Determining Just Cause: An Equitable Solution for the Workplace

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DETERMINING JUST CAUSE: AN EQUITABLE SOLUTION FOR THE WORKPLACE

Abstract: A majority of courts now recognize that an employer's implied promise to discharge an employee only for just cause is an exception to the at-will employment doctrine. These courts, however, have not articulated a clear definition of just cause nor have they established a consistent standard for a jury's review of employer discharge decisions. This Comment suggests that courts develop strict guidelines for determining if an employee's conduct is just cause for discharge. Further, this Comment proposes that courts adopt a standard of review that requires the jury to balance employer and employee interests.

The United States is one of the few industrialized countries that denies job security to the vast majority of its workers. While other countries provide workers with protection from discharge without just cause, in the United States only union and civil service employees enjoy similar protection. The prevailing rule with regard to all other employees is the at-will employment doctrine. This doctrine allows employers to discharge employees for good cause, bad cause, or no cause at all. Employee rights advocates have urged that just cause protection be extended to all employees. The courts, recognizing the injustice of the at-will employment rule, have been responsive to these urgings. Despite their willingness to extend more protection to a broader base of employees, however, the courts have not articulated a clear definition of just cause, nor have they agreed whether an employer's determination of just cause should be held to an objective

1. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 508 (1976); see id. at 508-19 (specific job protection provisions in France, Germany, Great Britain and Sweden).
2. Id. at 508. This standard, established by the International Labor Organization, limits dismissal to cases where "there is a valid reason . . . connected with the capacity or conduct of the worker or based on the [employer's] operational requirements." Id. at 508-09.
5. Blades, supra note 4, at 1405 (citing Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915)).
7. See H. FERRITT, supra note 4, at 13-17.
or subjective standard. The following hypothetical illustrates the problem:

Employer, Acme Company, provides an employee handbook to all its employees. The handbook states that employees will be terminated only for “just cause.” Three Acme employees approach an Acme manager with information that Bob, another Acme employee, has been seen drinking at work. The manager obtains written reports from all three employees and investigates the allegations. During the investigation, the manager finds an empty liquor bottle in Bob’s trash can and smells alcohol on Bob’s breath. The manager promptly discharges Bob.

Does the manager have just cause for dismissing Bob? Drinking on the job is generally accepted as conduct that justifies discharge, so it is unlikely that Acme’s basis for the discharge will be questioned. Nevertheless, the evidence Acme relied on to make its discharge decision is likely to be challenged. While Acme had convincing evidence that Bob was drinking on the job, it lacked conclusive proof. Can Acme’s good faith belief that Bob was drinking on the job justify Bob’s termination or should Acme be required to prove its allegation?

The law in this area is unsettled. Clear definitions of just cause and the standard of review in just cause cases are necessary in order to create an atmosphere of certainty in the workplace. This Comment reviews the current definition of just cause, discusses the jury’s scope of review in just cause cases, and proposes applying a more balanced approach to the determination of just cause.

I. DETERMINING “JUST CAUSE”

The just cause concept dates back to the Statute of Laborers enacted in 1562.9 This statute prohibited employers from discharging employees without a “reasonable cause.”10 Most American jurisdictions followed this rule until it was displaced by the employment at-will doctrine, which was established in 1877.11 Just cause resurfaced in the 1930s when unions, concerned about their members’ job security, began including just cause provisions in their collective bargaining agreements.12 Like union members, federal, state and municipal employees also enjoy just cause protection from discharge.13

10. Id.; 1 W. BLACKSTONE, COMMENTARIES 425 (1847).
11. Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118, 124 (1976). By 1913, the employment at-will doctrine was the law in the majority of the states. Id. at 126.
12. Comment, supra note 9, at 531.
13. H. PERRITT, supra note 4, at 223, 226.
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Recently, courts have extended just cause protection beyond union and civil service employees into the private sector.\textsuperscript{14} Today, the majority of American jurisdictions recognize employee claims for wrongful discharge if the employee alleges that the employer breached an implied promise to discharge only for just cause.\textsuperscript{15} Courts considering just cause cases must address two issues: first, what is the appropriate definition for just cause; and second, who should make the factual determination that just cause existed.

\textbf{A. The Accepted Definition: A Fair and Honest Cause}

Much of the recent attention given just cause has focused on defining the term. The difficulty in defining just cause stems from the multitude of possible fact patterns from which a just cause dispute can arise.\textsuperscript{16} Just cause disputes have originated from discharges based on possession or use of drugs or alcohol,\textsuperscript{17} insubordination,\textsuperscript{18} absenteeism,\textsuperscript{19} theft,\textsuperscript{20} and incompetence.\textsuperscript{21} Although many courts, fearful that no one definition can apply in all circumstances, have been reluctant to give just cause a fixed definition,\textsuperscript{22} some courts have taken the variety of fact patterns into consideration in developing a definition of just cause.\textsuperscript{23} These courts frequently define just cause as "a fair and honest cause or reason."\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{14} See supra note 8 (cases extending just cause protection).
\item \textsuperscript{17} Sanders v. Parker Drilling Co., 911 F.2d 191 (9th Cir. 1990).
\item \textsuperscript{18} Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 897 n.39 (1980).
\item \textsuperscript{19} Volino v. General Dynamics, 539 A.2d 531 (R.I. 1988).
\item \textsuperscript{21} Belcher v. Department of State Lands, 228 Mont. 352, 742 P.2d 475 (1987).
\item \textsuperscript{22} Comment, supra note 9, at 543.
\item \textsuperscript{23} See, e.g., Trans World Airlines, Inc. v. Beaty, 402 F. Supp. 652, 658 (S.D.N.Y. 1975) (some reason “which is not arbitrary or capricious”); Hollingsworth v. Board of Educ., 208 Neb. 350, 303 N.W.2d 506, 512 (1981) (conduct rising to the level of “incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity” or other conduct that interferes with the employee’s performance of his or her duties); Weaver v. State Personnel Bd., 71 Wis. 2d 46, 237 N.W.2d 183, 185 (1976) (“A cause sufficient at law . . . “).
\end{itemize}
B. Applying the Definition: Who Decides If There Was Just Cause?

