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*Midgett v. Sackett-Chicago, Inc.:* Extension of the Tort of Retaliatory Discharge to Employees Covered by Collective Bargaining Agreements

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INTRODUCTION

Under the employment at-will rule, an employer can discharge an employee without cause and without notice. Although the rule also allows an employee to leave without cause and without notice, in operation the rule has had a more severe effect on the employee
than on the employer. In the past, employees were able to move from one job to another more freely than they can in today's more specialized workplace. To ameliorate the harsh effects of the at-will rule on employees, legislatures and courts have restricted the ability of employers to discharge employees without cause.

The National Labor Relations Act ("NLRA") protects the rights of employees to unionize and bargain collectively with their employers. Collective bargaining has enabled unions to enter into agreements which provide that the employer can discharge the union employee only for just cause. Such agreements also often require a terminated employee who wishes to challenge his discharge to do so through the grievance and arbitration procedures established in the agreement. The United States Supreme Court has consistently held that an employee must exhaust his remedies

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3. See infra notes 21-24 and accompanying text.
4. See infra notes 22-24 and accompanying text.
5. See infra notes 27-38, 55-67 and accompanying text.
7. NLRA § 1, 29 U.S.C. § 151 (1982) states:
The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

See also infra notes 29-38.
8. See infra notes 31-33 and accompanying text.
9. See infra notes 34-38 and accompanying text.
under the agreement before he can initiate a civil action against his employer.\textsuperscript{10}

Many states, including Illinois, have restricted an employer's ability to terminate an employee without good cause by recognizing the tort of retaliatory discharge.\textsuperscript{11} An employer commits this tort if he discharges an employee in retaliation for actions by the employee which are favored as a matter of public policy. The tort was adopted because courts did not want at-will employees choosing between losing their jobs and violating public policy.\textsuperscript{12}

Recently, courts have had to decide whether a union employee who is covered by a collective bargaining agreement which contains grievance and arbitration procedures can bring an action in tort for retaliatory discharge.\textsuperscript{13} Employers maintain that a union employee must exhaust the grievance procedures provided by the collective bargaining agreement before he can bring his employer to court and that any relief should be restricted to the remedies set forth in the agreement.\textsuperscript{14} Employees argue that the union employee should be able to bring an action for retaliatory discharge in order to protect activities favored by the state as a matter of public policy.\textsuperscript{15} In \textit{Midgett v. Sackett-Chicago, Inc.},\textsuperscript{16} the Illinois Supreme

\begin{flushright}
\textsuperscript{10} See infra notes 39-40 and accompanying text.  \\
\textsuperscript{12} See infra note 60 and accompanying text.  \\
\textsuperscript{13} See infra notes 86-157 and accompanying text.  \\
\textsuperscript{14} See infra notes 108-12 and accompanying text.  \\
\textsuperscript{15} See infra notes 88-107 and accompanying text.  \\
\textsuperscript{16} 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).
Court held that a union employee can bring an action in tort for retaliatory discharge without exhausting his contractual remedies.\textsuperscript{17}

This note first will review the legislative and judicial limitations placed on the employment at-will rule, including the protections provided by the National Labor Relations Act and the tort of retaliatory discharge. Next, the note will discuss acceptance of the tort action in Illinois and the Illinois Supreme Court's extension of the tort action to union employees in \textit{Midgett v. Sackett-Chicago, Inc.}. It will then examine whether this was a proper and necessary extension of the tort in light of the federal labor law policy favoring the use of arbitration for the settlement of grievances. Finally, this note will discuss the impact of the \textit{Midgett} decision on the collective bargaining process.

\section*{BACKGROUND}

\textit{The Employment At-Will Rule}

The employment at-will rule provides that an employer or an employee can terminate the employment relationship for any or no reason.\textsuperscript{18} The rule reflects the laissez-faire philosophy which dominated industrial America in the late nineteenth and early twentieth centuries.\textsuperscript{19} The employment at-will rule gave the employer great flexibility since he could vary the number of employees he retained as market conditions changed.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 152, 473 N.E.2d at 1285.
\item \textsuperscript{18} The case most frequently cited in support of the employment at-will rule is \textit{Payne v. Western & Atl. R.R. Co.}, 82 Tenn. 507, 518-19 (1884), \textit{overruled on other grounds}, \textit{Hutton v. Watters}, 132 Tenn. 727, 179 S.W. 134 (1915). The \textit{Payne} court stated:
\begin{quote}
[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at-will for good cause, or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.
\end{quote}
\item \textit{Id.} See also \textit{supra} note 1. The rule has survived in large part because of the support it found in contract law. \textit{See Blades, supra} note 2, at 1419. In contract law, there is no contract unless there is mutuality of obligation, mutuality of remedy, and consideration. \textit{See Murg & Scharman, supra} note 2, at 336-37. In the typical employer/employee relationship, these elements are absent. \textit{Id.} Consequently, when an employee is discharged, he has no cause of action against his employer because no contract exists. \textit{Id. See also} Note, \textit{Implied Contract Rights and Job Security,} 26 Stan. L. Rev. 335, 340-69 (1985) [hereinafter cited as Note, \textit{Job Security}].
\item \textsuperscript{19} \textit{See Blades, supra} note 2, at 1417.
\item \textsuperscript{20} \textit{See Murg & Scharman, supra} note 2, at 323-26. The employment at-will rule allowed an employer to tailor his workforce to market demands. This was not the case under the English Rule, which raised a presumption that every employment contract was intended to have a one-year limitation. \textit{Id.}
\end{itemize}
Although the employment at-will rule also gives the employee the freedom to quit his job and find employment elsewhere, the rule has come under attack because in the contemporary employment relationship this often is not possible. The workplace has become more specialized and as a consequence, the employee is no longer as free to move from one job to another. In addition, many employees are in a position of unequal bargaining power when negotiating employment terms with their employer. As a result of this imbalance, both the judiciary and the legislature have modified the employment at-will rule by restricting the employer's absolute right to discharge the at-will employee.

The National Labor Relations Act

Some of the first modifications of the employment at-will rule resulted from the enactment of the National Labor Relations Act. In enacting the NLRA, Congress was attempting to pro-

21. This early position on the employee's freedom to change jobs was described in Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 69, 139 So. 760, 761 (1932), as follows:

An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend.

22. See Note, Common Law Action, supra note 2, at 1443. One commentator has stated:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent on wages. If they lost their jobs, they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all their income is something new in the world. For our generation, the substance of life is in another man's hands.

