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At-Will Employment in Pennsylvania after Banas and Darlington: New Concerns for a Legislative Solution

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AT-WILL EMPLOYMENT IN PENNSYLVANIA AFTER BANAS AND DARLINGTON: NEW CONCERNS FOR A LEGISLATIVE SOLUTION

Kurt H. Decker†

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I. INTRODUCTION

Employee and employer conflict is at the core of our economic and social structure. Consequently, employment law may be among the most political of legal areas. Legislation and court decisions have historically reflected the shifting balance of eco-

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nomic forces between employee and employer.¹ Today, these forces are shaping the substantive area of at-will employment.²

The at-will employment relationship allows termination of employment by either an employee or employer at any time for no reason.³ Wide-spread criticism has arisen over this employment concept.⁴ Today, courts and legislatures are creating ex-

1. For a discussion of the history of the labor movement within the United States, see generally C. Morris, The Developing LABOR LAW 1-66 (2d ed. 1983).


3. See, e.g., Geary v. United States Steel Corp., 456 Pa. 171, 175, 319 A.2d 174, 176 (1974) ("Absent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason."); Darlington v. General Electric, 350 Pa. Super. 183, 189, 504 A.2d 306, 309 (1986) ("[A]n employment contract of indefinite duration was deemed to be terminable at will for any cause or no cause, regardless of the 'morality' of the situation."); Banas v. Matthews Int'l Corp., 348 Pa. Super. 464, 479, 502 A.2d 657, 644 (1985) (quoting Geary, 456 Pa. at 175, 319 A.2d at 176); see also Note, The Employment Handbook as a Contractual Limitation on the Employment at Will Doctrine, 31 VILL. L. REV. 335, 335 (1986) ("The employment at will doctrine . . . holds that under a general agreement of employment for an indefinite length of time, the hiring of an employee is at will and the employer is free to terminate an employee at any time for any reason.") (citing Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884), overruled on other grounds sub nom., Hutton v. Watters, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915)).

The Second Restatement of Agency refers to at-will employment as follows: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

4. For a discussion of criticisms and judicial erosion of the at-will employment doctrine, see C. Bakaly, Jr. & J. Grossman, Modern LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH 115 (1983) ("Perhaps no other issue in the law of employment contracts has generated as much recent controversy and commentary as the judicial erosion of the employment at-will rule."); J. Kauff & M. McClain, UNJUST DISMISSAL UP-DATE 1985—HOW TO EVALUATE, LITIGATE, SETTLE, AND AVOID CLAIMS (1985); Blades, Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1416 (1967) ("[T]he philosophy [of at-will employment] is incompatible with these days of large, impersonal, corporate employers; it does not comport with the need to preserve individual freedom in today's job-oriented, industrial society."); Decker, At-Will Employment in Pennsylvania—A Proposal for its Abolition and Statutory Regulation, 87 DICK. L. REV. 477, 482 (1983) [hereinafter Decker, At-Will Employment in Pennsylvania] ("Perhaps the most significant recent development affecting employment relations has been the modification of at-will employment in a number of jurisdictions."); Decker, At-Will Employment: A Proposal for its Statutory Regulation, 1 HOFSTRA LAB. L.F. 187,
ceptions to this *laissez faire* employment relationship, particularly in cases wherein employees are terminated in a manner inconsistent with public policy. 

Pennsylvania courts have not remained

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untouched in their consideration of the at-will employment relationship.  


6. See, e.g., Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). In Geary, the Pennsylvania Supreme Court considered the "novel" issue of whether an at-will employee could assert a cause of action for "wrongful discharge." Id. at 174, 319 A.2d at 175. The court recited that the general rule in Pennsylvania was that "[a]bsent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason." Id. at 175, 319 A.2d at 176 (citations omitted). The court went on to state in dicta, however, that

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employee's power of discharge might give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

Id. at 184, 319 A.2d at 180 (dicta) (emphasis added).

The Geary court nevertheless decided the case before it on the basis that the plaintiff-employee (Geary) had "made a nuisance of himself" by protesting the sale of allegedly unsafe steel tubing products to various levels of management. Id. at 180, 319 A.2d at 178. Thus, the court concluded that Geary was terminated for a legitimate reason, that "no clear mandate of public policy [was] violated thereby;" and thus, as an at-will employee, Geary had no cause of action for "wrongful discharge." Id. at 185, 319 A.2d at 180.

In the twelve years following Geary, however, the Pennsylvania courts have seized on Geary's dicta to create a common-law public policy exception to the
Recently, in *Banas v. Matthews International (Banas II)*, the Pennsylvania Superior Court considered whether handbooks and employment policies are binding employer commitments in Pennsylvania. The superior court spent nearly three years in its attempt to conclusively resolve this issue for Pennsylvania employees and employers, including en banc reargument following the general rule of termination at-will. See, e.g., *Banas v. Matthews Int'l*, 348 Pa. Super. 464, 481-83, 502 A.2d 637, 646 (1985). In *Banas*, the Superior Court of Pennsylvania stated that, in the absence of contractual modification, the employment at-will rule is presumed to apply. *Id.* at 479, 502 A.2d at 644. Thus, the plaintiff-employee has the burden of proving that the public policy exception is applicable. *Id.* at 483, 502 A.2d at 646. In *Banas*, however, the employee neither pleaded nor proved facts to overcome the at-will presumption, and thus the court upheld his termination. *Id.* at 483, 502 A.2d at 647.


the original superior court panel’s decision, *Banas v. Mathews International (Banas I).* The superior court’s subsequent decision, however, has not provided final direction. Pennsylvania employees and employers may be in no better position since the superior court’s recent decision in *Banas II* than they were when the original conflict arose between the *Banas I* panel and the panel in *Richardson v. Charles Cole Memorial Hospital.* Within a month after the *Banas II* decision, the superior court, in *Darlington v. General Electric,* suggested that further modification of the at-will employment doctrine by the judiciary be curtailed in the absence of legislative action. Against this background and within the framework of an ultimate legislative solution, this Article will discuss the superior court’s decisions in *Banas II* and *Darlington.*

II. *Banas v. Matthews:* Handbooks and Employment Policies in Pennsylvania

A. The Role of Employment Handbooks and Policies Generally

Employers use handbooks and employment policies to communicate with their employees on a variety of subjects, including work rules, discipline policies, wages and fringe benefits. Specifically, these communication devices often outline: 1) rules of expected employee behavior; 2) disciplinary or termination pro-

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11. 350 Pa. Super. at 191-92, 504 A.2d at 310 (“[W]e believe that if terminable-at-will contracts are to be forbidden, the judicial process may be an inappropriate forum for such sweeping policy change.”).

12. *See H. Perritt,* supra note 5, § 8.5, at 309. Professor Perritt categorizes typical provisions as “those circumscribing employee authority or activities and those governing the granting of benefits to employees.” *Id.*
cedures; 3) hours and wages; 4) layoff and recall policy and 5) benefits such as health care insurance, pensions, leaves of absence, holidays and vacations. Frequently, the handbook is the sole place in which the employer sets forth these statements. They are commonly intended to create a closer relationship between an employer and its employees by establishing and maintaining a communication network. For this reason, no two employer's handbooks and employment policies are exactly alike. The variety in practice reflects the employer's particular operational and management styles.

