Members of the College gathered on the evening of August 8th at the historic Atlanta Biltmore for the Ninth Annual Induction of new admittees. The Biltmore has been the site of many important ceremonies; but not since the reception for Charles Lindbergh has the State of Georgia seen a more captivating event than the one which took place on this hallowed occasion. As in past years, the fete was complete with outstanding cuisine, ample liquid refreshment, elegant surroundings, several hours of wholesome fellowship and more than three hundred-twenty attendees decked out in their most elegant formal attire. A newspaper report of the Biltmore’s grand 1924 opening could, just as easily, fit the College soiree: “...a ceaseless pageant of human life, and even of human romance...the hotel was at its best making the life and spirit within its walls transcend the routine of everyday existence.”

The administration of the College Oath and the installation of the Class of 2004 was presided over by President Joe Garrison with the assistance of Past President Bob Dohrmann and Vice-President John Higgins. An impressive array of 68 new fellows were admitted in a festive observance celebrated by family and colleagues. A special recognition was given to the late Professor Tim Heinsz of the University of Missouri, who tragically died this past July 2nd, a month after his election to the College.

Everyone appeared to enjoy the moment renewing old acquaintances, sharing “war” stories and supportively cheering for favorite new Fellows. One of the most excited inductees was Connye Harper of Detroit, Michigan, who responded to the cheers of her adoring fans with her own version of the “royal wave.” “Founding Father” Steve Tallent appeared truly pleased with the progress and growth of his beloved progeny. The first honorees from the West Virginia and Delaware, Walt Auvil of Parkersburg and Sheldon Sandler of Wilmington, and the first inductee from the National Football League, Harold Henderson of New York, were welcomed to the College. The “godfather” of public sector labor law, Jerry Lefkowitz from Albany New York, accepted his induction in a reserved manner, while new member Floyd Allen of Detroit wins this year’s “Rowdy Table” award.

Your roving reporter is hopeful that inductee Dennis Duffy of Time-Warner will recognize the incredible journalistic talent of a fellow UVA “Wahoo,” and recommend that he be given an opportunity at a national venue - one that pays better than our beloved College Newsletter.

All in all, it was a great occasion and the College membership owes a big “thank you” to our Executive Director Susan Wan for her meticulous planning and execution.

Don Slesnick
Reporter-at-Large
This issue of the newsletter is dedicated to the topic of “at will” employment. We would like to thank those Fellows who graciously volunteered to contribute an article for inclusion in this issue.

Some “Outside The Box” Thoughts About Compelled Arbitration of “At Will” Employment Terminations

By John M. True, III

Inducted as Fellow in 2001, Mr. True is a Superior Court Judge in Alameda County, California. Prior to his appointment, he spent 27 years representing plaintiffs and labor unions as well as mediating and arbitrating employment disputes.

The dramatic rise in the popularity of compelled arbitration of employment disputes is arguably one of the most significant developments in the law of employment termination over the last two decades. Of course, this happened in large part because almost all courts which took a look at the legal issues presented by arbitration “agreements” upheld them against the vigorous challenges by the plaintiffs’ bar. ushered in with the US Supreme Court’s decision in Gilmer v. Interstate Johnson/Lane Corp. in 1991, and essentially finalized in Circuit City v. Adams in 2001, the phenomenon seems poised to transform employment litigation, taking it largely private.

In the meantime, however, the doctrine that employment for an unspecified term is considered to be “at will” has continued to be the rule in most jurisdictions. While private sector employees in some states benefit from various judicially created exceptions to the “at-will” doctrine, most do not. This has, I submit, allowed the law of employment termination to become fundamentally unbalanced and asymmetrical.

As an illustration of this concern, consider the following fairly typical language from a hypothetical employment agreement and/or personnel policy:

You (the employer) and we (the employee) agree that we are going to submit to an arbitrator any and every dispute that arises under this ‘at will’ agreement, but we also agree that the arbitrator shall have no power to modify or alter its terms – especially the ‘at will’ one – or to impose his or her notions of ‘good cause’ on us.

The average employee contemplating such language might be forgiven for asking, “so what’s to arbitrate?” Indeed, the practical effect of these clauses, increasingly commonplace in employment relationships, is not to confer any substantive right on the employee but to privatize the enforcement of legislatively mandated public rights, notably the right to be free from illegal discrimination and harassment.