F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951). Another commentator has stated that when an employee loses his job today, he loses more than wages. He also may lose standing in society, employee benefits, and self-esteem. Note, Job Security, supra note 18, at 337-410; see also T. Kahn, THE MEANING OF WORK: INTERPRETATION AND PURPOSE FOR MEASUREMENT, IN THE HUMAN MEANING OF TRIAL CHARGE (A. Campbell & P. Converse eds. 1972); Blackburn, Restricted Employer Discharge Rights, A Changing Concept of Employment At-Will, 17 Am. Bus. 467, 470 (1980).


24. This inequality has been examined by commentators, legislatures, and courts in an attempt to correct the imbalance. See supra note 2; infra notes 26-68 and accompanying text.

25. See infra notes 26-107 and accompanying text; see also supra note 11.

mote the free flow of commerce through stability and peace in labor relations.\textsuperscript{27} In order to accomplish this goal, employees were given the statutory right to organize and join a labor organization and to bargain collectively with the employer.\textsuperscript{28} The NLRA has fostered the growth of collective bargaining agreements which have done much to temper the harsh effects of the employment at-will rule.\textsuperscript{29}

A collective bargaining agreement defines the relationships among the employer, the employee and the union.\textsuperscript{30} The agreement often will state the grounds upon which an employer may discharge an employee.\textsuperscript{31} In fact, approximately eighty percent of all collective bargaining agreements specify that employees may be fired only for "cause" or for "just cause."\textsuperscript{32} Further, sixty-five percent of these agreements list specific grounds for discharge, such as discharge on the basis of race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 633(a) (1982) (prohibits employment discrimination based on age or for asserting rights under the Act); Rehabilitation Act of 1973 29 U.S.C. §§ 793, 794 (1982) (prohibits discrimination in employment of handicapped persons by federal contractors or by any program receiving federal funds); Employee Retirement Income Security Act of 1974 29 U.S.C. §§ 1140, 1141 (1982) (prohibits employment discrimination for asserting rights under the Act); Vietnam Era Veterans Readjustment Assistance Act 38 U.S.C. § 2012 (1982) (requires that covered government contractors employ and advance in employment qualified Vietnam veterans); Clean Air Act 42 U.S.C. § 7622 (1982) (prohibits discharge of employees initiating or testifying in proceedings against their employers for violating the Act); Consumer Credit Protection Act § 304(a), 15 U.S.C. § 1674(a) (1977) (prohibits discharge of employees whose wages are garnished because of indebtedness); Judiciary and Judicial Procedure Act 28 U.S.C. § 1875 (1982) (prohibits discharge of employees for jury service); Railroad Safety Act 45 U.S.C. §§ 441(a), (h)(1) (1982) (prohibits railroad employer from discharging employees who file complaints or initiate proceedings related to railroad safety laws, or who refuse to work based on reasonable belief that dangerous conditions exist).

\textsuperscript{27} NLRA § 1, 29 U.S.C. § 151 (1982); see supra note 7 and accompanying text.

\textsuperscript{28} NLRA § 7, 29 U.S.C. § 157 (1982) ("Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .")

\textsuperscript{29} See Note, Common Law Action, supra note 2, at 1443.

\textsuperscript{30} See GORMAN, supra note 6, at 540-41.

\textsuperscript{31} Id.

\textsuperscript{32} 2 BUREAU OF NATIONAL AFFAIRS, INC., COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS § 40:1 (1979). Various factors are considered in determining whether or not a discharge is for just cause. Some of the more significant factors include the nature of the offense, the past employment record of the employee, length of service, whether reasonable rules have been clearly disseminated and enforced in a consistent manner, and whether the concept of progressive discipline has been applied. Elkouri & Elkouri, How Arbitration Works, ch. 15 (3d ed. 1976). See also Note, Discharge in the Law of Arbitration, 20 VAND. L. REV. 81, 85-88 (1966). In the absence of a just cause provision, arbitrators often will read one into the contract. See Summers, supra note 2, at 499-500.
intoxication, absenteeism, and violation of company safety rules. Such agreements virtually eliminate the discretion enjoyed by employers under the employment at-will rule.

The collective bargaining agreement will typically also contain procedures which are to be utilized if a dispute over an employee's discharge arises. Specifically, most agreements will set out grievance procedures consisting of a series of steps to be taken within a certain time period for the resolution of the dispute. Typically, the grievance procedures will involve the employee and his union representative, who takes the grievance to the employee's immediate superior and, if no settlement is reached, up through the management hierarchy. If the dispute remains unsettled, the collective bargaining agreement usually requires that the dispute be submitted to binding arbitration. Compared to civil litigation, the grievance and arbitration procedures are much more informal, expeditious, and inexpensive methods for the settling of disputes.

Historically, the courts and the National Labor Relations Board have held that grievance and arbitration procedures are the appropriate methods for resolving disputes and that the union employee must exhaust such contractual remedies before he files a civil action against his employer. The purpose of this exhaustion doc-

34. Grievance and arbitration provisions are found in virtually all formal collective bargaining agreements currently in effect. See 2 BUREAU OF NATIONAL AFFAIRS, INC., COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS § 51:1 (1983).
35. Elkouri & Elkouri, supra note 32, at 120-21.
36. Id.
37. Id.
38. GORMAN, supra note 6, at 543; see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 55-58 (1974) (grievance procedures provide a quick and inexpensive method for the settlement of grievances when compared to civil suit); infra notes 142-62 and accompanying text.
39. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) (employee must utilize the grievance and arbitration procedures found in the collective bargaining agreement so that work disputes can be settled in an orderly and peaceful manner). Preceding Maddox were three Supreme Court decisions known as the "Steelworkers Trilogy": United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) (if a collective bargaining agreement provides grievance procedures, the agreement is to arbitrate all grievances and not simply those which a court deems meritorious); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 593 (1960) (an order to arbitrate will not be denied unless it can be positively shown that the arbitration clause does not cover the dispute); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 574 (1960) (courts will not overrule arbitrator's decision in which he is interpreting the employment contract). In these cases, the Court adopted the federal policy which favors the arbitration of grievances because arbitration helps to promote industrial peace and stability. This policy led to the Supreme Court's decision in Maddox requiring the exhaustion of contractual remedies. For a general discussion of the Steelworkers Trilogy, see Wollet,
trine is to encourage the settling of disputes in the workplace rather than in the courtroom and to promote industrial peace.\textsuperscript{40}

The Supreme Court, however, has created limited exceptions to this exhaustion requirement, namely in cases involving federal statutory rights, such as those provided by Title VII of the Civil Rights Act\textsuperscript{41} and by the Fair Labor Standards Act.\textsuperscript{42} For example, in\textit{Alexander v. Gardner-Denver Co.},\textsuperscript{43} an employer discharged a union employee, who then filed a grievance against his employer for unjust discharge.\textsuperscript{44} After an arbitrator found the discharge to be proper,\textsuperscript{45} the employee filed an action in federal court alleging that the discharge was in violation of Title VII of the Civil Rights Act.\textsuperscript{46} In a unanimous decision, the Supreme Court held that the arbitration proceeding did not bar the employee's action under Title VII.\textsuperscript{47} While the employee normally would have been bound by


\textsuperscript{40} Republic Steel Corp. v. Maddox, 379 U.S. 650 (1961):

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. Unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant.