Handbooks and employment policies gained importance as employers became larger, requiring a system of rules for orderly and efficient employer functioning. Small employers can usually operate with few or no formal rules, because activities can be individually directed. For larger employers, however, individualized decision making becomes impractical. Increased size multiplies the number of employment decisions to be made beyond the ability of one person to make them.

B. The Development of Pennsylvania Courts' Treatment of Employment Handbooks and Policies

Handbooks and employment policies have become increasingly involved in challenges to the at-will employment relationship. Courts have, under certain circumstances, considered

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13. See C. Bakaly & J. Grossman, supra note 4, at 169. Grievance procedure mechanisms serve to reduce the incidence of costly and embarrassing litigation as well as to improve employee morale. Id. Such internal dispute resolution systems have been developed by employers in response to the erosion of the at-will employment doctrine. See id. Thus, many employers currently provide, to at-will employees, dispute resolution systems which range from very informal to as highly-structured as ones typically found in collective bargaining agreements. Id. As applied to at-will employees, these systems are often referred to as "open door" policy, "formal appeal" to management and "arbitration." See id.

14. See H. Perritt, supra note 5, § 8.2, at 304. For a discussion of the historical development of employee personnel policies, see id. § 8.2, at 304-06.

15. Id. § 8.3, at 306.

16. Id. § 8.3, at 306-07 ("When organizations get larger, . . . the feasibility of discretionary decision making diminishes if the organization's activities are to be coordinated.").

17. See C. Bakaly & J. Grossman, supra note 4, at 41. The issue which gave rise to the recent controversy is whether the manuals bind employers. Bakaly and Grossman state:

For many years, the law was clear that a manual was merely a unilateral statement of position by the employer. Its provisions were guidelines only, and could be followed or not at the employer's discretion. In re-
these employer communications as binding commitments.\textsuperscript{18}

\textit{Id.}


Damage award against employers in these cases can be substantial. See, e.g., Washington Welfare Ass’n v. Poindexter, 479 A.2d 313 (D.C. 1984).

Pennsylvania courts, until recently, rejected any binding commitments arising from handbooks and employment policies. The first indication that Pennsylvania courts might consider handbooks and employment policies as binding commitments appeared in Novosel v. Nationwide Insurance Co. Disregarding precedent which attached no binding effect to handbooks and employment policies, the court held that a jury could find that an employer's policies and procedures are binding. In Novosel, the Third Circuit noted that its role required it to predict the way in which the Pennsylvania Supreme Court would decide this issue. The federal court's decision in Novosel, however, was not followed by the Pennsylvania Superior Court's panel in Richardson. In Richardson, a director of nursing contended that a handbook


19. See, e.g., Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013, 1015-16 (E.D. Pa. 1978), aff'd mem., 609 F.2d 500 (3d Cir. 1979) ("There is nothing in the law of Pennsylvania suggesting that failure to adhere to certain stated guidelines constitutes ... [a] violation of public policy ... Therefore, we conclude that failure to adhere to company personnel policy does not create a cause of action for breach of an employment contract.").

Beidler brought a wrongful termination suit against his former employer, based in part on the employer's failure to comply with the termination procedures set out in the personnel policy. 461 F. Supp. at 1015. The district court, relying on out-of-state precedent, rejected Beidler's contention that his employer's failure to adhere to the policy constituted a breach of implied contract. Id. at 1016. For recent commentary discussing Beidler's effect on the development of Pennsylvania's common-law jurisprudence with regard to enforceability of terms in employment manuals, see Flaxman, supra, note 4.

20. 721 F.2d 894 (3d Cir. 1983). In his wrongful termination suit, Novosel alleged that his dismissal resulted from his refusal to lobby for his employer, and from his opposition to his employer's political viewpoint. Id. at 896. The Third Circuit held that Novosel stated a wrongful discharge claim under the public policy exception to at-will employment. Id. at 900 (citing Geary v. United States Steel Corp., 456 Pa. 171, 184-85, 319 A.2d 174, 180 (1974)). However, the court remanded the case for a factual determination of whether Novosel stated a cause of action for wrongful discharge or breach of contract based on Nationwide's practice or policy. Id. at 902-03. On remand, the district court denied Nationwide's motion for summary judgment regarding Novosel's wrongful discharge and breach of contract claims. See Novosel v. Nationwide Ins. Co., 118 L.R.R.M. (BNA) 2779 (W.D. Pa. 1985).

21. Novosel, 721 F.2d at 902-03. The Third Circuit vacated the district court's order that granted Nationwide's motion to dismiss both the tort and contract claims. Id. at 895-96. The court stated that "Novosel's allegation that Nationwide's custom, practice or policy created either a contractual just cause requirement or contractual procedures by which defendant failed to abide is a factual matter that should survive a motion to dismiss." Id. at 902-03.

22. See id. at 897.

issued by the hospital constituted part of her employment contract, and that it provided for a definite tenure of employment.\(^2\) In rejecting Richardson’s position, the superior court panel stated:

In *Beidler v. W.R. Grace, Inc.*, ... the federal district court held that under Pennsylvania law, failure to adhere to a company personnel policy does not create a cause of action for breach of an employment contract. We agree with that holding.

Appellant’s unilateral act of publishing its policies did not amount to the ‘meeting of the minds’ required for a contract. The terms of the handbook were not bargained for by the parties and any benefits conferred by it were mere gratuities. ... In fact, the handbook was unilaterally revised by appellant twice during appellee’s employment.

The record in this case clearly indicates that appellee’s employment was terminable at will by either party. Therefore, appellant is not liable for breach of contract as a result of appellee’s discharge.\(^2\)

After *Richardson*, it appeared certain that employees could not successfully assert that handbooks and employment policies were binding commitments in Pennsylvania.\(^2\) However, approximately nine months after *Richardson*, another superior court panel, in *Banas I*, decided that an employee handbook was a binding commitment for some purposes, but not for others.\(^2\)

Banas was an at-will employee who was terminated for using his employer’s materials to make a grave marker for his nephew’s grave.\(^2\) He claimed that this work did not violate the employee handbook, which authorized the use of employer equipment and

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\(^2\) *Id.* at 108, 466 A.2d at 1085. Richardson based her claim on a provision in the handbook which stated “that it was the policy of the hospital ‘to provide continual employment to all employees whose work proves satisfactory.’” *Id.*

\(^2\) *Id.* at 108-09, 466 A.2d at 1085 (citations omitted).

\(^2\) *See id.* at 108, 466 A.2d at 1085 (“We hold that ... that [the lower] court erred in concluding that the policies set forth in the employee handbook constituted part of appellee’s contract of employment.”).

\(^2\) *See Banas I, 116 L.R.R.M. (BNA) 3110, 3114 (Pa. Super. 1984)* (“We ... hold that a manual published or authorized by an employer and distributed to an employee-at-will becomes part of the parties’ employment contract except as to the term (length) of employment.”). The *Banas I* panel consisted of Judges Brosky, McEwen and Beck.