This really doesn’t seem right. Why shouldn’t employers who really want to keep their disputes with their employees out of the civil justice system approach the idea a bit more straightforwardly and offer a “quid” (good cause) for the quo (private ADR)? Wouldn’t that be a fundamentally fair trade-off? Even better, what if an enlightened legislature or two were to say something like “good cause for everyone employed for more than one year, but arbitration of any disputes about good cause discharges if either party demands it.”

Wouldn’t most employers under such a system be better taken care of? They’d at least enjoy some modicum of job security, even if they were required as a condition of getting that job to give up the right to enforce it before twelve citizens good and true. Is that so bad? My many years representing plaintiffs in employment disputes suggests that most workers would prefer fairness and justice over the chance to win a lot of money in a lottery-style civil justice proceeding.

Wouldn’t most employers also be better served? They’d at least avoid those same twelve citizens – whom they allegedly regard as irrational and “runaway” (rather than good and true). Yes, the existence of a good cause standard would require employers to think through their reasons for firing a worker pretty carefully. Again, is that so bad? They almost always do just this, or at least claim to.

What if we were to think outside the box for a moment and contemplate replacing the hoary “Wood’s Rule” embedded in the laws of many states with language that would abolish (cont’d. on pg. 3)
the “at-will” presumption and replace it with a requirement that any person employed for more than one year may be terminated only for “good cause.”

Such a bill would also provide that, in any dispute over whether “good cause” existed for the termination of an employee, either the employer or the employee could elect to submit the dispute to private, confidential arbitration by a neutral arbitrator selected by both parties. This would be done after a filing fee is paid by the claimant/employee and whose award or decision would be final and binding except under the circumstances provided by applicable state or federal law. For instance, a “Fairness in Employment Termination Act” might read:

**Section One: Termination from employment of more than one year’s duration; good cause required —**

An employment lasting for a period greater than one year may be terminated by the employer only for good cause. “Good cause” means reasonable, job-related grounds for dismissal based on:

1) a failure to perform job duties satisfactorily;
2) disruption of the employer’s operation, or
3) other legitimate business reason including 
   a) the exercise of business judgment in 
      good faith by the employer, including 
      setting its economic or institutional 
      goals and determining methods to 
      achieve those goals; 
   b) organizing or reorganizing operations, 
      discontinuing, consolidating, or divest- 
      ing operations or positions or parts of 
      operations or positions; 
   c) determining the size of its work force 
      and the nature of the positions filled by 
      its work force, and 
   d) determining and changing standards of 
      performance for positions.

**Section Two: Termination from employment of more than one year’s duration; election of exclusive remedy —**

1) Any dispute arising from or relating to a termination under Section One above shall, 
   upon the election of either party, be resolved exclusively by private, confidential arbi- 
   tration conducted by a neutral arbitrator mutually acceptable to the employer and the 
   employee.

2) In the event of such election, the arbitrator’s decision shall be final, binding and conclu- 
   sive on the parties except as provided for in applicable state law and/or The Federal 

3) The cost of arbitration shall be borne entire- 
   ly by the employer except that the employee 
   may be required, at the employer’s option, to 
   pay an “arbitration processing” fee of not 
   more than the filing fee for civil complaints 
   in the county in which the dispute arises.

4) The arbitrator shall have the authority to 
   order such pre-hearing discovery, including 
   but not limited to depositions and document 
   production, as may be necessary to the just 
   resolution of the dispute; and

5) The arbitrator may award damages (includ- 
   ing actual, compensatory and punitive dam- 
   ages), equitable relief (including 
   reinstatement to employment), reasonable 
   attorneys’ fees and costs, or any other relief 
   consistent with applicable law.

This isn’t meant to be a perfect panacea for 
all that ails us, nor will it please everybody. But is 

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Is it not a real step in the right direction?

**Good Cause** — Some will say that legislation of 

It means to be a perfect panacea for 
all that ails us, nor will it please everybody. But is 

Is it not a real step in the right direction?

**Workers very seldom bargain for good cause protection.**

Many think (erroneously) that they are 

They are entitled to it without doing so.