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'\textsuperscript{Id.} at 652-53 (citations omitted). Further, even if an employee has exhausted all of his remedies under the collective bargaining agreement, he must also prove that the union breached its duty of fair representation before he can bring a civil action.\textit{Vaca v. Sipes}, 386 U.S. 171 (1967). A breach of the duty of fair representation can occur when the union acts in an arbitrary, bad faith, or discriminatory manner towards the employee. However, a union will not breach its duty of fair representation simply because it settled an employee's grievance before arbitration.\textsuperscript{Id.} at 190-93. \textit{See generally Developing Labor Law}, supra note 6, at 1258-88.

\textsuperscript{43} 415 U.S. 36 (1974).
\textsuperscript{44} \textit{Id.} at 39.
\textsuperscript{45} \textit{Id.} at 42.
\textsuperscript{46} \textit{Id.} at 43.
\textsuperscript{47} \textit{Id.} at 59-60.
the arbitration decision, the *Alexander* Court believed that the arbitration proceeding was an inappropriate forum in which to adjudicate federal statutory rights.\textsuperscript{48} According to the Court, the employee's rights under Title VII were independent of his rights under the collective bargaining agreement.\textsuperscript{49} Further, the arbitration process was informal and might not fully protect the rights guaranteed by the federal statute.\textsuperscript{50} The Court also noted that arbitrators generally enforce the terms of the collective bargaining agreement regardless of any conflict which might arise between those terms and Title VII.\textsuperscript{51}

The NLRA and the federal labor policies advanced by the statute have done much to protect union employees from the harsh effects of the employment at-will rule.\textsuperscript{52} This protection, however, does not extend to the millions of employees who are not covered by collective bargaining agreements.\textsuperscript{53} Consequently, some courts have sought to protect such employees by recognizing the tort of retaliatory discharge.\textsuperscript{54}

**THE TORT OF RETALIATORY DISCHARGE**

The tort of retaliatory discharge\textsuperscript{55} provides a cause of action to

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\textsuperscript{48} *Id.* at 52-59.

\textsuperscript{49} *Id.* at 49-50.

\textsuperscript{50} *Id.*

\textsuperscript{51} *Id.* The Court earlier had stated:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.


\textsuperscript{52} See Murg & Scharman, *supra* note 2, at 482.

\textsuperscript{53} Only 19.7\% of American workers belong to a union. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 412 (1980). In Illinois, from 1970 to 1978, 1.54 million to 1.68 million workers in a total labor force of 5.1 million were members of a union. *Id.* at 108.

\textsuperscript{54} See Comment, Employment at-Will, *supra* note 2, at 991. Some courts that have modified the employment at-will rule have been influenced by technological, economic, and sociological changes in the nation. *Id.* The spread of judicial activism also helps explain these decisions. See Note, Common Law Action, *supra* note 2, at 792. One commentator has argued that the courts ought to guarantee at-will employees the same rights enjoyed by union employees. Peck, *supra* note 2, at 42. Peck argues that by not guaranteeing at-will employees the same rights, courts are denying the employee at-will equal protection. The best explanation, however, for the modification of the employment at-will rule is that the results of the rule are harsh and unfair. See Blades, *supra* note 2, at 1405-10; see also *supra* notes 21-25 and accompanying text.

\textsuperscript{55} The first state to recognize a cause of action for retaliatory discharge was Califor-
employees who are discharged for engaging in activities which are favored as a matter of public policy, such as reporting for jury duty,\textsuperscript{56} refusing to engage in an employer's illegal activities,\textsuperscript{57} testifying before a grand jury\textsuperscript{58} or refusing to alter the results of pollution control tests.\textsuperscript{59} Courts which have recognized the tort have

\textsuperscript{56} See Nees v. Hocks, 272 Or. 210, 536 P.2d 512, 513 (1980).

\textsuperscript{57} See Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee discharged because he refused to participate in an illegal scheme to fix the price of retail gasoline).


attempted to spare employees at-will from choosing between keeping their jobs and promoting public policy. By allowing punitive damages, courts have deterred employers from making retaliatory discharges. Some courts have added to the tort's deterrent effect by permitting discharged employees to recover damages for mental pain and suffering.

"Public policy" is an "inherently amorphous and ambiguous concept." Consequently, courts have had to determine on a case-

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60. The Indiana Supreme Court held that an employee discharged for filing a workers' compensation claim must have a cause of action in tort for retaliatory discharge since his discharge violates public policy. Frampton v. Central Indiana Gas Co., 260 Ind. 249, 252, 297 N.E.2d 425, 428 (1973). The court held that if public policy was to be implemented, "the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal." Id. at 251, 297 N.E.2d at 427.

61. See Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (because cause of action sounds in tort, plaintiff who is discharged for refusing to violate consumer code is entitled to punitive damages). One court has stated that the "thrust of punitive damages may be the most effective means of deterring conduct" which may frustrate the purposes of public policy. Hansen v. Harrah's, 675 P.2d 394, 396 (Nev. 1984) (discharge for filing worker's compensation claim). See also Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 189-90, 384 N.E.2d 353, 359 (1978), where the court held that without punitive damages, there would be little to dissuade an employer from discharging employees for reasons which violate public policy. One commentator has stated:

"The assessment of punitive damages in cases of abusive firings would be fitting and desirable. They are typically awarded where the plaintiff's loss is caused by the defendant's malicious, suppressive, wilful, wanton, or ruthless behavior and the usual objective is deterrence. Deterrence should also be a prime objective of the remedy for abusive discharge."

Blades, supra note 2, at 1427.