The determination of just cause does not end with a factfinder’s decision that the employer’s cause was fair and honest. The employer’s factual determination is also subject to review. A number of courts have considered the role the jury should play in reviewing an employer’s termination decision. Several opinions have favored a de novo standard whereby the jury can independently determine whether the employee did in fact do what he was accused of doing. Other courts have limited the jury’s review to determining whether the employer had a good faith belief that the employee committed the alleged conduct. At least one court has attempted to merge these two standards in order to balance the interests of both employers and employees.

I. The De Novo Standard: Toussaint v. Blue Cross & Blue Shield

_Toussaint v. Blue Cross & Blue Shield_ and its companion case, _Ebling v. Masco Corp._, were the first cases to address the jury’s scope of review in a just cause dispute. The facts of the two cases are indistinguishable. Both Toussaint and Ebling were mid-management employees who had inquired about job security before accepting their positions. Both were assured that as long as they did their jobs they would be guaranteed continued employment. Toussaint was subsequently terminated for insubordination and personality conflicts. Ebling was terminated for poor judgment. Both employees brought actions against their former employers, claiming that the employers had breached their agreement to discharge only for just cause.

26. Id.
31. Id.
32. 292 N.W.2d at 884.
33. Id. at 883, 884.
34. Id. at 884.
35. Id. at 897 n.39.
36. Id.
37. Id. at 883.
In its opinion, the Michigan Supreme Court discussed who should determine whether the behavior that resulted in the termination actually occurred.\textsuperscript{38} The court stated that where an employer agreed to discharge an employee only for just cause, it is up to the jury to determine whether the employee was, in fact, discharged for the reasons stated.\textsuperscript{39} In such cases, the jury need only review the honesty of the employer's stated reason for the discharge.

The court, however, established a different procedure for discharges based on misconduct.\textsuperscript{40} The court stated that in such situations, the jury must determine whether the employee actually did what the employer alleged.\textsuperscript{41} This statement requires the jury to make an independent, de novo finding regarding the factual basis of the employee's conduct. Although the court appeared to give the jury broad discretion in cases of misconduct, the court limited this discretion by stating that its holding should not be interpreted to give employees the right to be discharged only with "the concurrence of the communal judgment of the jury."\textsuperscript{42}


In \textit{Simpson v. Western Graphics Corp.},\textsuperscript{43} the Oregon Supreme Court adopted an entirely different view from that of \textit{Toussaint}. In \textit{Simpson}, the court stated that unless the employer has contracted away its power to make a decision, the employer retains the right to determine if the facts that led to the discharge exist.\textsuperscript{44} In \textit{Simpson}, the employer, Western Graphics, had provided all employees with an employment manual stating that employees would be terminated only for just

\begin{thebibliography}{44}
\bibitem{38} Id. at 895.
\bibitem{39} Id.
\bibitem{40} Id. The court broadly defined misconduct as intoxication, insubordination, and dishonesty. Id. at 896.
\bibitem{41} Id. This court delineated the role of the jury even further in a subsequent decision. In \textit{Renny v. Port Huron Hosp.}, the court stated that the jury was to determine whether the employee committed the specific misconduct for which he was fired, whether the firing was pretextual, whether the reason for discharge amounted to good cause, and whether the employer was selectively applying the rules. 427 Mich. 415, 398 N.W.2d 327, 335 (1986).
\bibitem{42} \textit{Toussaint}, 880 N.W.2d at 896. Despite this restriction on employee rights, the \textit{Toussaint} court did not provide any guidelines that prevent a factfinder from granting this right to employees. \textit{Sanders v. Parker Drilling Co.} illustrates the tendency of a factfinder to extend the right of a communal judgment of the jury to employees. 911 F.2d 191, 205 (9th Cir. 1990) (Kozinski, J., dissenting) ("Today's decision makes us the first court in the country to require an employer to prove to the satisfaction of a jury that employees involved in an inherently hazardous activity, whom they reasonably suspected of using drugs on the job, were in fact guilty of doing so.").
\bibitem{43} 293 Or. 96, 643 P.2d 1276 (1982).
\bibitem{44} 643 P.2d at 1279.
\end{thebibliography}
cause. Simpson was discharged for allegedly threatening another employee with violence. Simpson denied the charge and asked the court to consider whether he had really threatened the other employee. The court refused. Instead, it upheld the lower court’s ruling that limited the employer’s burden to proving it made a good faith determination of a sufficient cause for discharge based on facts reasonably believed to be true and not for any arbitrary, capricious, or illegal reason. Contrary to Toussaint, the court held that it was not necessary that just cause exist in fact.