...
Some others might say that the just cause standard in the language set forth above is a little employer-friendly, containing as it does a number of nods to business judgment, the need to reorganize businesses and the like. That may be. But we do, after all, live and work in a system based on entrepreneurial, free-enterprise principles. Any concept of good cause has got to take into account the need for businesses to shape and re-shape themselves so as to remain competitive. European countries, many of which protect workers from discharge far more rigorously than we do (or than my statute would), have been criticized for limiting the competitive abilities of affected firms. It is claimed that a sort of economic malaise, “Euro-sclerosis,” takes over in which companies are afraid of hiring workers, knowing that it will be difficult to terminate them.9

In any event, it seems highly unlikely that a rigid, objective “just cause” standard would ever be accepted here in the heart of post-industrial capitalism. And, in my view, it is irrational or arbitrary employer behavior that should be subject to challenge under a new statutory scheme. The guy fired after years of employment because his new supervisor just doesn’t like him is the type of employee — currently out of luck under the “at will” doctrine — whom I would like to see protected.

**Compelled Arbitration** — Then there are those for whom the very thought of private arbitration at the election of the employer is, and will always remain, anathema. And there is undeniable force to their concerns. Work is important to us all — maybe paramount. It should not be left to some rent-a-judge to make decisions about the fundamental issues which come up every day in the workplace. These are public rights and they should be subject to resolution in a public forum.

But wake up and smell the coffee. To be sure, there are problems with privatizing the adjudication of important employment rights. The California Supreme Court, for instance, has made this abundantly clear in *Armendariz*10 and its progeny. However — and this seems to me to be key — it has also endorsed the concept. Maybe it’s time to deal with that development. And maybe this sober appraisal of the situation should take place before the U.S. Supreme Court takes up the looming question of whether *Armendariz*-type limitations on mandatory arbitration fall within the preemptive reach of the Federal Arbitration Act.11

So a legislative initiative might not be such a bad thing. Admittedly, the statute sketched out above addresses only some of the difficult issues presented by private adjudication of employment disputes, e.g., costs, discovery, remedies. Other hard questions remain. The fundamental fairness and adequacy of the arbitral forum, the “repeat user” problem, the submission of public law issues to a private, confidential process are all still there, like stains in the sink you’ve scoured for hours. They seem to me to be the intractable parts of the problem, and we might as well admit it.

So why not set them off against the equally ugly stain of arbitrary employment termination and come up with a trade-off? Sure, it wouldn’t be entirely pretty from either side’s point of view — analogies to making sausage come to mind — but as a means to meaningful protection from arbitrary discharge, it seems at least a plausible idea. It is, after all, the idea which has animated decades of private workplace justice under collective bargaining agreements. As noted herein, the state of Montana, which is the only jurisdiction in the country to have legislated a good cause discharge provision,12 encourages arbitration by mandating fee- and cost-shifting in the event the discharged employee offers to arbitrate and prevails before the arbitrator.13

The proposal floated here is far from perfect. There is plenty that could be added — or subtracted. But its essence is the exchange of a substantive right valuable to working people (good cause) for a procedural one sought by employers (arbitration). And that, I would respectfully point out, makes a certain amount of sense.

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1 500 U.S. 20, 111 S.Ct. 1647 (1991)
2 532 U.S. 105, 121 S.Ct. 1302 (2001)
3 Only the state of Montana has codified the principle of “good cause” for termination. Montana Code Ann. §§ 39-2-901 - 914.
4 See, e.g., Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211.
5 See, e.g., Cal. Labor Code § 2922: An employment, having no specified term, may be terminated at the will of either party on notice to the other.
6 Employment for a specified term means an employment for a period greater than one month.
11 24 Cal.4th 83, 99 Cal.Rptr.2d 745 (2000)
A PERSPECTIVE ON THE EROSION OF THE EMPLOYMENT-AT-WILL DOCTRINE

By Dennis C. Donnelly and Jerry M. Hunter

Both Mr. Donnelly and Mr. Hunter are management lawyers practicing with the firm of Bryan Cave in St. Louis, Missouri. Mr. Donnelly was inducted a Fellow of the College in 1997 and Mr. Hunter became a Fellow in 1998.