\(^2\) *Id.* at 3111. Banas’ employer was a manufacturer of bronze signs, plates and grave markers. *Id.*
waste material, with permission, for personal work.\textsuperscript{29}

The \textit{Banas I} panel did not overrule \textit{Richardson}, but indicated instead that the cases upon which it relied were of "doubtful" precedential value.\textsuperscript{30} In \textit{Banas I}, the superior court distinguished \textit{Richardson}, stating that:

While it is clear, and \textit{Richardson} holds, that a manual cannot create a contract giving an at-will employee a definite term (length) of employment, it is equally clear that the content of a manual is not meaningless. We are unwilling to conclude that 'an employee handbook on personnel policies and procedures is a corporate illusion, full of sound . . . signifying nothing.'\textsuperscript{31}

The panel concluded that the handbook was part of the employer's unilateral employment offer, for which the employee supplies both acceptance and consideration by performing the job.\textsuperscript{32} However, the \textit{Banas I} panel recognized the employer's continuing right to "augment, modify, and even withdraw" the handbook, stating that a new offer of employment becomes effective on the date the new handbook is distributed.\textsuperscript{33} This panel's decision, however, was reargued before the superior court sitting en banc,\textsuperscript{34} presumably to resolve the conflict between \textit{Banas I} and \textit{Richardson}.

On December 20, 1985, the Pennsylvania Superior Court issued its \textit{Banas II} decision, reversing that part of \textit{Banas I} which had awarded Banas damage for breach of contract.\textsuperscript{35} Purporting to

\textsuperscript{29.} \textit{Id.} at 3112. The court characterized the issue before it as whether "the manual create[d] an enforceable contract right in Banas that he could make a grave marker, with permission, and not be fired." \textit{Id.} at 3114. The employer argued that the supervisor did not know Banas' intended use when he granted permission. \textit{Id.} at 3111.

\textsuperscript{30.} \textit{Id.} at 3113 n.4. The court noted two Third Circuit decisions which held that an employment policy could contractually bind an employer, and thus impliedly overruled Pennsylvania case law stating otherwise. \textit{Id.} (citing Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221 (3d Cir. 1984); Novosel, 721 F.2d 894 (3d Cir. 1983)).

\textsuperscript{31.} 116 L.R.R.M. at 3113 (citation omitted).

\textsuperscript{32.} \textit{Id.} at 3114. Under this contractual analysis, the \textit{Banas I} court held that "[e]mployers bind themselves by the manual to that class of employees rightfully entitled to receive the manual." \textit{Id.}

\textsuperscript{33.} \textit{Id.} The court noted that the new offer is limited to the provisions of the new manual, and where the employer withdraws the manual, a new offer begins upon notification of withdrawal to the employee. \textit{Id.} By continuing employment, the employee accepts the new offer and provides consideration to support the contract. \textit{Id.}

\textsuperscript{34.} \textit{See Banas II}, 348 Pa. Super. at 464, 466, 502 A.2d at 637, 638.

\textsuperscript{35.} \textit{Id.} at 467, 502 A.2d at 638. The court affirmed the judgment awarding
conclusively resolve the conflict created by Richardson\textsuperscript{36} and Banas I,\textsuperscript{37} the Banas II majority held that the handbook provision relied upon by Banas did not bind his employer to terminate only for "good cause" because "the handbook did not contain, expressly or by clear implication, any just cause provision [and the employee Banas] has shown nothing to take his case out of the settled employee-at-will rule."\textsuperscript{38} The court concluded that the issue of whether a handbook provision can bind an employer "is a decision that must await a case in which the action is brought for breach of a just cause provision."\textsuperscript{39} However, three members of the nine-judge panel dissented, in part,\textsuperscript{40} arguing that handbook provisions are binding as part of an employer's unilateral offer of employment.\textsuperscript{41}

Banas damages on a defamation claim, which he based on remarks of the employer's officers. \textit{Id.}

\textsuperscript{36} For a discussion of Richardson, see supra notes 23-26 and accompanying text.

\textsuperscript{37} For a discussion of Banas I and its effects on the holding in Richardson, see supra notes 27-34 and accompanying text.

\textsuperscript{38} Banas II, 348 Pa. Super. at 485, 502 A.2d at 648. The court stated that the question of whether Banas' supervisor gave him permission to use the company's materials was irrelevant, because the "handbook nowhere provided that an employee would be dismissed only if the facts warranted it." \textit{Id.} at 484, 502 A.2d at 647 (emphasis added). The court stated, however, that "[i]f the handbook had contained, if not expressly at least by clear implication, a just cause provision, then [a] . . . claim might have [had] merit." \textit{Id.} at 484-85, 502 A.2d at 647.

\textsuperscript{39} \textit{Id.} at 485, 502 A.2d at 648. The superior court noted other courts which have created an exception to the employment-at-will rule, where an employment handbook contains a provision committing the employer to dismiss an employee for just cause only. \textit{Id.} at 483, 502 A.2d at 647 (citing Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Fine River State Bank v. Mettulle, 333 N.W.2d 622 (Minn. 1983); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 568, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982)). However, the Banas II court expressly refused to decide whether it agreed with these decisions, stating that "it would be mere \textit{dictum}, for nowhere in the employee handbook issued by appellant is there a provision that commits appellant to dismiss an employee for just cause only." \textit{Id.} at 484, 502 A.2d at 697. The court projected that "[i]n another case we may, or may not, decide to permit recovery for breach of a commitment made by the employer in an employee handbook, but this case does not present that issue." \textit{Id.}

\textsuperscript{40} \textit{Id.} at 486-87, 502 A.2d at 648-49 (Rowley, Beck and Johnson, JJ., concurring in part and dissenting in part).

\textsuperscript{41} \textit{Id.} at 504, 502 A.2d 658 (Beck, J., concurring in part and dissenting in part, joined by Rowley and Johnson, JJ.) Judge Beck stated:

\[ 
\text{[T]he provisions of a handbook distributed to employees can constitute an offer of a unilateral contract which an employee may accept by remaining on the job, and that once accepted, the provisions of the handbook are binding on both parties as conditions of employment until modified by a subsequent offer and acceptance of new conditions.} 
\]

\textit{Id.} (Beck, J., concurring in part and dissenting in part, joined by Rowley and Johnson, J.) While the Banas II decision was pending after en banc reargument, courts in
III. After Banas II: Implications of a Just Cause Requirement

Prior to the Banas cases, the 1974 Pennsylvania Supreme Court decision in Geary v. United States Steel Corp. held that there was no common-law cause of action for "unjust" or "wrongful" termination in Pennsylvania. The court acknowledged, however, that a public policy exception to the at-will employment doctrine may exist, stating: "[T]he employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened." The Pennsylvania cases following Geary relied on this language to develop "as a matter of common law a public policy exception to the [at-will] rule." The Pennsylvania Superior Court recognized the existence of this exception in Banas II and suggested, in dicta, that this exception may be available to an employee who was asserting that his or her employer was bound by a handbook or employment policy which expressly or by clear implication guaranteed just-cause dismissal. The plaintiff-employee in Banas, however "neither pleaded nor proved that his case [fell] within . . . [this] public policy exception." Thus, the Banas II court refrained from deciding whether the Geary public policy ex-
ception applied in implied-in-fact contract cases such as Banas. 48

In light of Banas II, Pennsylvania employees and employers presently have no clear standard against which to determine when and if handbooks and employment policies are binding commitments by the employers. The Banas II majority suggested that this issue must continue to be litigated on a case-by-case basis to determine whether handbook provisions or employment policies express a sufficiently clear "just-cause" guarantee to merit application of the public policy exception to the at-will rule. 49

The Banas II majority, however, offered little, if any, guidance as to what constitutes an "express just cause" or "just cause by clear implication" commitment by an employer. 50 For example, it is unclear whether "express just cause" or "just cause by clear implication" exists where, for example, the employer promulgates: 1) disciplinary rules outlining expected conduct; 2) internal grievance procedures or 3) words stating discipline or termination will only be for good reason, good cause, reasonable cause or in the best interest of the employer. Similarly, it is unclear whether an employer's conduct in disciplining and terminating employees creates a binding commitment where no express just-cause provision exists. Is this just cause by clear implication? 51

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**Id.** at 499, 502 A.2d at 655 (Beck, J., concurring in part and dissenting in part).