3. Moving Toward a Middle Ground: Baldwin v. Sisters of Providence, Inc.

Baldwin v. Sisters of Providence, Inc. attempted to resolve the controversy between the objective de novo and subjective good faith standards by proposing a middle ground. In Baldwin, the plaintiff worked as a respiratory therapist for the defendant’s hospital. A patient claimed she was molested by a hospital employee whose description matched Baldwin’s. After an investigation by Sisters of Providence, Baldwin was discharged. The employee handbook provided that discharge would be limited to instances of “gross violation of conduct.”

In deciding who should determine whether there was just cause, the Washington Supreme Court combined an objective reasonable belief standard with a subjective good faith standard. The court said that a discharge for good cause is one that is not for any arbitrary, capri-
cious, or illegal reason and that is based on facts supported by substantial evidence and reasonably believed by the employer to be true.\textsuperscript{56}

II. A NEW DEFINITION OF JUST CAUSE

The "fair and honest cause or reason" definition of just cause appeals to courts because of its flexibility. The benefit of this definition is that it does not limit employers’ discharge decisions to narrow categories of conduct. Instead, employers are allowed to mold performance standards according to the needs of their particular workplace.

The appeal of the "fair and honest cause or reason" definition is limited, however, by the ambiguity of its meaning. "Fair" and "honest" are elusive terms. "Fair" means "equitable, reasonable, even-handed."\textsuperscript{57} "Honest" means "free from fraud or deception."\textsuperscript{58} The characterization of causes and reasons as "fair" and "honest" is misleading. Causes and reasons are not fair or honest—people are. Instructing the jury that just cause is a "fair and honest cause or reason" shifts the jury's focus away from the reason for termination and gives it the opportunity to scrutinize the behavior of the employer.\textsuperscript{59}

By allowing the jury to make this shift, courts are opening the door to jury bias. In the jury’s collective mind, the question becomes not "Did the employer have just cause for the discharge?", but rather, "Was the employer fair and honest?" If the jury is not given any guidelines for reviewing the employer's decision, they may ignore the just cause instructions entirely and make a judgment based solely on how much they sympathize with the employee.\textsuperscript{60} The jury may be tempted to consider each plaintiff’s personal circumstances. For example, if the jury members see an unemployed single mother or a

\textsuperscript{56} Id.
\textsuperscript{57} BLACK’S LAW DICTIONARY 595 (6th ed. 1990).
\textsuperscript{58} WEBSTER’S NEW COLLEGIATE DICTIONARY 544 (anniversary ed. 1981).
\textsuperscript{59} C. BAKALY & J. GROSSMAN, supra note 25, at 144 ("Judicial definitions of good cause sometimes focus not on the employee's behavior but on the employer's motivation."). The jury instructions on termination for good cause do little to prohibit the jury from making this shift. At most, the instruction will give the "fair and honest cause or reason" definition and ask the jury to balance the interests of the employer and employee in making their determination. J. McCarthy, supra note 15, at 506. Other instructions give the "fair and honest cause or reason" definition with no language modifying the jury's inquiry. WRONGFUL EMPLOYMENT TERMINATION PRACTICE 707, 731 (G. Saperstein & B. Silverman eds. 1987).
\textsuperscript{60} See infra notes 87–91 and accompanying text. This potential for jury bias is illustrated in three surveys of wrongful termination cases. In one study of 120 wrongful termination cases in California, the jury found for the employee in 67.5% of the cases. J. DERTOUZOS, E. HOLLAND & P. EBENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 25 (1988). In another study of California jury verdicts, the jury found for the employee in 78% of the cases. 35 Daily Lab. Rep. (BNA) A-4 (Feb. 24, 1987). A nationwide study of 260 wrongful discharge verdicts showed employees recovered in 58.4% of the cases. I. SHEPARD, P.
worker with no transferable skills, they are likely to conclude that discharging such a person could not be fair treatment. A more definitive instruction is necessary to direct and balance the jury's inquiry.

In order to avoid the problems with the current definition, the just cause instruction should provide the factfinder with strict guidelines for reviewing termination decisions. The factfinder should first determine if the employer stipulated the kinds of conduct that would lead to termination. If the conduct was stipulated, the factfinder's review of the employer's reason for the discharge ends here; the conduct becomes just cause for dismissal as a result of the employment agreement.

If the conduct was not stipulated, the factfinder should determine if the employee's alleged conduct is the kind of conduct that a reasonable employer in similar circumstances would consider grounds for discharge. Using a reasonableness standard gives the factfinder an objective guideline for determining just cause. The objective nature of this definition requires the jury to focus on the reason for the discharge and prohibits any inquiry into the plaintiff's personal circumstances. Unlike the "fair and honest cause or reason" jury instruction, a reasonable employer instruction would not ask the jury to determine whether the employer was fair. Rather, it would ask for an evaluation of whether or not the conduct that gave rise to the dismissal is the


Other commentators have recognized the jury's propensity to sympathize with employees. See Blades, supra note 4, at 1428 ("[T]here is the danger that the average jury will identify with, and therefore believe, the employee."); Kotler, Reappraising the Jury's Role as Finder of Fact, 20 GA. L. REV. 123, 129 (1985) ("[J]uries have the potential to arbitrarily and capriciously decide cases according to their prejudices . . . ."); Comment, supra note 9, at 531 n.14.