One of the benefits of longevity is the capacity for 20-20 hindsight over five decades in the field. From this vantage point the watershed which most significantly contributed to the erosion of the employment-at-will doctrine (“the doctrine”) was the passage of Title VII of the Civil Rights Act of 1964. This legislation in its first iteration protected applicants and employees against discriminatory hiring and termination actions by employers. But, these initial, and relatively modest, statutory protections provided the fulcrum upon which an employee could challenge the underpinnings of the doctrine. Previously, an employer could terminate an employee for good reason, bad reason, or no reason at all. And, by the same token, the employee could “quit” employment for good reason, bad reason or no reason at all, and s/he was not otherwise tied to a form of involuntary servitude.1 For almost two hundred years, the doctrine in this country had stood as a codified reaction to the indentured nature of employment in Eighteenth century western European countries and outright servdom in many other parts of the world. Indeed, the doctrine was more an affirmation of the right of an American worker to simply walk away from her or his job as it was the confirmation of the employer’s right to terminate an employment relationship with little or no notice or obligation.

Simultaneously, the concept of a property right in employment, borrowed from the public employment paradigm, moved forward with judicial forums becoming more comfortable recognizing some kind of quasi property right in employment which could be statutorily protected.2 The application of the quasi-property right concept among employees with private corporations, who are not contract parties with their employers, would have been deemed extremely liberal just five decades ago.

However, as the post World War II full employment bubble burst in the mid-1970s, the interest of employees and their representatives in holding onto employment positions increased substantially. As the value of employment became more essential to economic survival in a less Agrarian society, the doctrine came under much greater scrutiny. And the heretofore “fringe benefits” of employment, particularly health and life insurance, invested employment with the accouterments of an economic property worth protecting. Over the last quarter century, the critical value of a job greatly increased as substantial layoffs in the basic kinds of production occurred during the decline of rust belt industries in the 1970s, 1980s, and 1990s. The defense industry, for example, experienced substantial net loss of strong middle class income jobs during the last decade.3

Further erosion of the doctrine came about as more statutory rights and protections against discriminatory treatment in employment were expanded. These developments now have virtually permitted employees seeking to challenge any adverse employment action a readily available opportunity to seek redress in court. To be sure, not in all cases have these remedies resulted in the retention of employment. In fact, as a practical matter more often than not, suits result in either a judgment for the plaintiff in a monetary amount and perhaps front-pay; or, they result in an order upholding the termination and the dismissal of a claim. Frequently, protected status of one sort or another has facially permitted employees seeking to challenge a termination or other adverse employment action the opportunity to merely seize a convenient protected category or other claim of protection in order to articulate a claim of “wrongful discharge.”

In any event, as a result not only of the expansion of the federal protections against job discrimination, but also of the mirror image expansion of state legislation to protect employment rights, the doctrine has been significantly watered down. The fundamental notion of employment-at-will may, in many instances, no longer be central to the analysis of an employment situation. There are vastly more theories upon which a plaintiff employee may leverage an exception to the doctrine and advance a claim of some kind of adverse employment action than existed in 1980. For example, the whole concept of wrongful termination, particularly for some

(cont’d. on pg. 6)
purported violation of a "public policy" has become a "gully washer" further eroding the doctrine.

The state of California deserves special mention, as one of the first states to recognize this public policy exception. Initially, California subscribed to an extremely broad definition of public policy, defining it simply as anything contravening good morals or the interests of society.

As other state courts began refining the public policy doctrine, California relied on those decisions to narrow their own definition of public policy. Despite the brief narrowing trend, in 1998 the California Supreme Court returned to a broad definition, going beyond those courts requiring some sort of statute on which to base public policy, and holding that an administrative regulation, grounded in a statute, even if the regulation did not specifically apply to the employer, could support a cause of action for wrongful discharge in violation of public policy.

Interestingly, changes in state statutes have been fostered by organized labor, and other movements advancing employee employment rights. In short, employment has become a right to secure and hold for a given individual under any one of a number of protected categories.

