necessary substance. The complete parallel with breach of contract cases that *Toussaint* provides is academically appealing; the vast majority of employees protected by just-cause provisions would, however, notice no difference in effect between the two rules.

tators have noted the dilemma facing employee-plaintiffs whose potential recovery is limited. See, e.g., Grodin, *supra* note 5, at 140.