61. See Kotler, supra note 60, at 129. Restricting the jury's scope of review has been an accepted method for securing the uniformity and predictability of jury decisions and preventing jury abuses. Id.

62. The employer has the right to determine the kind of conduct that will result in discharge as long as the employer's rules are "reasonably related to achieving efficient operation and maintaining order and are not manifestly unfair or do not unnecessarily burden employees' rights." Summers, supra note 1, at 502; accord Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 897 (1980) ("The employer's standard of job performance can be made part of the contract."); C. BAKALY & J. GROSSMAN, supra note 25, at 145. For instance, an employer cannot specify that employees will be discharged for serving jury duty or protesting corporate policy. See, e.g., Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (at-will employee who alleged he was discharged in retaliation for his insistence that his employer comply with the Food, Drug and Cosmetic Act stated a cause of action for wrongful discharge); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employer who discharged employee because she served jury duty against the employer's wishes was liable for wrongful discharge).

63. See supra note 59 and accompanying text.
kind of behavior that justifies discharge. A reasonable employer def-
definition for just cause is the first step toward providing more certainty in
the workplace.

III. THE JURY'S SCOPE OF REVIEW: POLICY
IMPLICATIONS OF THE DE NOVO AND GOOD
FAITH STANDARDS

A new definition for just cause solves only the first part of the just
cause problem. What remains to be resolved is who should decide
whether or not just cause existed—the employer or the jury. As Tou-
saint, Simpson, and Baldwin illustrate, there is substantial conflict
among jurisdictions regarding the jury’s scope of review in just cause
cases. This lack of consensus ensures that already crowded court
dockets will continue to be flooded by wrongful discharge litigation.64
Wrongful discharge legislation has been proposed65 to relieve the pres-
sure on the courts. Instead of alleviating the problem, however, this
legislation, if passed, will only magnify it.66 Relief will come only in
the form of a clear and uniform standard of review. In order to select
that standard, analysis of the costs and benefits associated with both
the de novo and good faith standards is necessary.

A. The De Novo Standard: A Cost-Benefit Analysis

I. Benefit to Employees: Enhanced Job Security

Power in the employer-employee relationship is far from equally
balanced. Although today’s employers are less omnipotent than their
counterparts of the early 1900s,67 employers still maintain substantial
control over company operations, work environment and conditions of
employment. The result of this imbalance is that few private industry
employees have any opportunity to negotiate for job security.68 Those

64. Each year, an estimated two million Americans are discharged from their jobs.
Approximately 150,000 may have been discharged without just cause. Stieber, Recent
65. The Commission on Uniform State Laws has proposed a Uniform Employment
Termination Act. The text of the proposed act can be found at 90 Daily Lab. Rep. (BNA) D-1
(May 9, 1990).
66. The proposed Uniform Act fails to specify whether employers would be judged by a de
novo or good faith standard. One of the drafters of the act suggested that if arbitrators could
“flesh out” a standard for just cause, so could the courts. St. Antoine, supra note 6, at 71.
However, as demonstrated, the courts have been unable to “flesh out” a uniform standard. What
took arbitrators several years to develop may take even longer for the courts to develop if they
continue on their divergent paths.
67. See Massingale, supra note 6, at 202.
68. Blades, supra note 4, at 1411.
who do are usually in upper level, managerial positions. The rest must subject themselves to the severe consequences a wrongful discharge can inflict on employees and their families.

By allowing juries to review the factual circumstances surrounding an employer’s decision to terminate, the de novo standard adopted in *Toussaint* enhances job security for all employees, regardless of their individual bargaining power. This standard provides those employees who have an implied just cause contract with substantially the same measure of job security that union and civil service employees have long enjoyed.

A major difference remaining between private sector employees and union and civil service employees is that the latter usually receive the benefits of just cause in the context of an arbitration agreement, while private sector employees must litigate their claims. In arbitration, the discharging employer is required to make a full, fair and objective investigation that considers all the available facts and evidence regarding the discharge. To demonstrate just cause for discharge, the employer must prove that the employee engaged in the alleged conduct. Probable cause for dismissal is insufficient.

Under a de novo standard, employees with just cause agreements receive the procedural advantages of arbitration, but in the environ-