On the other hand, employers have now sought to ameliorate the adverse impact of the cost in time, money, and productivity lost in litigating wrongful discharge claims through the courts by various alternative disputes resolution processes (ADR), both mandatory and voluntary. Numerous employers have implemented voluntary programs and others have mandated a form of ADR, including mediation and arbitration for all employee issues as a prelude, precondition, or mutually agreed upon substitute for litigation in court.

Numerous employers have implemented voluntary programs and others have mandated a form of ADR, including mediation and arbitration for all employee issues as a prelude, precondition, or mutually agreed upon substitute for litigation in court.

In retrospect, it is somewhat ironic that a doctrine which began as the enunciation of the independence of the American worker to leave her/his job is now essentially being eroded and replaced by a modern expansion of the rights of the American worker to stay in her/his job or be compensated if s/he loses it.

3. The United States Bureau of Labor Statistics reported a drop in aerospace employment from 1990 to 2001 of over a half million jobs.
8. In its Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a condition of employment, the EEOC Notice No. 915.002 (July 10, 1997), the U.S. Equal Employment Opportunity Commission announced its opposition to any unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment. The EEOC took the position that the imposition of such agreements by employers harm both the individual civil rights claimant and the public interest in eradicating discrimination.
VOX POPULI: THE PUBLIC POLICY TORT IN THE WORKPLACE

By Robert B. Fitzpatrick

Inducted as a Fellow of the College in 1996, Mr. Fitzpatrick is the principal in the law firm of Fitzpatrick & Associates in Washington, DC, where he represents clients in employment law and employee benefits matters.

“[B]eneath the legal façade a faint hope is discernible rising like a distant star over a swamp of uncertainty and perhaps of despair. Those who love their work may sometimes forget that a successful human community requires the performance of many vapid and colorless tasks. Even the most tedious physical labor is endurable and in a sense enjoyable, however, when the laborer knows that his work will be appreciated and his progress rewarded. ‘Work without hope,’ said Coleridge, ‘draws nectar in a sieve. And hope without an object cannot live.’ The ethic which permeates the American dream is that a person may advance as far as his talents and his merit will carry him. And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all.” Judge Walter Gewin, Miller v. International Paper Co., 408 F.2d 283, 294 (5th Cir. 1969).

The public policy tort claim traces its origins to fundamental concepts of a civil democratic society, i.e., the power of the people, vox populi.

The public policy tort claim traces its origins to fundamental concepts of a civil democratic society, i.e., the power of the people, vox populi. At bedrock, the tort in the employment setting called wrongful or abusive discharge is better named the public policy tort. Its predicate is that the people, normally through their elected representatives or their designees, have clearly spoken and enunciated a public policy that should be enforced and is otherwise remedy-less. Fundamental to the tort is the notion that public policy is not to be invented out of whole cloth by the judiciary, but rather the judiciary is empowered only to determine whether a public policy exists and whether it is enforceable in tort. Decades ago the courts transported these tort notions into employment law. And, for decades, the state courts have been refining the body of common law jurisprudence that developed after the states, with virtual unanimity, recognized the public policy tort.

Among the first cases to recognize the tort in the employment context was Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985). In Wagenseller, a hospital staff nurse allegedly was fired for refusing to participate in a skit that was put on during an employer-sponsored rafting trip. The skit, a parody of the song “Moon River,” required the members of the group to “moon” the audience. The court, while not limiting its recognition of the public policy tort to cases involving violation of a criminal statute, found that firing Wagenseller for refusing to participate in activities that would violate the indecent exposure statute would fulfill the requirements of the tort.

The Wagenseller court held that “[t]he interests of society as a whole will be promoted if employers are forbidden to fire for cause which is ‘morally wrong’. 710 P.2d at 1033. The court cited with approval the definition of public policy articulated by the Illinois Supreme Court in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981), where the court stated: ‘There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed.” Palmateer, 85 Ill. 2d at 130, 421 N.E.2d at 87879, quoted in Wagenseller, 710 P.2d at 1032.