62. The tort action will provide greater protection than a retaliatory discharge action based on contract principles because the employee normally is limited in contract actions to the recovery of compensatory damages. See supra note 55. Commentators have also suggested that the tort action will provide an employee with greater protection than a collective bargaining agreement, Murg & Scharman, supra note 2, at 368-69, because the union employee's remedy usually is limited to back pay and reinstatement. See Gorman, supra note 6, at 138-39. In addition, the tort action gives the employee the right to a jury which is likely to be more sympathetic than an arbitrator. Murg & Scharman, supra note 2, at 368-69.


"The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not under changed conditions, be the public policy of another."

by-case basis which activities are protected by the tort of retaliatory discharge. Public policy generally favors any activity believed to safeguard the public good. Thus, courts have allowed retaliatory discharge actions to be brought by employees discharged for reporting the illegal activities of their employers, for refusing to take lie detector tests and for filing workers' compensation claims. The Illinois Supreme Court first recognized the tort in an action brought by an employee discharged for filing a workers' compensation claim.

RETALIATORY DISCHARGE IN ILLINOIS

In 1979, the Illinois Supreme Court approved of the tort of retaliatory discharge in Kelsay v. Motorola, Inc. In Kelsay, a Motorola employee had an employment contract which was terminable at-will. After being injured while working in his employer's plant, the employee filed a workers' compensation claim. The employer attempted to dissuade the employee from filing the claim; however, the employee proceeded and was subsequently dis-
Thereafter, the employee filed a civil suit based on the tort of retaliatory discharge and was awarded compensatory and punitive damages. The Illinois Appellate Court reversed, holding that the employee had no cause of action due to the employment at-will rule.

The Illinois Supreme Court reinstated the trial court decision. The court explained that the purpose of the workers' compensation statute was to provide automatic recovery to employees for work-related injuries. According to the court, the public policy of the state favored utilization of the remedies in the statute. The court then held that in order to enforce and implement this public policy,

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72. Id.
73. Id.
75. Motorola made three arguments before the Supreme Court. First, it argued that no cause of action should be recognized because the exclusivity provisions of the Workers' Compensation Act limited the employer's responsibility for compensation to certain enumerated occurrences. Kelsay, 74 Ill. 2d at 179, 384 N.E.2d at 356. Secondly, Motorola stated that the Act contained no restrictions on an employer's right to discharge employees. Id. Finally, the defendant argued that by providing for criminal sanctions, the legislature had demonstrated its intention that the Act preclude civil remedies. Id.

The Workers' Compensation Act, ILL. REV. STAT. ch. 48, § 138.11 (1983) provides: "The compensation herein provided together with the provisions of this Act shall be the measure of the responsibility of any employer engaged in any of the businesses or enterprises enumerated. . . ." Paragraph 138.4(h) provides:

It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

76. Id. at 180-81, 384 N.E.2d at 356. Under the common law, the defenses of assumption of risk, contributory negligence, and the fellow-servant rule made it difficult for the employee to recover. See DARLING-HAMMONG & KNEISER, THE LAW AND ECONOMICS OF WORKER'S COMPENSATION 7-8 (1980).
77. Kelsay, 74 Ill. 2d at 182, 384 N.E.2d at 357. Workers' compensation laws serve several public-policy objectives besides prompt recovery for work-related injuries, such as relieving the financial drain incurred by charities as a result of uncompensated injuries at the workplace, promoting employer interest in job safety and rehabilitation, preventing accidents by encouraging objective studies of the causes of accidents, and discouraging concealment of work hazards. CHAMBER OF COMMERCE OF THE U.S.A., ANALYSIS OF WORKMEN'S COMPENSATION LAWS, HISTORY OF WORKMEN'S COMPENSATION AND EMPLOYER'S LIABILITY, (1974 ed.).
a cause of action for retaliatory discharge should exist. If the tort were not allowed, employees would be forced to choose between their jobs and their statutory rights under the workers' compensation statute. An employer's right to discharge was no longer as absolute as it once was. The right to discharge could not be used to defeat the purpose of the workers' compensation statute.

The court also held that the inclusion of criminal sanctions in the statute did not preclude the bringing of a civil action. The criminal sanctions, according to the court, were not a sufficient deterrent for the discharging employer. The court therefore held that in the future, employees would be able to recover punitive damages as this was the most effective way to deter the unethical employer from discharging employees who file workers' compensation claims.

In *Palmateer v. International Harvester Co.*, the Illinois Supreme Court extended the tort of retaliatory discharge to cover any discharge which contravened the public policy of the state. In this case, the employee had been discharged for reporting the illegal activities of his coworker to the police. Recently, in

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78. *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357.
79. *Id.* The court stated: "We cannot ignore the fact that when faced with such a dilemma, many employees would choose to retain their jobs, and thus, in effect, would be left without a remedy either common or statutory." *Id.*
80. *Id.* See *supra* note 75 for the relevant text of the statute.
81. *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357. The court rejected the holding of the Seventh Circuit in *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977). The Seventh Circuit had held that the legislature would not have omitted a civil cause of action for retaliatory discharge from such comprehensive and integrated legislation unless it had intended to preclude such a civil action. *Id.* at 748. The *Kelsay* court stated that even though there was no explicit proscription against retaliatory discharge, the court did not think that the legislature intended that an employee choose between workers' compensation and continued employment. *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357.
82. *Kelsay*, 74 Ill. 2d at 178, 185, 384 N.E.2d at 358-59, 360. The court stated: "In the absence of other effective means of deterrence, punitive damages must be permitted to prevent the discharging of employees for filing workmen's compensation claims." *Id.* at 176, 384 N.E.2d at 359.
83. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
85. *Palmateer*, 85 Ill. 2d at 127, 421 N.E.2d at 877. The court found that underlying the Illinois Criminal Code was a public policy which favored the investigation and prosecution of criminal offenses and that the discharge violated this policy and thus gave rise to a cause of action in tort for retaliatory discharge. *Id.* at 133, 421 N.E.2d at 880.

The Illinois Appellate Court has extended the tort of retaliatory discharge to cover
Midgett v. Sackett-Chicago, Inc., the Illinois Supreme Court extended the tort of retaliatory discharge to union employees covered by a collective bargaining agreement which contains grievance procedures.

Midgett v. Sackett-Chicago, Inc.