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69. *Id.* at 1411-12.
70. See infra notes 118-26 and accompanying text.
72. See Penn & Whelan, *Job Security and the Role of Law: An Economic Analysis of Employment-at-Will*, 20 STAN. J. INT’L L. 353, 381 (1984). Arbitrators deciding a just cause dispute under an arbitration agreement tend to focus on a list of conditions that should be present to find a just cause discharge instead of relying on a blanket definition. The seven conditions emphasized by arbitrators are: (1) the employee was forewarned about the consequences of his conduct; (2) the employer’s rule was reasonably related to the employer’s business operations and its expectations of employee performance; (3) the employer made a good effort to discover if the employee did in fact violate the rules before discharging the employee; (4) the company conducted a fair and objective investigation; (5) the employer obtained substantial evidence that the employee was guilty as charged; (6) the employer applied its rules evenhandedly and without discrimination; and (7) the penalty was reasonably related to the seriousness of the offense and the employee’s record with the company. *In re* Enterprise Wire Co., 46 Lab. Arb. (BNA) 359, 362-65 (1966) (Daugherty, Arb.).
74. The employer’s burden of proof varies from case to case. In some cases, a preponderance of the evidence burden is imposed. *In re* Roadway Express, 87 Lab. Arb. (BNA) 224 (1990) (Cooper, Arb.). In others, a clear and convincing evidence test is used. *Id.* If the employer accuses the employee of criminal conduct, the arbitrator may require the employer to prove guilt beyond a reasonable doubt. *In re* Avis Rent A Car Sys., Inc., 85 Lab. Arb. (BNA) 435, 439 (1990) (Alsher, Arb.).
76. *Id.* at 151.
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ment of the courtroom. Merging the requirements of arbitration with the dynamics of the courtroom is beneficial to employees. By giving employees an opportunity to have the facts of their discharge reviewed by a jury of their peers, the de novo standard could significantly enhance job security in the United States.

2. The Cost to Employers: Diminished Managerial Discretion

The de novo standard imposes an immense cost on employers by giving employees the advantages of arbitration in a courtroom setting. Arbitration affords more benefits to its participants than does a jury trial.77 With arbitration, participants receive a quick,78 inexpensive79 and flexible80 resolution to their conflict. In contrast, wrongful discharge cases can take years just to get into the courtroom,81 and, at the conclusion of the trial, the remedy is usually limited to monetary compensation.82 In terms of both time and money,83 a courtroom proceeding is more costly to employers than is arbitration.

Another advantage of arbitration over litigation is that arbitration provides employees and employers with the experience of a specialized tribunal84 and the opportunity to select a mutually acceptable mediator.85 Courtroom proceedings do not provide either of these advantages. In court, the parties to a wrongful discharge dispute have little

77. See Grodin, Past, Present and Future in Wrongful Termination Law, 6 LAB. LAW. 97, 104 (1990) ("If we expect to apply the kind of judgment that a labor arbitrator brings to bear in the collective bargaining arena, then we need someone like an arbitrator to make that judgment.").
79. Id.
80. St. Antoine, supra note 6, at 79.
81. A study of 120 wrongful discharge trials in California determined that the average time to get to trial was 38 months. J. DERTOUZOS, E. HOLLAND & P. EBENER, supra note 60, at 25.
83. A study of 120 wrongful discharge trials in California found that the average compensatory award given to plaintiffs was $262,237. J. DERTOUZOS, E. HOLLAND & P. EBENER, supra note 60, at 25–26. The final amount is often modified by post-trial activities. Id. at 33–35.
84. As a group, arbitrators are extremely well educated. Most have attended college and many have obtained advanced degrees in economics and law. Arbitrators also bring a wealth of experience to their positions. Prior to becoming arbitrators, many worked with unions, employer associations, or the federal or a municipal government in a labor relations capacity. Somers & Dennis, Survey of the Arbitration Profession in 1969, 24 ANNUAL MEETING OF NAT’L ACAD. OF ARB. 275, 275–303 (1971).
85. F. ELKOURI & E. ELKOURI, supra note 78, at 87. In selecting an arbitrator, each side can inquire into the knowledge, experience, specialty, and professional affiliations of an individual arbitrator. See id. at 90–94. Parties can also research how an individual arbitrator has decided a specific issue in the past. Id.
choice regarding the jury members who are impaneled.\textsuperscript{86} Furthermore, juries rarely bring any special knowledge of labor relations into the courtroom; rather, the jury's knowledge is limited to what is presented to them during trial.

The most significant advantage of arbitration is the arbitrator's ability to remain impartial.\textsuperscript{87} Although arbitrators are not entirely without bias or prejudice, they can be expected to "divest [themselves] of any personal inclinations and . . . to stand between the parties with an open mind."\textsuperscript{88} Juries may be less able to divorce themselves from their personal biases. Each member of the jury brings his or her individual prejudices into the process. Usually, a majority of the members of any jury deciding a wrongful discharge case work as employees, rather than in management.\textsuperscript{89} As a result, there is a potential for the jury to "identify with, and therefore believe, the employee."\textsuperscript{90} This potential for bias is further compounded by the presence of a defendant with a deep pocket.\textsuperscript{91} In a close case, the jury may decide to impose liability on the employer simply because the employer has ample resources.