48. Id. at 481-83, 502 A.2d at 646-47.

49. Id. at 484-85, 502 A.2d at 647-48.

50. See id. at 481-86, 502 A.2d at 646-47.

51. For evidence that confusion exists in post-Banas II cases in which courts continue to grapple with accommodation of the at-will rule and just cause termination policy, see Martin v. Capital Cities Media, 354 Pa. Super. 199, 511 A.2d 830 (1986). In Martin, the court reasoned that the binding effect of an employment handbook arises from "evidence of the employer's intention to be legally bound and to convert an at-will employee into an employee who cannot be fired without objective just cause." Id. at 221-22, 511 A.2d at 841. The handbook in Martin specifically stated that the list of actions which would lead to disciplinary action was illustrative and "shall not be deemed to exclude any other just causes." Id. at 219, 511 A.2d at 840 (emphasis in original). The Martin court then applied a just cause analysis similar to that espoused in Banas II, stating:

[I]t seems clear that the employer did not intend to turn over to a trier of fact in a judicial setting the responsibility of defining "just cause." The intention to do so must be stated with clarity. The use of this term must be read to mean that the employer, in his subjective judgment, would decide what causes for discharge are "just." To regard the use of the term "just cause" here as some sort of talisman which magically converts the at-will employee into one who can never be discharged without objective just cause would defy reason.

Id. at 219-20, 511 A.2d at 840 (emphasis in original).
A. Analogies in Collective Bargaining Practices and Procedure

Practice and procedure under collective bargaining agreements may offer guidance to the questions raised by Banas II. The collective bargaining agreement is similar to a handbook or employment policy, in that it includes provisions governing work rules, discipline policies, wages and fringe benefits.\textsuperscript{52} Under a collective bargaining agreement, an employee's right to employment is a contractual right based on the collective bargaining agreement, which is paramount to the individual contract of employment.\textsuperscript{53}

Most collective bargaining agreements in the private and public sectors require a cause or just-cause standard for termination or other discipline.\textsuperscript{54} Arbitrator Joseph D. McGoldrick has described the significance of the terms "cause" and "just cause" as follows:

\begin{quote}
[It] is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious charge," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or, perhaps, more properly as part of a new body of common law of "management and labor under
\end{quote}

\textsuperscript{52} See R. Gorman, Basic Text on Labor Law 540 (1976) ("The labor agreement is not a contract of employment; employees are hired separately and individually, but the tenure and terms of their employment once in the unit are regulated by the provisions of the collective bargaining agreement.").

\textsuperscript{53} J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay . . . collective bargaining . . . nor may they be used . . . to limit or condition the terms of the collective agreement.").

collective bargaining agreements.” They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.55

Absent precise definitions, cause or just cause56 may be considered any combination of the following: 1) the “law of the shop” as to the particular offense; i.e., showing a consistent pattern of response to that offense in a certain manner, as requiring severe or less than severe discipline;57 2) a consistent pattern of enforcement of rules and regulations and of making known the rules to all employees;58 3) case histories of other incidents of enforcement;59 4) known practices of severe discipline for certain offenses because of the product manufactured or safety consideration;60 5) offenses calling for immediate suspension and those not requiring removal;61 6) on-premises and off-premises offenses, and the differences in their treatment;62 7) general “arbitral authority,” derived from publication of awards, articles, etc.;63 8) the arbitrator’s own sense of equity and his/her subjective judgment as to the significance, seriousness and weight to be given the incident involved, the record of the employee, or the circumstances causing the termination;64 9) the severity of the

55. Worthington Corp., 24 Lab. Arb. (BNA) 1, 6-7 (1955) (McGoldrick, Arb.).
56. For a general discussion of cause and just cause, see F. Elkouri & E.A. Elkouri, supra note 54, at 650-54.
57. See J. Redeker, Discipline: Policies and Procedures 8 (1983) (“Predictability in discipline requires that the employer always react in the same fashion when presented with the same stimulus.”).
58. See F. Elkouri & E.A. Elkouri, supra note 54, at 682-84; J. Redeker, supra note 57, at 25.
59. See J. Redeker, supra note 57, at 30 (advocating employer’s record-keeping to facilitate comparison with discipline of prior offenses).
60. See F. Elkouri & E.A. Elkouri, supra note 54, at 660-75.
61. See id. at 658-60 (violent or criminal nature of offense taken into account).
62. See id. at 656-58.
63. See J. Redeker, supra note 57, at 23-24.
64. See F. Elkouri & E.A. Elkouri, supra note 54, at 661-63, 673-75 (arbitrators’ burden of proof and due process considerations).
facts of the case;\textsuperscript{65} 10) attempts made to rehabilitate the employee by the employer;\textsuperscript{66} 11) progressive discipline steps that may or may not have been taken;\textsuperscript{67} 12) the discipline penalty imposed as it relates to the facts of the case;\textsuperscript{68} 13) whether a "second chance" is warranted from the employee's prior record\textsuperscript{69} or 14) whether the employee is un reclaimable as indicated by his/her prior record, facts of the case; etc.\textsuperscript{70} Thus, a relevant question is whether the above factors are sufficient to establish just cause by clear implication under \textit{Banas II}.\textsuperscript{71}

Where express just cause is not contained in a collective bargaining agreement, many arbitrators imply a just-cause restriction.\textsuperscript{72} For instance, arbitrator Walter E. Boles noted that "a 'just cause' basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement."\textsuperscript{73} The reason is:

If the Company can discharge without cause, it can lay

\textsuperscript{65} See id. at 670 ("It is said to be 'axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.'") (quoting Capital Airlines, 25 LAB. ARB. (BNA) 13, 16 (1955) (Stowe, Ref.)).

\textsuperscript{66} See id. at 672-73 (rehabilitation through corrective or progressive discipline); J. REDEKER, supra note 57, at 29 ("[C]entral to the arbitrator's reasoning was the concept that the employer is obligated to make reasonable efforts to rehabilitate an employee.").

\textsuperscript{67} See F. ELKOURI & E.A. ELKOURI, supra note 54, at 670-73. For a discussion of the traditional approach to progressive discipline, see J. REDEKER, supra note 57, at 20-32.

\textsuperscript{68} See F. ELKOURI & E.A. ELKOURI, supra note 54, at 664-67.

\textsuperscript{69} See id. at 678-81 (parameters of consideration given to employee's past record).

\textsuperscript{70} For a general discussion of the above-listed factors, see F. ELKOURI & E.A. ELKOURI, supra note 54 and J. REDEKER, supra note 57.

\textsuperscript{71} For example, the United States District Court for the Eastern District of Pennsylvania held that a manual containing an employee code of conduct and specific grounds for termination, but without a specific provision governing the length of the job tenure, was "insufficient to overcome the presumption that the contract was freely terminable." Ruch v. Strawbridge & Clothier, Inc., 567 F. Supp. 1078, 1080 (E.D. Pa. 1983). Furthermore, the \textit{Ruch} court stated that "[t]he provisions governing employee conduct in this action contain no assurances that an employee will not be terminated even if the regulations contained therein are rigidly adhered to by . . . employees." Id. Whether this result is still valid after \textit{Banas II} is questionable.