Facts

Midgett v. Sackett-Chicago, Inc. was a consolidated appeal in which the plaintiffs, union employees, had filed a suit in tort for other violations of public policy. See Witt v. Forest Hospital, Inc., 125 Ill. App. 3d 481, 450 N.E.2d 811 (1st Dist. 1983) (Section 34 of the Guardianship And Advocacy Act, Ill Rev. Stat. ch. 91½, § 734 (1983), which protects any person who produces information under the Act, supports a cause of action for retaliatory discharge when an employee is discharged for producing information); Petrick v. Monarch Printing Corp., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1st Dist. 1982) (employee who was discharged for refusing to support criminal activities of employer has a cause of action in tort for retaliatory discharge).

In other cases, the appellate court has refused to extend the definition of retaliatory discharge. See Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d 1137 (1st Dist. 1984) (employee who alleges wrongful discharge based on age has no cause of action for retaliatory discharge and is limited to remedies under the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, ¶ 1-101 to 9-102 (1983)); Price v. Carmack Datsun, Inc., 124 Ill. App. 3d 979, 464 N.E.2d 1245 (4th Dist. 1984) (employee who alleges dismissal for submitting a claim under group health insurance plan has no cause of action for retaliatory discharge); Witkowski v. St. Anne's Hosp. of Chicago, Inc., 113 Ill. App. 3d 745, 447 N.E.2d 1016 (1st Dist. 1983) (employee who claims discharge was in retaliation for exercise of rights under disability benefit plan has no cause of action for retaliatory discharge as cause of action is preempted by ERISA.)

86. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).
87. Id. In Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 407 N.E.2d 95 (3d Dist. 1980), the Illinois Appellate Court had addressed this issue and had held that a union employee had no cause of action because the employee was covered by a just-cause provision in his union contract. Id. at 406, 407 N.E.2d at 99. ("To permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement."). Id. See also Suddreth v. Caterpillar Tractor Co., 114 Ill. App. 3d 296, 449 N.E.2d 203 (2d Dist. 1983) (worker who alleges discharge for filing a workers' compensation claim has no cause of action in tort for retaliatory discharge and must use grievance and arbitration procedures in the collective bargaining agreement); Deatrick v. Funk Seeds Int'l, 109 Ill. App. 3d 296, 441 N.E.2d 669 (4th Dist. 1982) (summary judgment granted to employer who alleged as affirmative defense that plaintiff had not exhausted his remedies under the collective bargaining agreement).

In Wyatt v. Jewel Cos., Inc., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1st Dist. 1982), A different panel of the appellate court disagreed with Cook and held that a union employee does have a cause of action in tort whether he has utilized his contract remedies or not. The court stated: "In Kelsay an employee discharged for filing a workmen's compensation claim has an action in tort . . . [w]hile the employee in Kelsay happened to be an employee at-will, the court did not limit its holding to such employees." Id. at 841, 439 N.E.2d at 1054. See also Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1st Dist. 1983) aff'd, 105 Ill. 2d 143, 454 N.E.2d 1280 (1984).
retaliatory discharge, alleging that they were discharged for filing workers' compensation claims.\textsuperscript{88} The plaintiffs were covered by collective bargaining agreements, each of which contained a just-cause discharge provision\textsuperscript{89} as well as grievance and binding arbitration procedures.\textsuperscript{90} None of the plaintiffs, however, attempted to challenge his discharge within the grievance procedures before filing his action for retaliatory discharge.\textsuperscript{91}

The trial courts dismissed the complaints for failure to state a cause of action.\textsuperscript{92} In one of the cases, the First District of the Illinois Appellate Court reversed, holding that under \textit{Kelsay}, the employee's complaint in tort for retaliatory discharge stated a cognizable claim.\textsuperscript{93} The Fourth District of the Appellate Court, however, did not allow the tort of retaliatory discharge, following precedent which had held that a union employee must exhaust all of his contractual remedies before attempting to bring his employer to court.\textsuperscript{94}

\textit{The Majority Opinion}

The majority of the Illinois Supreme Court held that the union employees could pursue an action for retaliatory discharge even though they were covered by a collective bargaining agreement.\textsuperscript{95} Following the reasoning of \textit{Kelsay}, the court stated that the tort action could be maintained by any employee discharged in contravention of a clearly mandated public policy.\textsuperscript{96} In these cases, by discharging the union employees for filing workers' compensation claims, the employers violated the public policy considerations underlying the workers' compensation statute.\textsuperscript{97} The court reasoned

\begin{itemize}
  \item \textsuperscript{88} \textit{Midgett}, 105 Ill. 2d at 146, 473 N.E.2d at 1282. The cases consolidated were Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1st Dist. 1983) and Gonzalez v. Prestress Engineering Corp., 118 Ill. App. 3d 1167, 470 N.E.2d 663 (4th Dist. 1983) (mem.).
  \item \textsuperscript{89} See supra note 32 and accompanying text.
  \item \textsuperscript{90} \textit{Midgett}, 105 Ill. 2d at 147-48, 473 N.E.2d at 1282.
  \item \textsuperscript{91} \textit{Id.} at 146-48, 473 N.E.2d at 1282.
  \item \textsuperscript{92} \textit{Id.} at 146, 473 N.E.2d at 1281.
  \item \textsuperscript{93} Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 10, 454 N.E.2d 1092, 1095 (1st Dist. 1983).
  \item \textsuperscript{94} Gonzalez v. Prestress Engineering Co., 118 Ill. App. 3d 1167, 470 N.E.2d 663 (4th Dist. 1983) (mem.). Although the case was disposed of by order, it is clear that the court was following precedent. See Deatrick v. Funk Seeds International, 109 Ill. App. 3d 998, 441 N.E.2d 669 (4th Dist. 1982) (union employee must exhaust contractual remedies before attempting to bring his employer to court).
  \item \textsuperscript{95} \textit{Midgett}, 105 Ill. 2d at 152, 473 N.E.2d at 1283-84.
  \item \textsuperscript{96} \textit{Id.} at 151-52, 473 N.E.2d at 1283-84.
  \item \textsuperscript{97} \textit{Id.} at 151, 473 N.E.2d at 1284. A discharge in retaliation for the filing of a
that if union employees were not given a cause of action in tort for retaliatory discharge, public policy would be undermined since such employees might be reluctant to file workers' compensation claims.\textsuperscript{98} Moreover, allowing union employees to bring an action for retaliatory discharge also would effectively deter employers from dismissing employees who filed such claims.\textsuperscript{99}