Despite the shortcomings of the jury system in labor disputes, the de novo standard vests broad discretion in the jury to second-guess corporate decisions.\textsuperscript{92} A de novo standard allows the jury to review independently employee conduct and to determine unilaterally whether they believe such conduct warranted discharge. The broad inquiry given the jury substantially restricts an employer's business judgment.\textsuperscript{93} Because the de novo standard endorses the jury's strict scrutiny of employers' discharge decisions, employers are forced to weigh every discharge against the risk of litigation.\textsuperscript{94}

With a de novo standard, the risk of litigation is great. This standard discourages employers who operate hazardous businesses from

\begin{itemize}
\item \textsuperscript{86} For example, in Washington each party can only exercise three peremptory challenges in a civil case. WASH. REV. CODE § 4.44.130 (1989).
\item \textsuperscript{87} F. ELKOURI & E. ELKOURI, supra note 78, at 92.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Approximately 16\% of civilian workers are in management positions. UNITED STATES DEP'T OF LABOR, GEOGRAPHICAL PROFILE OF EMPLOYMENT AND UNEMPLOYMENT table 3, at 10 (1988).
\item \textsuperscript{90} Blades, supra note 4, at 1428.
\item \textsuperscript{91} Hans, The Jury's Response to Business and Corporate Wrongdoing, 52 LAW & CONTEMP. PROBS. 177, 195 (1989).
\item \textsuperscript{92} H. PERRITT, supra note 4, at 355.
\item \textsuperscript{93} Hahn & Smith, Wrongful Discharge: The Search for a Legislative Compromise, 15 EMPLOYEE REL. L.J. 515, 529 (1990) ("[The de novo standard] decreases the flexibility employers must have . . . to make aggressive entrepreneurial decisions and unduly constrains them from terminating employees in many cases in which the free exercise of good faith [and] legitimate business judgment [would] dictate[] such action.").
\item \textsuperscript{94} Massingale, supra note 6, at 202.
\end{itemize}

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reacting to a potentially dangerous situation by immediately discharging a problem employee, but it does not shield these employers from the awesome liability they may incur if that employee causes an accident. This presents a significant dilemma for employers. If an employer reasonably believes an employee could cause an accident that would potentially harm another employee or the public, but fails to discharge that employee, the employer can be held liable for any ensuing accident. Similarly, the employer that does discharge the employee will be held liable for wrongful discharge if a jury later determines the employer was mistaken regarding the facts.

Even employers who adequately investigate and document an employee's objectionable behavior before the discharge are subject to the risk of litigation. The de novo standard encourages employees who were justifiably discharged to initiate vexatious suits. An employee can easily state a claim for wrongful discharge. To get into court, the employee simply must claim that he did not engage in the alleged conduct. Once the employee states this claim, there are two possible routes to success. First, the employer, fearful of a jury favoring the employee, may agree to settle a claim that has little merit. Second, if the case goes to court, the jury may sympathize with the employee and ignore the evidence relied on by the employer.

The usual rationale for imposing the onerous burden of the de novo standard on employers is that the employer can avoid the burden by simply removing the just cause provision from its employment agreements. This rationale assumes that all just cause agreements are explicit. A review of the case law shows that this is not the case. Many just cause disputes are based on implied contracts resulting from casual comments made by other employees in some position of

96. Id. "Is it fair (or safe) to put company officials to a choice between risking an environmental catastrophe and a crushing jury verdict?" Id. at 215 (Kozinski, J., dissenting).
97. See Blades, supra note 4, at 1428.

A rule allowing juries to second guess the employer's decision... would... hold the employer to a standard of perfection [and]... would allow the employee a second chance to challenge his termination before a fact finder who is likely to be more sympathetic and less familiar with the actual conditions and practices of the workplace.

authority. The employer has little control over such situations. Furthermore, if just cause legislation passes, employers will no longer be able to remedy the situation as easily.

If a de novo standard is imposed on employers, the decision should be removed from the jury. Even employee rights advocates who have been instrumental in proposing just cause legislation recognize the inequities of allowing a jury to make a de novo review of employer decisions. The Montana Wrongful Discharge from Employment Act discourages the use of jury trials by providing attorneys' fees to the prevailing party if this party originally offered to submit the dispute to arbitration and the losing party refused. Likewise, arbitration is the preferred mode of enforcement under the proposed Uniform Employment Termination Act.

3. Costs to Employees: The Price of Enhanced Job Security

Although employees are perceived to "win" if a de novo standard is adopted, they may pay for their enhanced job security through decreased wages and diminished privacy. The employer may be the better party to bear the costs associated with wrongful discharge, but the employer's costs must be funded from some source, and wages are a likely target. Employee privacy may also suffer with a de novo standard, especially if employers adopt widespread surveillance techniques to monitor employee conduct.


102. The trend has been for legislation to not specify the standard of just cause by which employers will be judged. See Proposed Uniform Employment Termination Act, 90 Daily Lab. Rep. (BNA) D-1 (May 9, 1990); Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-902 to -914 (1989).

103. Grodin, supra note 77, at 104; St. Antoine, supra note 6, at 69.


105. Id. § 914.


107. Hahn & Smith, supra note 93, at 529.


109. Sanders v. Parker Drilling Co., 911 F.2d 191, 217 (9th Cir. 1990) (Kozinski, J., dissenting) ("For the right to have a jury second-guess management's termination decisions, my colleagues trade away not only the workers' safety but their privacy and dignity as well.").
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4. Impact on Society: The Costs Outweigh the Benefits

The impact of the de novo standard for just cause extends beyond the confines of the employment relationship into the public domain. Although society is likely to profit from an overall increase in job security, the costs associated with this standard outweigh the benefit. The public will be forced to pay the price of this increased job security when employers increase the costs of their goods and services to offset the resulting inefficiencies, when an employee retained by an employer fearful of a wrongful termination dispute causes an accident, and when the courts become burdened with wrongful discharge litigation. The public may not be willing to bear these costs. Critics of the civil service system believe that civil service employees receive too much protection from their just cause provision. Because the de novo standard provides private employees with something resembling civil service tenure, the public may be unwilling to extend de novo protection to all employees.