At a minimum, such regulations of employee conduct may constitute just cause by clear implication. The \textit{Banas II} majority suggested that disciplinary rules and grievance mechanisms might constitute some form of just cause, and that \textit{Banas} may have prevailed had a breach of these been alleged. See \textit{Banas II}, 348 Pa. Super. at 484-85 & n.10, 502 A.2d at 647 & n.10.

\textsuperscript{72} See F. ELKOURI & E.A. ELKOURI, supra note 54, at 652.

\textsuperscript{73} Id. (quoting Cameron Iron Works, 25 LAB. ARB. (BNA) 295, 301 (1955) (Boles, Arb.)).
off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply by invoking its claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement—the security of a worker in his job.\textsuperscript{74}

It is not clear whether this can also be implied, pursuant to \textit{Banas II}, in handbooks and employment policies; i.e., whether the "fundamental" right to job security constitutes just cause by clear implication.

Many collective bargaining agreements also contain progressive discipline provisions.\textsuperscript{75} These impose a form of procedural due process through "an escalating series of disciplinary steps" taken before termination of the employee.\textsuperscript{76} Even in the absence of progressive discipline provisions, collective bargaining agreements "frequently enumerate 'cardinal sins' for which no prior warning is necessary before an employer dismisses the employee."\textsuperscript{77} The most common "cardinal sins" include dishonesty, insubordination, drug use or alcohol consumption while on duty, fighting, use of company vehicles without permission and possession of firearms on company property.\textsuperscript{78} Other misconduct of equal magnitude will also justify termination for cause.\textsuperscript{79}

Termination is recognized as the ultimate industrial penalty because the employee's job, contractual benefits and future em-

\textsuperscript{74} Id. (quoting Atwater Mfg. Co., 13 \textit{Lab. Arb.} (BNA) 747, 749 (1949) (Donnelly, Arb.)). Professor Perritt has suggested that arbitrators will imply a just cause limitation "in order to avoid the danger of sustaining discipline at the employer's whim." H. Perritt, \textit{supra} note 5, § 3.5, at 87.

\textsuperscript{75} See H. Perritt, \textit{supra} note 5, § 3.5, at 87.

\textsuperscript{76} Id.

\textsuperscript{77} Id. § 3.5, at 87-88. Employees who commit lesser offenses, or "sins," are subjected to progressive discipline. Id. § 3.5, at 88. For illustrative treatment of various offenses, see F. Elkouri & E.A. Elkouri, \textit{supra} note 54, at 692-707.

\textsuperscript{78} See H. Perritt, \textit{supra} note 5, § 3.5, at 88. For analyses and representative cases of the most common "cardinal sins," see generally J. Redeker, \textit{supra} note 57, at 55-251.

\textsuperscript{79} See Genuine Parts Co., 79 \textit{Lab. Arb.} (BNA) 220, 224 (1982) (Reed, Arb.) ("[T]here are certain offenses so serious that any employee in our industrial society may properly be expected to know that such conduct is heavily punishable."); A. Zack & R. Bloch, \textit{Labor Agreement in Negotiation and Arbitration} 145 (1983) ("[T]hose acts that are immediately and substantially destructive of the employment relationship . . . will be grounds for immediate discharge.").
ployability are at stake. In termination cases, the burden is nearly always on the employer to prove employee wrongdoing, and this is always so where the collective bargaining agreement requires just cause for termination. However, the quantum of proof required remains an unsettled issue.

B. Just Cause Under Trainer v. Trainer Spinning Co.

Any discussion of just cause should not omit the Pennsylvania Supreme Court's decision in Trainer v. Trainer Spinning Co. Trainer involved the termination of an employee who had been hired to manage a spinning company. The facts made no reference to any written employment agreement. Only corporate minutes and resolutions referred to the employment. Termination occurred after "differences arose" between the employee and some members of the corporation's board of directors. The employee sued to recover the balance of the salary allegedly due for the remaining period of time that the employee

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81. See id.; accord, Stylemaster, Inc., 79 Lab. Arb. (BNA) 76, 77-78 (1982) (Winton, Arb.) ("[I]t is a well-established principle in arbitration that the burden to prove guilt or wrong-doing lies with management.").

82. See H. Perritt, supra note 5, § 3.5, at 88. In a 1982 wrongful dismissal case, arbitrator Jeffrey B. Winton stated:

While it is well-established that the burden of proof lies with management, the quantum of proof is a less settled matter. In some cases, proof beyond a reasonable doubt is required, yet in others a preponderance of evidence or clear and convincing evidence is sufficient.

Sometimes, where proof is not strong enough to support discharge, it is nonetheless sufficient to justify a lesser penalty.


83. 224 Pa. 45, 73 A. 8 (1909). Although Trainer has never been expressly overruled, it has also never been cited in a subsequent case. Its only reported recognition, other than its original publication, appears in the American Law Reports. See Annotation, Vacation Pay Rights of Employee Not Hired Under Collective Labor Agreement, 91 A.L.R. 2d 1078, 1079 n.4 (1963).

84. 224 Pa. at 50, 73 A. at 10. Trainer was hired in 1902 by the promoters of a newly incorporated milling corporation to be a manager for a term of five years at a salary of $2,500.00 per year. Id.

85. Id. at 46-52, 73 A. at 8-10.

86. Id. at 46-50, 73 A. at 8.

87. Id. at 51, 73 A. at 10. The Board initially resolved to give Trainer a three-month "vacation" with pay while someone else managed the mill. Id. at 46, 73 A. at 8. When Trainer refused to take his leave and turn over the mill to a new manager, the board reconvened and resolved to discharge him. Id. at 47, 73 A. at 8.
was not permitted to continue as a manager.\textsuperscript{88}  

Although there was no evidence of any "just cause" policy or provision in Trainer's alleged contract of employment, the trial judge nonetheless instructed the jury to find for Trainer if they concluded that he was hired "for five years or . . . for one year, and that the discharge was made during the term without a justifiable and a reasonable cause."\textsuperscript{89}  The jury found for Trainer and the Pennsylvania Supreme Court upheld the jury's verdict stating that "the jury could very properly . . . determine whether there was 'just cause' for the discharge."\textsuperscript{90}  The Trainer court held that a just cause review standard may be applicable under Pennsylvania law where an employer breaches a contract of employment notwithstanding the lack of an express "just cause" provision. An analogy can thus be drawn to a breach of handbook or employment policy case such as Banas.\textsuperscript{91}  It is suggested that the just-cause standard in Trainer is equivalent to the "just cause by clear implication" standard that Banas II suggests.\textsuperscript{92}  

C. Implications for the Pennsylvania Judiciary  

Pennsylvania courts have not progressed in their resolution of this question since the Third Circuit’s original implications in Novosel that handbooks of employment policies could be binding commitments.\textsuperscript{93}  The Pennsylvania Supreme Court should now review the recent Banas II decision,\textsuperscript{94}  and enunciate a standard which would prevent the need for employees and employers to litigate what constitutes express just cause or just cause by clear implication on a case-by-case basis. The court should set forth conclusive guidance, as courts in other jurisdictions have done, as to whether handbooks and employment policies are binding commitments as part of a unilateral employment offer.\textsuperscript{95}  Otherwise, it  