Under most collective bargaining agreements, an employer must offer reinstatement and give back pay to an employee who has been discharged improperly.\textsuperscript{100} The \textit{Midgett} court held that these contractual remedies did not sufficiently deter employers from discharging employees in violation of public policy while the tort action, which allows the imposition of punitive damages, would be an effective deterrent.\textsuperscript{101} Further, the court believed that it would be unfair to exempt an employer who discharges a union employee from punitive damages while at the same time assessing punitive damages in actions filed by an at-will employee.\textsuperscript{102} Alternatively, the court found no reason to allow an at-will employee to recover these punitive damages while not giving this same opportunity to union employees.\textsuperscript{103}

In response to the employer's argument that federal labor law policy, which requires the exhaustion of contractual remedies, would be violated if union employees were granted a cause of action in tort, the court held that the strong state interest in protect-
ing employees' rights was too important to disallow the action.\textsuperscript{104} The court noted several United States Supreme Court decisions which have allowed union employees covered by collective bargaining agreements to proceed directly to court with claims founded upon violations of federal statutory rights.\textsuperscript{105} The majority also stated that the tort action was independent of any rights or obligations under the collective bargaining agreement\textsuperscript{106} and would have no perceptible impact on the use of arbitration procedures.\textsuperscript{107}

\textit{The Dissenting Opinion}

The dissent argued that the majority had turned what was once a limited exception for at-will employees into a general rule applicable to all employees.\textsuperscript{108} The dissent believed that a collective barg-
gaining agreement which permits an employee to be fired only for just cause provides adequate protection from retaliatory discharge.\(^{109}\)

The dissent also argued that by allowing union employees to bring an action in tort for retaliatory discharge, the majority undermined the objectives of collective bargaining, namely, that the employee voluntarily bargained with the employer for an agreement containing grievance and arbitration procedures and the employee ought to be bound by that agreement.\(^{110}\) Moreover, the dissent noted that the United States Supreme Court had established a policy favoring the exhaustion of contractual remedies in order to promote industrial peace, a policy which would be subverted by allowing union employees to proceed directly to court.\(^{111}\)

**Analysis**

By extending the tort of retaliatory discharge to union employees, the *Midgett* court arguably invited industrial strife by allowing union employees to circumvent contractual grievance and arbitration procedures.\(^{112}\) After *Midgett*, some factual disputes over employers' motives for discharging union employees, disputes formally resolved in the workplace itself or before impartial arbitrators, will be heard by juries more likely to be sympathetic to the employee's plight.\(^{113}\) Yet the extension of the tort to union employees was both logical and necessary in order to give full effect to the state's strong public policy against retaliatory discharges.\(^{114}\) While public policy also favors arbitration of labor disputes,\(^{115}\) contractual remedies simply are not effective deterrents against retaliatory discharges.\(^{116}\) More importantly, neither the workplace nor the arbitrator's office is an appropriate forum in which to enforce the public policy of the state,\(^{117}\) especially when that policy sets up a right independent of the collective bargaining

\(^{109}\) *Midgett*, 105 Ill. 2d at 155-56, 173 N.E.2d at 1286-87 (Moran, J., dissenting).
\(^{110}\) Id.
\(^{111}\) Id.
\(^{112}\) See *supra* notes 26-40 and accompanying text.
\(^{113}\) See *supra* note 100 and accompanying text.
\(^{114}\) See *supra* notes 69-85, 96-98, 104 and accompanying text.
\(^{115}\) See *supra* notes 39-40 and accompanying text.
\(^{116}\) See *supra* notes 100-01 and accompanying text.
\(^{117}\) See *supra* notes 48-51 and accompanying text.
agreement.\textsuperscript{118}

The \textit{Midgett} court followed the reasoning of \textit{Kelsay v. Motorola, Inc.},\textsuperscript{119} the first Illinois case to allow a tort action for retaliatory discharge.\textsuperscript{120} In \textit{Kelsay}, the Illinois Supreme Court approved the tort in part because the employee at-will was perceived as a victim subject to discharge for engaging in activities which were favored as a matter of public policy.\textsuperscript{121} In contrast, the union employee, with his collective bargaining agreement in hand, generally is able to protect himself because the agreement states that an employee can be fired only upon a showing of just cause.\textsuperscript{122} Moreover, if the employee is discharged without proper cause, he may contest the discharge through contractual grievance procedures that culminate in arbitration binding on all parties.\textsuperscript{123} It is doubtful that a discharge which violated public policy, such as one for filing a workers’ compensation claim, would be held to be with proper cause.\textsuperscript{124} Consequently, the union employee at first glance does not appear to need the tort of retaliatory discharge since the collective bargaining agreement protects him when he engages in activities favored by public policy.

In granting the union employee a cause of action in tort for retaliatory discharge, the \textit{Midgett} decision also seems to conflict with federal labor law policy, which favors the use of arbitration to settle labor disputes.\textsuperscript{125} Arbitration gives the union and the employer

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} See supra note 106 and accompanying text.
\item \textsuperscript{119} 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
\item \textsuperscript{120} See supra notes 69-82 and accompanying text.
\item \textsuperscript{121} \textit{Kelsay}, 74 Ill. 2d at 182, 384 N.E.2d at 357.
\item \textsuperscript{122} See Blades, supra note 2, at 1404-05; see also Summers, supra note 2, at 482-84.
\item \textsuperscript{123} See supra notes 34-38 and accompanying text.
\item \textsuperscript{124} The Illinois Appellate Court has stated that a collective bargaining agreement need not enumerate retaliatory discharge as a grievance for it to be arbitrated under a just-cause provision. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 405-06, 407 N.E.2d 95, 98 (3d Dist. 1980). Arbitrators are free to determine whether any kind of termination meets the just-cause requirements of the agreement. \textit{Id.} The Supreme Court has stated: “Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form. . . .” Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580. The collective bargaining agreement is intended to cover all of the employment relationship. \textit{Id.} at 579.
\item \textsuperscript{125} See supra notes 39-40 and accompanying text. The court refused to consider another aspect of federal labor law, namely, preemption of state causes of action by the NLRA or by section 301 of the Labor Management Relations Act, 29 U.S.C. § 301 (1982). Midgett, 105 Ill. 2d at 153, 473 N.E.2d at 1386. The preemption issues resulting from extension of the retaliatory discharge action to union employees are beyond the scope of this note. For the Supreme Court’s latest pronouncements on the subject of Federal labor-law preemption, see Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985); Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985).
\end{enumerate}
\end{footnotesize}
the opportunity to develop a uniform and exclusive method for settling disputes in the workplace and for avoiding industrial strife.\textsuperscript{126} The use of grievance and arbitration procedures allows the parties to resolve the dispute in a manner which is inexpensive and expeditious for the employer and the employee, thereby saving the expense and time involved in a civil action.\textsuperscript{127} Since the employee now can circumvent the collective bargaining agreement and take his employer directly to court, retaliatory discharge actions may disrupt the orderly administration of disputes which arbitration promotes and thereby undermine federal labor law policy.\textsuperscript{128}