Over the last two decades, the state courts have grappled with many intellectually challenging issues raised by this new tort, and they will continue to do so in the coming years. One issue that continues to engage the courts’ attention is whether a public policy can be found in a professional code of a self-regulating organization, e.g., lawyers or nurses. For example, in the District of Columbia’s seminal case, Carl v. Children’s Hospital, 702 A.2d 159 (D.C. 1997) (en banc) (“Carl II”), the plaintiff, a nurse,
NINTH ANNUAL INDUCTION DINNER
alleged that she was discharged because of her advocacy for patients’ rights before the legislature and the courts. Id. at 160. In support of her claim, she cited, inter alia, certain provisions of the national nursing code of conduct, the Code for Nurses With Interpretative Statements, as imposing a duty upon professional nurses to “participate in the legislative process, to advocate positions of public importance on behalf of patients, and to educate the legislature so that it can make informed public policy decisions.” Id. at 160 & n.3. The plaintiff argued that the nursing code of conduct therefore expressed a clear mandate of public policy to permit her to speak out publicly on issues affecting the public interest without fear of retaliation. Id. at 159. The en banc court, per curiam, reversed dismissal of the case without considering whether the nursing code of conduct could serve as a source of public policy. Id. at 161. Four judges who concurred separately indicated that although some professional codes of ethics, such as the lawyers’ Rules of Professional Conduct, might be a source of public policy because they had been adopted by the courts to regulate lawyer conduct, the nursing code of conduct would not fall into that category. Id. at 165 (concurring opinion of Terry, Wagner, Farrell, and Ruiz, citing Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 28, 488 A.2d 229, 234, cert. denied, 101 N.J. 255, 501 A.2d 926 (1985); Wright v. Shriners Hospital for Crippled Children, 412 Mass. 469, 473, 589 N.E.2d 1241, 1244 (1992)). Three other judges who concurred separately, however, would have held affirmatively that “a professional code of ethics may contain an expression of public policy.” Id. at 192, 194 (concurring opinion of Mack, Ferren, and Reid, quoting Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505, 512 (1980) (recognizing possible public policy interest arising from medical Hippocratic oath or other codes of professional ethics), and citing Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728, 73031(1982) (recognizing wrongful discharge cause of action based on pharmaceutica code of ethics)).

Shortly after Carl II, in Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998), the plaintiff, a lawyer, predicated her claim for wrongful discharge on Rules 5.1 and 5.2 of the Rules of Professional Conduct. Id. at 884. The court assumed without deciding that the Rules cited stated a clear mandate of public policy as required by Carl II; however, one member of the panel again stated her belief that a professional code of ethics could constitute an expression of public policy. Id. & n.21. Other courts have found that the lawyers’ Rules of Professional Conduct and/or Code of Professional Responsibility represent a clear and definitive statement of public policy. See, e.g., Lewis v. Nationwide Mutual Ins. Co., 2003 U.S. Dist. LEXIS 5126, 19 IER Cas. (BNA) 1470 (D. Conn. 2003); Crew v. Buckman Labs. Int’l, Inc., 78 S.W.3d 852, 862 (Tenn. 2002).


Whether an employee who complains only internally within the corporation regarding suspected illegal activities by the corporation is entitled to pursue a public policy tort claim is a subject of significant debate among the courts. In Wholey v. Sears Roebuck, 370 Md. 38, 803 A.2d 482 (2002), the court specifically stated that, as the legislature had not created a general, all-encompassing “whistleblower protection” statute which would protect employees who investigate and internally report suspected criminal activity, the court would decline to act the legislature’s stead. Id. at 496. On the other hand, in Liberatore v. Melville Corp., 168 F.3d 1326 (D.C. Cir. 1999), the court rejected the defense argument that internal complaints regarding violations of law were not covered by the public policy tort. Id. at 1351; accord Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128, 113031(Ill. 1999) (wrongful discharge claim can

(Handwritten notes)

Most courts have now expanded the reach of the public policy claim beyond mere statutes to include federal, state, and local regulations.
proceed where employee did not report illegal conduct to authorities, but only to employer).