\textsuperscript{88} Id. at 51, 73 A. at 9. Trainer was discharged after serving four years and three months as manager. Id. at 51, 73 A. at 10.  
\textsuperscript{89} Id. at 50, 73 A. at 9 (emphasis added).  
\textsuperscript{90} Id. at 51, 73 A. at 10; see also Decker, Forgotten Case May Be Key to At-Will Law, VII Pa. L.J. Rptr. 1 (No. 32, August 20, 1984).  
\textsuperscript{91} See Decker, supra note 90.  
\textsuperscript{92} See Banas II, 348 Pa. Super. at 484-85, 502 A.2d at 647 (if the handbook had contained, if not expressly, at least by clear implication, a just cause provision, then appellee's claim might have merit) (emphasis in original).  
\textsuperscript{93} For a discussion of Novosel, see supra notes 20-22 and accompanying text.  
\textsuperscript{94} For a discussion of Banas II, see supra notes 35-41 and accompanying text.  
\textsuperscript{95} For a list of jurisdictions which have decided whether an employer can be bound to policies set out in a handbook or manual, see supra note 18.
will remain to be determined whether "just cause" with respect to handbooks or employment policies may be viewed as it is by arbitrators interpreting collective bargaining agreements to constitute express just cause or just cause by clear implication. To accomplish this, trial and lower appellate courts will expend much time in exploring the meaning of express just cause and just cause by clear implication.

D. Implications for Pennsylvania Employers Dealing with Handbooks and Employment Policies After Banas

When an employer negotiates with a union the terms and conditions for a collective bargaining agreement, it knows that it is entering into an enforceable contract. Consequently, the employer gives careful consideration to the rights given to the unionized employees and the rights retained by the company. In dealing with nonunion employees, however, employers have traditionally enjoyed considerable unilateral discretion. Thus, statements made in handbooks and employment policies were intended to be general guidelines for conduct, but subject to withdrawal, modification, exceptions or interpretation at any time by the employer. Many employers have been surprised by the present trend which suggests that handbooks and policy statements are binding upon the employer and may imply other rights in the employee as well.

Because of emerging legal requirements and the Pennsylvania Superior Court's door-opening decision in Banas II, Pennsylvania employers may now wish to regard their handbooks and employment policies in the same manner as collective bargaining agreements, i.e., as binding and enforceable commitments. This may, in fact, provide a tangible benefit to employers with nonunion workforces. Such employers may deter or prevent employees from organizing by communicating to their employees that they regard their handbook or policy statements as binding commitments. Why do employees need a collective

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96. For a discussion of just cause in the context of collective bargaining agreements, see supra notes 54-55 and accompanying text.
97. For a list of jurisdictions holding employee handbooks and manuals binding upon the employer, see supra note 18.
99. Handbooks that contain some form of job protection counteract the most important reason why employees seek to unionize. The value to an employee of job security and the power to contest employer termination decisions in court should not be underestimated by employers. See J. Redecker, supra note
bargaining agreement or union representative if they already have enforceable employer commitments? This inquiry can be particularly effective if the terms and conditions of the handbook or employment policy equal or exceed that which employees could gain from a collective bargaining agreement and a union organizing campaign. As long as the provisions in the handbook are perceived as fair by the employees, this argument could be important in avoiding or deterring unionization.

California has dramatically circumscribed the at-will employment relationship; most jurisdictions have not gone as far. However, given the increasing sympathy of courts in responding to these cases, employers may well be advised to "act as if" their personnel decisions are potentially binding under the most restrictive standards. Even if an employer is operating in a non-union setting, every decision should be treated as if it were subject to labor arbitration under a collective bargaining agreement. Therefore, an employer should anticipate having to meet a just-cause standard for every adverse employee action it takes. In this way, an employer may better defend its actions, as Banas II suggests.

57, at 41 ("[E]mployee insecurity creates innumerable problems for the employer and, ultimately, produces union activity."); see also St. Antoine, supra note 4, at 35.

100. California courts have created exceptions to the at-will employment relationship which extend beyond the increasingly recognized public policy and statutory right exceptions. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee stated cause of action for wrongful discharge where termination was based on unwillingness to participate in illegal price-fixing scheme); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (implied contract requiring employer not to act arbitrarily arose from employee's consistent promotions and employer's assurances); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (termination without cause violates employer's implied promise of good faith and fair dealing which arose from employee's eighteen years of service). For a more complete discussion of exceptions to at-will employment in California, see C. Bakaly & J. Grossman, supra note 4, app. at 212.1-216.1 (Supp. 1985).

101. See H. Perritt, supra note 5, § 8.10 at 316 ("The basic question that should be asked of top management . . . is: Are you willing to have this particular provision legally enforced against you?").

102. For a discussion of Banas II, see supra notes 35-41 and accompanying text.
IV. CURTAILMENT OF FURTHER JUDICIAL MODIFICATION OF THE AT-WILL EMPLOYMENT DOCTRINE

A. Darlington v. General Electric

Recently, in Darlington, the Pennsylvania Superior Court signaled the curtailment of further judicial erosion of at-will employment within Pennsylvania by announcing that "[i]nherent in the at-will presumption itself is an important public policy—that the employer should be master of his business." Darlington, who had been employed as an engineer at General Electric for fifteen years, was accused of certain expense and telephone account irregularities and was terminated. Darlington brought a wrongful discharge suit, claiming that his termination violated his employment contract, which allegedly implied that employment was to be for a reasonable length of time and could only be terminated for just cause. At trial, the jury returned a $100,000 verdict against General Electric. However, the trial court granted a judgment notwithstanding the verdict, which the Pennsylvania Superior Court affirmed. The Darlington court found the evidence insufficient to overcome the at-will presumption, and stated that the court therefore "cannot interfere with General Electric's decision to discharge."

104. Id. at 210-11, 504 A.2d at 320. The court reasoned that "[t]he policy underlying the at-will presumption mandates that where there is no contract to rebut the at-will presumption, and where no public policy has been violated by the discharge, we must weigh the employer's interest in running his business more heavily than all the other interests." Id.
105. Id. at 188, 504 A.2d at 308. Darlington claimed that "he did not knowingly and deliberately engage in the impermissible conduct he was charged with but was merely following company policy as he knew it." Id.
106. Id. at 188, 504 A.2d at 308-09. Darlington contended that "the totality of circumstances surrounding his hiring evinces the parties' intent that the employment was to be for a reasonable length of time." Id. at 192, 504 A.2d at 311. These circumstances included the long-term nature of the projects on which he was hired to work and the company policy, as explained to him, of flexibility regarding employee "problems." Id. at 192, 504 A.2d at 310.
107. Id. at 187, 504 A.2d at 308.
108. Id.
109. Id. at 206, 504 A.2d at 317. The court noted: "Were we to open the tribunals of justice and allow juries to decide every question involving an at-will employee dismissal, we would be allowing them to dictate the business policies of the giant corporation and the family run business alike." Id.; see also Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 220, 511 A.2d 830, 841 (1986) ("We believe . . . that the employment should be presumed to be "at-will" unless an intent to alter the at-will relationship is clearly stated in the handbook. The at-will rule will not be overcome by vague or general promises in Pennsylvania."). For a discussion of the holding in Martin, see supra note 51.
Darlington has been the most employer-oriented decision to date concerning Pennsylvania employment at-will doctrine. More importantly, however, it represents judicial recognition of the view that further modification of at-will employment should be left to the legislature and not to the courts. The Darlington court stated that "if terminable-at-will contracts are to be forbidden, the judicial process may be an inappropriate forum for such sweeping policy change."\(^{110}\)