In addition, the \textit{Midgett} decision will make it more difficult for the employer to prevail in disputes over the actual reason for the discharge of an employee. Before \textit{Midgett}, an arbitrator familiar with such disputes determined if the discharge was just.\textsuperscript{129} Under \textit{Midgett}, such determinations often will be made by jurors less knowledgeable than arbitrators and perhaps more sympathetic towards the employee.\textsuperscript{130} The increased possibility of civil liability, including punitive damages,\textsuperscript{131} may make employers leery of discharging employees even when the discharge would be just.\textsuperscript{132} Yet, the strong public policy considerations underlying the workers' compensation statute\textsuperscript{133} fully justified extension of the tort of retaliatory discharge to union employees. Moreover, the extension was necessary in order to provide the union employee with the opportunity to obtain punitive damages as part of his "complete remedy" for the retaliatory discharge.\textsuperscript{134} Further, the tort was extended so that no employer who discharged an employee in violation of public policy would be immune from punishment merely because that employee was covered by a collective bargaining agreement.\textsuperscript{135}

The tort of retaliatory discharge exists not only to protect the

\textsuperscript{126} See \textit{supra} note 40 and accompanying text.
\textsuperscript{127} See Alexander \textit{v. Gardner-Denver Co.}, 415 U.S. 36, 55 (1974); see also Barrentine \textit{v. Arkansas-Best Freight System, Inc.}, 430 U.S. 728 (1981) (Burger, C.J., dissenting) "By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony and avoids strikes and conflicts; it provides a swift, fair, and inexpensive remedy.").
\textsuperscript{128} See \textit{supra} note 40 and accompanying text.
\textsuperscript{129} See \textit{Elkouri \& Elkouri, supra} note 36, at 53-56.
\textsuperscript{130} Blades, \textit{supra} note 2, at 1428. See also Palmateer \textit{v. International Harvester Co.}, 85 Ill. 2d 124, 142-45, 421 N.E.2d 876, 884-86 (Ryan, J., dissenting).
\textsuperscript{131} See \textit{supra} note 61 and accompanying text.
\textsuperscript{132} Blades, \textit{supra} note 2, at 1428.
\textsuperscript{133} See \textit{supra} notes 96-99 and accompanying text.
\textsuperscript{134} See \textit{supra} note 103 and accompanying text.
\textsuperscript{135} See \textit{supra} note 102 and accompanying text.
employee, but also to punish the employer and to deter the employer from making retaliatory discharges in the future.\textsuperscript{136} For these reasons, the Illinois Supreme Court gave employees the opportunity to collect punitive damages.\textsuperscript{137} In arbitration proceedings, however, punitive damages normally are not awarded; instead, the employee may be reinstated with back pay.\textsuperscript{138} Hence, without some remedy independent of the collective bargaining agreement, the union employee would be denied the opportunity to recover punitive damages, an opportunity which is given to all other employees,\textsuperscript{139} and the employer might be less fearful of discharging his employees in violation of public policy.

Besides providing an incomplete remedy, the grievance and arbitration process is an inappropriate forum in which to enforce the public policy which underlies the tort of retaliatory discharge. Arbitrators are no more qualified to implement the public policy of Illinois than they were to enforce the federal statutory right at issue in \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{140} Arbitrators are bound by the terms of the collective bargaining agreement.\textsuperscript{141} Thus, if public policy is in conflict with the agreement, the arbitrator is bound to uphold the agreement and the public policy of the state may go unenforced. Further, even when no conflict exists, the informal arbitration process may not afford full protection of rights derived from the state's public policy.\textsuperscript{142} A judicial proceeding is

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  \item \textsuperscript{136} See supra note 82 and accompanying text.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} See supra note 100 and accompanying text.
  \item \textsuperscript{139} Midgett, 105 Ill. 2d at 150, 473 N.E.2d at 1284. The court went on to state: "If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against a violation of an important public policy of this State." \textit{Id.}
  \item \textsuperscript{140} 415 U.S. 36 (1974). See supra notes 43-51 and accompanying text. Several commentators have suggested that the reasoning of \textit{Alexander} is applicable to the tort of retaliatory discharge and its interference with federal labor-law policy. See Comment, \textit{State Action for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption}, 71 CALIF. L. REV. 942, 967-68 (1983); Comment, \textit{NLRA Preemption of State Wrongful Discharge Claims}, 34 HASTINGS L.J. 635, 657-59 (1983); Note, \textit{Common Law Action, supra} note 2, at 1462-63. See also Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (10th Cir. 1984) (state interests can override federal labor law policy requiring exhaustion of contractual remedies); Vaughn v. Pacific Northwest Bell Telephone Co., 289 Or. 73, 611 P.2d 281 (1980) (state may interfere with collective bargaining agreement when interference occurs to protect a substantial state interest); \textit{but see} Payne v. Pennzoil Corp., 138 Ariz. 52, 672 P.2d 1322 (1983) (exception to exhaustion requirement only when federal statute provides remedy); Embry v. Pacific Stationery, 62 Or. App. 183, 659 P.2d 436 (1983)(union employee barred from suit unless there is an independent statute to support it).
  \item \textsuperscript{141} See supra note 51.
  \item \textsuperscript{142} See \textit{Alexander}, 415 U.S. at 59.
\end{itemize}
often necessary to guarantee that the public policy is fully effectuated.

Moreover, some employee grievances may not even reach the arbitration stage.\textsuperscript{143} If the union refuses in good faith to process a grievance, the union employee will be left without a remedy against his employer.\textsuperscript{144} In \textit{Alexander}, the Court's concern for the "remediless employee" provided an additional ground for giving union employees access to the courts.\textsuperscript{145} In \textit{Midgett}, if the Illinois Supreme Court had not granted the union employee a separate cause of action and if the union in good faith had refused to proceed with his grievance, the employee would have been left without a remedy and more importantly, public policy would have gone unenforced.