B. The Good Faith Standard: A Cost-Benefit Analysis

Despite the immense costs of the de novo standard, courts and legislatures are not justified in turning to the other alternative and adopting an employer good faith standard. This standard comes with its own inequities. While the good faith standard safeguards managerial discretion, it destroys any hope of employee job security.

1. Benefit to Employers: A Presumption of Just Cause

The good faith standard is beneficial to employers. As illustrated in Simpson, the good faith standard protects management’s ability to make discharge decisions as long as the employer did not contract away its decision-making authority. This standard allows employers to retain broad managerial discretion and to benefit from the increased productivity and employee loyalty that result from the employer’s illusory promise of just cause treatment.

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110. Id.
111. See Note, Employer Opportunism, supra note 108, at 527 (“[A]nywhere between 30,000 and 103,000 claims could be filed under a general good cause statute.”).
112. H. PERRITT, supra note 4, at 354 n.35.
113. Id. at 354.
115. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 895 (1980). (“Having announced [a just cause] policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.”).

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The broad managerial discretion obtained under a good faith standard comes at too great a cost to employee job security. An employer's subjective, good faith belief alone is not enough to justify discharge. If this were all that was required, employers would have little incentive to exercise proper care in investigating alleged misconduct. Instead, employers could always rely on a good faith belief that such conduct really occurred. The "arbitrary, capricious or illegal reason" language included in the good faith standard would do little to protect employees because this language goes solely to the reason given for the discharge, not to the employer's reasonableness or justification.

By limiting the review of an employer's discharge decision to an evaluation of the employer's state of mind, the good faith standard establishes a presumption of just cause. In order to rebut this presumption, the employee has the difficult burden of demonstrating a lack of good faith on the part of the employer. Although other corporate decisions are protected by the business judgment rule that presumes corporate officers' actions are taken in good faith, the stakes involved in discharging employees are too high to grant employers such an extensive advantage.

2. Cost to Employees: Economic and Emotional Turmoil

A good faith standard for just cause does little to protect employees from unjust employer action. Despite a just cause agreement, an employer is free to discharge an employee so long as the employer has a good faith belief that the employee engaged in the prohibited conduct. The employer is under no duty to document employee behavior or to conduct an investigation.

By limiting the jury's review of employers' discharge decisions, the good faith standard poses severe consequences for employees. Discharge subjects employees to economic as well as psychological turmoil. For many workers, their jobs are their main source of identity and their primary social unit. Discharges deprive employees of the self-esteem they derive from their jobs, often leading to feelings of failure. These feelings of failure can spread beyond the employee's pro-
fessional capacity into his or her personal life. Studies of employees dismissed because of plant closures document the mental and physical health conditions that can accompany a job loss. Problems associated with loss of employment can include alcoholism, ulcers, suicides, cardiovascular deaths and impaired social relationships.

Like the emotional costs, the economic costs of job loss are also severe. The average worker has less than three months wages in savings. Loss of income and lack of savings can lead to financial problems as severe as repossession and foreclosure. The economic consequences of discharge are not limited to lost wages, but also include lost health benefits, lost retirement benefits, lost vacation time and the cost of finding new employment. The problem is even more dramatic for older employees and employees without transferable skills.

Also, if an employee is discharged for alleged misconduct, unemployment benefits may be denied, making it even harder to cope.

As with the de novo standard, the costs of the good faith standard are too great. The good faith standard unjustifiably favors employers. Employees and their families should not be subject to a rule that makes undeserved economic and emotional turmoil a reality, and a reality for which they have little recourse.

IV. THE NEED FOR A BALANCING TEST

Both the de novo and good faith standards for just cause are inequitable. Each tips the scale in favor of the interests of one party while ignoring the needs and vulnerabilities of the other. An analysis of the just cause standard demonstrates that there are a number of interests at stake. First, employees need protection against unfair and injurious employer action. In addition, society is interested in the fair treat-


122. Id.

123. Tobias, supra note 118, at 181.

124. Id.; Note, Protecting At Will Employees, supra note 108, at 1834.


126. Blades, supra note 4, at 1406. The severity of the effects of wrongful discharge have led some to label it the "organizational equivalent of capital punishment." Id. at 1406 n.11.

ment of employees as well as organizational efficiency. Finally, employers must be able to effectively manage their organizations. A fair standard for just cause must balance all these competing interests.

A. Baldwin v. Sisters of Providence, Inc.: A Balancing Test for Just Cause

In Baldwin v. Sisters of Providence, Inc., the Washington Supreme Court merged the de novo and good faith standards in order to balance employer and employee interests. The court held that "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." The first clause of the definition, "not for any arbitrary, capricious or illegal reason," establishes the good faith component of the balancing test. This clause focuses solely on the employer's reason for the discharge. Under this clause of the balancing test, only discharges that are unreasonable or made in bad faith are prohibited.