B. Legislative Regulation of At-Will Employment

**May Be Drawing Nearer**

Should the courts or the legislature be the primary movers in modifying at-will employment? The Pennsylvania Superior Court's decisions in Banas II and Darlington have brought this question to the forefront in Pennsylvania.\(^{111}\)

Modification of at-will employment is evolving in two settings. First, the courts are taking action. Second, state legislatures, along with Congress, may be compelled to provide a more definite, logical and orderly framework for resolution of these employment disputes. This action parallels employment law's development prior to the enactment of the National Labor Relations Act (NLRA).\(^{112}\) Recent Pennsylvania judicial decisions verify that

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\(^{110}\) Darlington, 350 Pa. Super. at 191-92, 504 A.2d at 310. The court reasoned:

The citadel of the at-will presumption has been eroded of late, but it has not been toppled. Perhaps the time has come for employees to be given greater protection in this area. This was the opinion of one commentator, who cautioned, however, that "Pennsylvania courts . . . should at this time avoid further modification of the at-will employment relationship. Restraint should be observed to minimize the adverse effects that any complete abrogation might have on employment, productive efficiency, and overburdening of the judicial process with additional cases. Time and thought should be given now to whether abrogation of the doctrine should occur through 'judicial erosion' or 'legislative mandate.'"

Id. (quoting Decker, *At-Will Employment in Pennsylvania*, supra note 4, at 479). The court reasserted its position in a subsequent decision. See Martin v. Capital Cities Media, 354 Pa. Super. 199, 221, 511 A.2d 830, 841 (1986) ("The judicial chamber is ill-equipped to determine what effects such a sweeping policy change [of at-will employment] would have on society. Such a change would best be accomplished by the legislative process, with its attendant public hearings and debate."). For a discussion of the holding in Martin, see supra note 51.

\(^{111}\) For a discussion of Banas II, see supra notes 35-41 and accompanying text. For a discussion of Darlington, see supra notes 103-10 and accompanying text.

\(^{112}\) 29 U.S.C. §§ 141-169 (1982 & Supp. III 1985). Prior to the enactment of the NLRA, "there developed a gradual sensitivity on the part of some courts to the need for fair procedures in the issuance and enforcement of injunctions
we are closer to legislative action than many realize or care to admit. The Pennsylvania Superior Court verified this in Darlington, stating its disapproval of the courts as the setting for modification of at-will employment.

It is no longer impossible to foresee what would be imposed by the judiciary. Courts are likely to be long on generalization and short on detail when outlining procedures, remedies, etc. Even though, for understandable political reasons, the Pennsylvania legislature may not wish to take the initiative, it may be compelled to take action on this issue by the boldness of some courts in creating broad modifications and exceptions to the at-will employment doctrine.

Courts are neither equipped to handle the additional caseload of employee termination actions, nor sufficiently experienced in the area of employee terminations. Nonetheless, Pennsylvania state and federal courts are more frequently being called upon to deal with these disputes. The judicial process is too long and procedurally cumbersome to provide adequate or swift remedies to the parties. Courts may be able to respond to the extreme case and to the atypical situation of an employment ter-

and, more important, a legislative sensitivity toward the interests of the laborer." R. Corman, supra note 52, at 3. For an overview of the labor movement leading to the NLRA, see generally id. at 1-6; C. Morris, supra note 1, at 1-66.

113. Evidence of the erosion of Pennsylvania employment at-will lies in the Third Circuit's 1983 Novosel decision, which held that the binding effect of an employer's practices or policies is a factual determination for the jury. See Novosel, 721 F.2d at 902-03. Evidence also lies in the Pennsylvania Superior Court's 1985 Banas II decision, which suggested that an employment manual could bind an employer upon a showing of an express or implied just cause provision. See Banas II, 348 Pa. Super. at 485-86, 502 A.2d at 648. For a discussion of Novosel, see supra notes 20-22 and accompanying text. For a discussion of Banas II, see supra notes 35-41 and accompanying text.

114. See supra note 110 and accompanying text. For a discussion of Darlington, see supra notes 103-10 and accompanying text.


116. See H. Perritt, supra note 5, § 9.11, at 348 ("Judicial recognition is
mination. However, they have no capacity to construct an administrative mechanism for daily enforcement.\footnote{117}

Congress and various state legislatures have prohibited, in certain instances, the summary termination of an at-will employee. The primary federal statutory schemes that limit an employer’s right to terminate an at-will employee are the NLRA\footnote{118} and Title VII of the Civil Rights Act of 1964.\footnote{119} The NLRA prohibits termination of employees for exercising the right to organize and select a representative.\footnote{120} Title VII prohibits any termination based upon discrimination involving race, color, religion, sex or national origin.\footnote{121} In decisions enforcing these statutes, courts have maintained that an employer may legally terminate an employee for any reason except one specifically prohibited by these statutes.\footnote{122} Other federal legislation restricting the right to terminate include: 1) the Age Discrimination in Employment Act of 1967;\footnote{123} 2) the Occupational Safety and Health Act of 1970;\footnote{124} 3) the Vietnam Era Veterans Readjustment Assistance Act of 1974;\footnote{125} 4) the Fair Labor Standards Act of 1938\footnote{126} available to employees without waiting for the legislatures to act . . . . On the other hand, litigation is slow and expensive.”).

\footnote{117} See Decker, \textit{At-Will Employment in Pennsylvania}, supra note 4, at 494.


\footnote{120} See 29 U.S.C. § 158(a)(1) (1982). Section 158(a)(1) states: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.” \textit{Id.} Section 157 employee rights include “the right to self-organization, [and] to form, join, or assist labor organizations.” \textit{Id.} § 157.

\footnote{121} See 42 U.S.C. § 2000e-2(a)(1) (1982) (“it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin . . . .”).

\footnote{122} See, e.g., NLRB v. Condenser Corp., 128 F.2d 67, 77 (3d Cir. 1942) (“If the contract with the [union] was not in violation of the statute, it follows . . . that [the] discharges were proper.”).

\footnote{123} See 29 U.S.C. § 623(a)(1) (1982) (“It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual’s age.”).

\footnote{124} See 29 U.S.C. § 660(c)(1) (1982) (“No person shall discharge . . . any employee because such employee has filed any complaint . . . under or related to this chapter [Occupational Safety and Health Act].”).

\footnote{125} See 38 U.S.C. § 2021(a) (1982) (guaranteeing right to reemployment upon satisfactory completion of military service); \textit{id.} § 2021(b)(1) (“Any person who is restored to or employed in a position in accordance with the provisions of . . . subsection (a) . . . shall not be discharged from such position without cause within one year after such restoration or reemployment.”); \textit{id.} § 2021(b)(3)
and 5) the Rehabilitation Act of 1973.\textsuperscript{127} Various state statutes contain similar limitations providing some protection for at-will employees.\textsuperscript{128}

At some point, employee groups and employers may support legislation, preferring a statutory solution to "the broad strokes and blurred outlines often produced by an innovative judiciary."\textsuperscript{129} Nonunionized employers may perceive legislation as the most important deterrent to unionization of their workers, since it minimizes the union's argument of increased job protection from wrongful termination.\textsuperscript{130} The promise of a union bargaining for greater job security cannot be underestimated, because job security is one of the most important reasons employees seek to organize.