An issue on which the states have split is whether a public policy claim can be predicated on a state’s statute that enunciates a public policy, but provides no enforcement mechanism. The issue comes up usually where a state’s anti-discrimination statute is not enforceable against the employer because it does not employ the statutory minimum number of employees for coverage. Maryland, for example, has held that small employers, not covered by the enforcement provisions of Maryland’s anti-discrimination law, can be sued, in effect, for discrimination in tort without any cap on damages; whereas larger employers cannot be so sued because the state has provided enforcement mechanisms, albeit only an administrative one, a mechanism far weaker than an uncapped tort claim. Molesworth v. Brandon, 341 Md. 621, 628, 637, 672 A.2d 608 (1996). Several other jurisdictions have followed the Maryland approach. See, e.g., Roberts v. Dudley, 140 Wn. 2d 58, 7071, 77, 993 P.2d 901 (2000); Williamson v. Greene, 200 W. Va. 421, 431, 490 S.E.2d 23 (1997); Collins v. Rizekana, 73 Ohio St. 3d 65, 7071, 74, 652 N.E.2d 653 (1995); but see Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731 (Conn. 2002) (declining to follow Washington, West Virginia, Maryland, and Ohio approach); Chavez v. Sievers, 43 P.2d 1022 (Nev. 2002) (same); Gottleib v. P.R., Inc., 61 F.3d 989 (Utah 2002); Burton v. Exam Cir. Indus. & General Med., 994 P.2d 1261 (Utah 2000); Jennings v. Marralle, 876 P.2d 1074 (Cal. 1994) (same); Brown v. Ford, 905 P.2d 223 (Okla. 1995) (same).

Another interesting debate ongoing in the courts is whether the public policy can be a public policy created by the federal government. Maryland, for example, seems clearly to adopt the position that there must be a clear policy, and whether it is found only in federal law is unimportant. See Lee v. Denro, Inc., 91 Md. App. 822, 605 A.2d 1017, 1020 & n.2 (Md. App. 1992) (assuming without deciding that employee can base claim for wrongful discharge under Maryland law on asserted violation of public policy exhibited by violation of federal statutes); see also Danfelt v. Board of County Comm’rs of Washington County, 998 F. Supp. 606 (D. Md. 1998) (court permitted employee to assert wrongful discharge claim based on FMLA); Phillips v. St. Mary Reg’l Med. Cir., 116 Cal. Rptr. 2d 770, 96 Cal. App. 4th 218 (2002) (plaintiff sued non-profit religious corporation for race and sex discrimination; California anti-discrimination statute exempted religious entities, but court found public policy against race and sex discrimination in state’s constitution and Title VII). In Virginia, it has been held by the federal courts, a claim predicated on a federally-created public policy is not cognizable under state law. Storey v. Patient First Corp., 207 F. Supp. 2d 431 (E.D. Va. 2002); see also McCarthy v. Texas Instruments, Inc., 999 F. Supp. 823, 829 (E.D. Va. 1998) ("such a claim must find root in a state statute [] it cannot have its genesis in an act of Congress"); Oakley v. May Dept. Stores, 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (the wrongful termination exception to the at-will doctrine "is predicated on public policies derived from Virginia statutes, not federal laws."); cf. Szaller v. American Nat’l Red Cross, 293 F.3d 148, 151 (4th Cir. 2002) ("federal policy is enforced by the means Congress specifies, not through state-law wrongful discharge actions"). In contrast, Judge Diane Wood of the 7th Circuit has opined that to refuse to permit the state common law claim of public policy tort to be predicated on a federally-created policy would violate the supremacy clause of the Constitution. See Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 277 F.3d 936, 942 (7th Cir. 2002).

The debate still rages as to whether the employee must show that the employer’s decision to terminate was motivated only in substantial part for reasons antithetical to the public policy, or whether that must be the sole cause for the termination.

(cont’d. from pg. 10)
SEVEN COLLEGE FELLOWS CONVENE IN NEW HAMPSHIRE

At a rare meeting of more than a handful of Fellows of The College of Labor and Employment Lawyers, seven Fellows attended the 6th Annual Labor and Employment conference held at Waterville Valley, New Hampshire. This conference was sponsored by the New England Consortium of State Labor Relations Agencies, a grouping of the state labor relations agencies in the six New England states plus the New York PERB. Thus, the conference was well represented by both agency officials and attendees throughout the region.

The keynote speaker was Fellow, and Past President, Harold Datz, chief counsel to the chairman of the National Labor Relations Board, who spoke on the topic of "The Relationship Between the National Labor Relations Act Principles and Public Sector Labor Relations." Harold not only tied cases and principles together, but also regaled the audience with many anecdotal experiences from his more than forty years of practice.