Finally, the tort of retaliatory discharge should be viewed as a right independent of the collective bargaining agreement, similar to the Title VII claim which the \textit{Alexander} Court found to be independent of the union employee's contractual rights.\textsuperscript{146} The tort of retaliatory discharge originates in the public policy of the state that seeks to protect employees who suffer work-related injuries.\textsuperscript{147}

\textsuperscript{143} See \textit{Alexander}, 415 U.S. at 59 n. 19. According to one commentator, the very nature of arbitration can impede the individual's efforts to have his rights protected. Moses, \textit{Deferral to Arbitration in Individual Rights Cases: A Reexamination of Spielberg}, 51 TENN. L. REV. 187, 229 (1984). In arbitration proceedings, the employer and the union are the only parties to the proceedings since they are the parties to the contract. \textit{Id.} at 229. The individual is represented by the union and therefore at the mercy of the union. \textit{Id.} The cost of arbitration is high and consequently, the union may refuse to arbitrate the claim. \textit{Id.} Further, if the employee is an unpopular union member, his grievance may be affected by reasons totally unrelated to the merits of his grievance. \textit{Id.} Although he may complain to the National Labor Relations Board that his union has breached its duty of fair representation, such cases are difficult to prove. \textit{Id.}

\textsuperscript{144} See \textit{Vaca v. Sipes}, 386 U.S. 171 (1967) (unless employee can show breach of good faith, he is not entitled to cause of action in federal court based on collective bargaining agreement); Humphrey v. Moore, 375 U.S. 335 (1964) (failure to show bad faith at arbitration hearing precludes union employees from bringing civil suit to determine seniority rights under collective bargaining agreement). See also \textit{supra} note 39; Moses, \textit{supra} note 143, at 227.

\textsuperscript{145} \textit{Alexander}, 415 U.S. at 60 n. 21.

\textsuperscript{146} \textit{Id.} at 52 ("[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee.")

\textsuperscript{147} \textit{Midgett}, 105 Ill. 2d at 144, 473 N.E.2d at 1283. As one judge has stated:

Exhaustion of the remedies provided in a collective bargaining agreement is a logical and sensible prerequisite to the maintenance of a cause of action when that cause is based upon a violation of the terms of the agreement itself. . . .

The plaintiff's cause of action [however] sounds not in contract, but in tort. It is based not upon violation of the terms of the collective bargaining agreement, but upon a violation of the public policy of the State of Illinois.
The tort was created in order to provide employees with a complete remedy and to deter employers from violating public policy. A retaliatory discharge action does not replace or limit the just-cause provisions of a collective bargaining agreement. It merely grants the employee an additional remedy if his discharge violates public policy.

**IMPACT**

Allowing a union employee a cause of action in tort for retaliatory discharge may interfere with dispute-resolution procedures established in collective bargaining agreements. Nevertheless, Illinois has interests to protect and allowance of the cause of action will not interfere greatly with the grievance-arbitration process. As it stands now, union employees only will have a cause of action for retaliatory discharge when the discharge contravenes public policy. Thus far, the Illinois Supreme Court has limited the tort action to discharges for the filing of workers' compensation claims and for the reporting of illegal activities. All other disputes arising under the collective bargaining agreement still are subject to grievance and arbitration procedures.

It is also possible that allowance of the tort action for retaliatory discharge will undermine the status of the union. One of the major benefits of union representation is the protection from unjust discharges afforded by grievance and arbitration procedures.

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148. See supra notes 96-99 and accompanying text.

A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in tort distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state interest in protecting the general public — an interest which transcends the employment relationship.

150. See supra notes 96-99 and accompanying text.
151. See supra note 85 and accompanying text.
152. The grievance procedure is a swift and inexpensive method for an employee to resolve his grievance. See supra note 127 and accompanying text. Additionally, the cause of action will not undermine the employer's incentive to arbitrate grievances and therefore "sound the death knell for arbitration clauses in labor contracts" since the...
Under the *Midgett* decision, the employee may abandon the union and the grievance procedures gained for him and obtain his own remedy, including punitive damages, in a civil court. The union contract, however, still offers significant benefits to employees discharged on grounds unrelated to the state's public policy. Moreover, the union offers the employee the opportunity to obtain better wages and working conditions through collective bargaining. Thus, it is unlikely that extension of the tort of retaliatory discharge to union employees will do much damage to the status of the union.

One issue sure to arise after *Midgett* will be what weight courts should give arbitrators' decisions in cases where the employee has exhausted contractual remedies before filing a civil action for retaliatory discharge. The United States Supreme Court in *Alexander* has suggested that lower courts must look to the particular facts and circumstances of each case. In determining the weight to be given the arbitrator’s decision, a court should consider factual similarities between the tort action claim and the grievance, the fairness and adequacy of the arbitration process, and the competency of the arbitrator. In the final determination, however, the court must be certain that public policy is being enforced, regardless of the consideration the arbitrator may have given to the employee's claim.

**CONCLUSION**

The employment at-will rule has undergone substantial change in recent years. Courts and legislatures have altered the rule in order to soften the rule's effects on the employee. Congress passed the National Labor Relations Act, which fostered the growth of collective bargaining and the arbitration of employee grievances,

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153. *See supra* notes 100-07 and accompanying text.
154. *See Elkouri & Elkouri, supra* note 32, at 630.
155. *Gorman, supra* note 6, at 496-525.
156. *Alexander, 415 U.S.* at 60 n. 21.
157. *Id.* One commentator in discussing the weight the federal court should give an arbitration decision which has its basis in Title VII, argued that no weight should be given the prior decision since this would be the most effective method to fully protect Title VII rights. *See Richards, Alexander v. Gardner-Denver Co.: A Threat to Title VII Rights, 29 Ark. L. Rev. 129, 184 (1975).* The Illinois Supreme Court could also take this approach and refuse to grant the arbitration decision any weight.
including unjust discharges. Courts also have lessened the rule's impact through creation of the tort of retaliatory discharge.

The Illinois Supreme Court recognized this tort action to spare at-will employees the choice between keeping their jobs and upholding public policy. In Midgett, the tort was extended to union employees, thus raising questions about the federal labor law policy which requires the exhaustion of contractual remedies.

The state interest in enforcing public policy, however, outweighs the interests of federal labor law policy. Grievance and arbitration proceedings are simply inappropriate forums in which to protect and promote the public policy of the state. Moreover, the expansion of the tort will do little, if any, damage to the effectiveness of grievance and arbitration procedures. The tort action for retaliatory discharge must be viewed as a right independent of rights arising from the collective bargaining agreement. The expansion of the tort of retaliatory discharge was necessary in order to effectuate fully the public policies of Illinois.

JOHN R. SPITZIG