Without the rest of the holding, the Baldwin test would not offer employees any more protection than is offered in Simpson. However, the second and third clauses, "based on facts supported by substantial evidence" and "reasonably believed by the employer to be true," provide the protective element. These clauses establish a two-part objective test. In order for the employer to avoid liability for wrongful termination, the factfinder must determine that the employer had substantial evidence that the alleged conduct occurred and that it was reasonable for the employer to rely on this evidence. "Substantial evidence" is an elusive term. Generally, it means "[s]uch evidence that a reasonable mind might accept as adequate to support a conclusion . . . evidence possessing something of substance and relevant consequence . . . which furnishes [a] substantial basis of fact from which [the] issues

128. Id.
129. Id.
131. Id. at 139, 769 P.2d at 304.
132. Arbitrary is defined as "[i]n an unreasonable manner . . . depending on will alone . . . bad faith." BLACK'S LAW DICTIONARY 104 (6th ed. 1990).
133. Capricious means made on a whim, based on an unfounded motivation. See id. at 211.
134. The Baldwin court did not state whether an independent factfinder or the employer would decide if substantial evidence exists. See Baldwin, 112 Wash. 2d at 139, 769 P.2d at 304. In order to balance the interests of the employer and the employee, this decision must be left to an independent factfinder. If this decision is left to the employer, the substantial evidence component no longer affords any protection to the employee.
tendered can be reasonably resolved.” The substantial evidence requirement asks if an independent party, examining the facts relied on by the employer, could reach the same conclusion. The “reasonably believed to be true” clause asks whether there were any circumstances that should have discouraged the employer from relying on those facts, or whether the employer was using those facts as a pretext and the discharge was really for another reason. By focusing the jury’s inquiry on the evidence relied on by the employer rather than on the employer’s good faith or the facts as they appear after the discharge, the Baldwin test goes far in balancing the interests of employers and employees.

B. A Balancing Test Will Lead to More Equitable Results

A standard like the one announced in Baldwin is necessary to effectively balance employer and employee interests. A balancing test is superior to the de novo standard because it limits the jury’s scope of review to scrutinizing the specific facts and evidence relied on by the employer, instead of allowing the jury to determine de novo what, in their judgment, really occurred. A balancing test also satisfies employer concerns regarding the excessive costs imposed by the de novo standard. Unlike the de novo standard, a balancing test imposes a reasonable employer requirement. In deciding to discharge an employee, employers are required to incur only those costs that a reasonable employer would incur. If a reasonable employer, in the same circumstances, would not engage in techniques such as widespread drug testing or planting an informant in order to ascertain the facts, then the discharging employer is not held liable for not doing so. Likewise, a reasonable employer standard also considers public policy issues. Under a balancing test, employees suspected of misconduct do not need to be retained if doing so could lead to serious consequences for the business or the public. If a reasonable employer in the same circumstances would have discharged the employee to avoid the possible adverse consequences, the employer will not be held liable for doing so.

A balancing test also satisfies employee concerns regarding unfair employer action. A balancing test, as opposed to a good faith standard, forces employers to account for their decisions. If the employer fails to review all the available facts prior to the discharge, the balancing test takes this failure into consideration and imposes liability. The benefit of such a standard is that it requires an employer to conduct a

135. BLACK'S LAW DICTIONARY, supra note 132, at 1428.
fair investigation and to make an independent review of the facts before dismissing the employee.\textsuperscript{136} A balancing test prohibits employees from being discharged unless there is compelling proof to support the employer's action.\textsuperscript{137} The employer's good faith alone is not enough; the employer is required to compile evidence from which a reasonable mind would conclude that discharge was justified. A balancing test should allay fears that anything short of a de novo standard would allow employers to dismiss employees on a mere suspicion of misconduct.\textsuperscript{138}

V. CONCLUSION

Within the past decade, the just cause definition and the standard of review in just cause cases have captured the attention of courts, legislatures, employee rights advocates and employment law commentators. Just cause definitions formulated by the courts have suffered from ambiguity and inconsistency. A clear definition that gives strict guidelines to the jury and limits the jury's inquiry to whether a reasonable employer would consider the conduct just cause for discharge is necessary.

A clear articulation of the jury's scope of review in just cause cases is also needed. Courts should follow the example of the Washington Supreme Court in \textit{Baldwin v. Sisters of Providence, Inc.}, and adopt a balancing test. A balancing test is beneficial to employers because it limits the jury's ability to second-guess employer decisions. Likewise, employees benefit from a balancing test because it protects them from arbitrary dismissals based on insufficient evidence. A standard that balances the employer's interest in managerial discretion against the employee's interest in job security will ensure fairness in the workplace.

\textit{Wendi J. Delmendo}

\textsuperscript{136} Wall, \textit{supra} note 99, at 94.

\textsuperscript{137} See Kestenbaum \textit{v. Pennzoil Co.}, 108 N.M. 20, 766 P.2d 280 (1988) (an employer has no reasonable grounds for discharge where the employer improperly relied on an investigator's summarized report not intended to stand on its own, failed to differentiate between firsthand knowledge and hearsay, gossip, or rumor, and made no attempt to ascertain the credibility of people interviewed), \textit{cert. denied}, 490 U.S. 1109 (1989).

\textsuperscript{138} See Sanders \textit{v. Parker Drilling Co.}, 911 F.2d 191 (9th Cir. 1990) (Reinhardt, J., concurring).