Labor, management and neutrals alike were represented by the other College Fellows attending. They included Allan Drachman, chair of the Massachusetts Labor Relations Commission, Parker Denaco, recently retired Executive Director of the New Hampshire Public Employee Labor Relations Board, Arbitrator and Professor Marc Greenbaum, and practitioner-advocates Jim Allmendinger, counsel to the New Hampshire National Education Association, Dick Molan, counsel to the New Hampshire Fire Fighters and SEIU, and Harry Pringle, of Drummond Woodsum and McMahon in Portland, Maine.

FATHER AND SON: COLLEGE FELLOWS

Inducted himself a Fellow of College in Atlanta in 1999, Earle Shawe celebrated the induction of his son, Stephen Shawe, this past August in Atlanta as well. Messrs. Shawe and Shawe become the College’s first father and son Fellows who are active at the same time. Bill Joy, a member of the inaugural class of 1996, passed away just before his son, Bob Joy was admitted in 1999.

The senior Mr. Shawe was one of the first attorneys in the country to specialize in all areas of labor relations under the National Labor Relations Act, including union avoidance, union elections, collective bargaining, unfair labor practice charges and union grievance matters. The younger Mr. Shawe has more than thirty-five years of experience representing management in labor and employment matters, including such areas as NLRB proceedings, collective bargaining, employment discrimination and employment tort and contract litigation. Congratulations to them both.

REGIONAL MEETING

On September 20th, Fellows in the Ninth Circuit South held their second informal meeting at the Gibson Dunn & Crutcher offices in downtown Los Angeles. Pamela Hemminger hosted a gathering of twenty plus Fellows. The program, put together and chaired by Warren Jackson, was titled "An Exploration of Diversity Issues." Warren assembled a panel of six employment law practitioners, one of whom is now serving on the bench, and all persons of minority racial and ethnic backgrounds. The panelists each gave sketches of their own perceptions of how they decided to practice in the field, how they are perceived and treated in their practices, their thoughts on minority recruitment and their advocacy for law firms and institutional employers on creating and maintaining a climate hospitable to employees of diverse backgrounds and achieving genuine diversity in our profession. There was considerable and candid interchange among the panelists, and then lively interplay with the audience.
THE FOLLOWING ARE CHANGES TO YOUR 2004 COLLEGE DIRECTORY:

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© Fellow Janet Hill became President of the National Employment Lawyers Association at its Fifteenth Annual Convention in San Antonio, Texas this past June. Ms. Hill practices with the firm of Hill & Beasley, LLP in Athens, Georgia.

© Fellow Emeritus Henry Weiss passed away on August 16. He was 94 years old. Mr. Weiss, who served as general counsel to the Air Line Pilots Association for over fifty years, was also a founder of the leading New York law firm of Cohen Weiss & Simon. He was admitted as a Fellow Emeritus in the inaugural class of 1996 and was awarded honorary membership by ALPA’s national convention in 1976. An expert on the Railway Labor Act, Mr. Weiss was an Adjunct Professor at New York University Law School for twelve years. He voluntarily joined the Navy during World War II and served as a village justice in Saltaire, New York on Fire Island, where he owned a home for many years.

© Congratulations to Fellows Stephen Pepe and Catherine Hagen. Cited in the September 15, 2004 issue of Wine Spectator, their Clos Pepe vineyard is highlighted as an elite pinot noir specialist. According to the Wine Spectator, their “vineyard is among the sites spurring quality in the emerging Santa Rita Hills appellation.”

© The fourth supplement to “Age Discrimination Litigation” will be published by James Publishing Company. The book, co-authored by Fellow Steve Platt and Cathy Ventrell-Monsees, is a practical lawyer’s reference book written for litigators. In addition, Mr. Platt recently supplemented a chapter on sex discrimination for the Illinois Continuing Institute of Eduction of which he has been a co-author of since 1984.

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Nominations for the Class of 2005 are now being accepted. Applications can be found on the website at www.laborandemploymentcollege.org. If you need a copy mailed, please contact Susan Wan at (202) 955-8225. The deadline for nominations is February 1, 2005.