Organized labor may be a critical factor in securing legislative relief.\textsuperscript{131} It might be the only interest group that would take the lead in promoting such a cause. "A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will undercut one of the unions' prime selling points."\textsuperscript{132} This possi-

\textsuperscript{126} See 29 U.S.C. § 215(a)(3) (1982) ("[I]t shall be unlawful for any person to discharge . . . any employee because such employee has filed any complaint . . . under or related to this chapter [Fair Labor Standards Act].")

\textsuperscript{127} See 29 U.S.C. § 794 (1982) ("No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .")


\textsuperscript{129} St. Antoine, supra note 4, at 35.

\textsuperscript{130} Id.

\textsuperscript{131} See H. Perritt, supra note 5, § 9.4, at 335 ("The trade union movement is well organized and influential with legislators . . . [I]ts support would be effective in behalf of . . . wrongful discharge legislation.") (footnote omitted).

\textsuperscript{132} St. Antoine, supra note 4, at 35; see also H. Perritt, supra note 5, § 9.4, at 335-36 ("The trade union movement has become increasingly aware . . . that
bility cannot be denied. However, organized labor could gain considerably from refurbishing its image as the champion of the disadvantaged. More practically, a universal rule requiring cause for termination could actually benefit unions in their organizing drives by protecting union sympathizers.

C. Legislative Response in Pennsylvania

In Pennsylvania, several pieces of legislation have been introduced since 1981 dealing with the summary termination of at-will employees. Each of these legislative proposals has purported to create a general statutory scheme to protect Pennsylvania's employees from wrongful terminations. Excluded from coverage are any employees protected by a collective bargaining agreement, those protected by civil service, tenured employees or persons who have a written employment contract of not less than two years duration and whose contracts require not less than six months notice of termination. These bills would require employers to terminate employees only for "just cause." If terminated, the employee would have to receive oral notification at the time of termination and written notification by registered mail within fifteen calendar days of the termination, stating all reasons for the action.

This proposed legislation also permits an employee to file a written complaint concerning his or her termination with the Pennsylvania Bureau of Mediation within thirty days of receipt of written notice of the termination. When the bureau receives

statutory expansion of employee rights may dilute the incentive for employees to organize. It is well recognized that one of the benefits that union organizers can offer to employee groups is protection against arbitrary dismissal.

133. See St. Antoine, supra note 4, at 36.
134. See id.
136. See, e.g., Pennsylvania House of Representatives, H.B. No. 2105 (May 1, 1984) ("The purpose of this law is to further establish . . . employee rights and to advance them to the point that all employees would have a process to seek redress when they have been dismissed from employment for any reason other than just cause.").
137. See, e.g., id. § 3 (definition of "employee").
138. See, e.g., id. § 4(a). The bills define a dismissal as "an involuntary discharge from employment, including a resignation or voluntary quit resulting from an improper or unreasonable action or inaction of the employer." See, e.g., id. § 3.
139. See, e.g., id. § 4(b).
140. See, e.g., id. § 5(a). Where the employer failed to provide written notifi-
the complaint, it would then appoint a mediator to assist the employer and the terminated employee in resolving the dispute.\textsuperscript{141} If, after thirty calendar days from commencement of mediation, no mutually satisfactory resolution occurred, the employee would have the option of invoking arbitration proceedings.\textsuperscript{142}

After a hearing, the arbitrator could select remedies that include: 1) sustaining the termination; 2) reinstating the employee with no, partial or full back pay and 3) ordering a severance payment.\textsuperscript{143} The arbitrator's decision would be final and binding upon the parties, and reviewable in the court of common pleas for the county where the dispute arose or where the employee resides.\textsuperscript{144} However, if a party sought judicial review, the court could set aside the award only if the arbitrator "was without, or exceeded the scope of, his jurisdiction, or that the award was procured by fraud, collusion or other similar and unlawful means."\textsuperscript{145}

It is likely that the legislature will not enact these proposals in their present form, if at all. However, the bills provide an excellent reference point for all interested parties to begin the debate on abrogating at-will employment through legislative action. As employees become increasingly concerned over the importance and security of their jobs, they will demand in greater numbers that the legislature take action to preserve their jobs, especially in times of inflation or high unemployment.

V. CONCLUSION

Legislation may provide a statutory scheme which could result in quick, inexpensive and binding resolution of wrongful termination disputes, similar to that of the arbitration procedures contained in many collective bargaining agreements.\textsuperscript{146} Today it is more imperative than ever for a realistic examination of this situation of the termination, the employee may file a complaint within 45 days of the discharge. \textit{See, e.g., id.} § 5(b).

141. \textit{See, e.g., id.} § 6(a).
142. \textit{See, e.g., id.} § 6(b), 7(a). The employee may, alternatively, request a continuance of the mediation if he "believes that a mutual resolution of the dispute is possible." \textit{Id.} § 7(a).
143. \textit{See, e.g., id.} § 8(b).
144. \textit{See, e.g., id.} § 9.
145. \textit{Id.} § 11.
146. For an excellent review of statutory proposals for regulating wrongful terminations, see H. PERRITT, supra note 5, ch. 9; \textit{see also F. ELKOURI & E.A. ELKOURI, supra note 54, at 7-9 (discussing advantages of arbitration over litigation).
area. The surge of at-will employment litigation has not diminished, and attorneys continue to develop novel theories with which to impose liability on employers for wrongful terminations.\textsuperscript{147} Legislative regulation, then, is all the more needed today. It is submitted that instead of opposing legislation, the prudent employer should welcome a statutory scheme as providing an orderly legal remedy outside the courtroom. Such legislation lessens the prospect of costly litigation in light of the fact that terminated employees can, under the present law, be expected to litigate new fact situations concerning an employer's obligation to deal with employees fairly and in good faith.\textsuperscript{148} One cannot over-emphasize the cost of traditional litigation to employers. Procedures such as motions to dismiss, depositions, interrogatories, and lengthy discovery proceedings are ill-suited to the area of employee terminations. The cost and delay of arriving at a final result are unacceptable. Employers and employees can both benefit from a relatively quick, inexpensive and binding mechanism for dealing with disputes over alleged wrongful terminations.

Arbitration, although not a perfect solution, presents one method for addressing these issues. Had employers covered by collective bargaining agreements been forced to follow the traditional litigation route to resolving employee terminations, they would have suffered serious financial crises years ago. Instead, arbitration has served as an alternative mechanism to contest an employee termination arising under a collective bargaining agreement. Despite its imperfections, arbitration, when contrasted with traditional litigation, still provides a binding resolution more quickly and more inexpensively.\textsuperscript{149}

In Darlington, a Pennsylvania appellate court has indicated for the first time that a legislative scheme might realistically offer the best solution to confront the rapidly developing area of the law of at-will employment.\textsuperscript{150} Darlington suggested that until legislation regulating employment terminations is considered, courts should


\textsuperscript{148} For a discussion of the benefits of legislation to employers, see Decker, at-will employment in Pennsylvania, \textit{supra} note 4, at 496.

\textsuperscript{149} See Decker, \textit{Federal Regulation}, \textit{supra} note 4, at 362 ("Arbitration would provide a proven, quick, inexpensive, and final resolution without overburdening the courts.") (citing Mennemier, \textit{Protection from Unjust Discharge: An Arbitration Scheme}, 19 \textit{Harv. J. Legis.} 49, 74 (1982)).

\textsuperscript{150} For a discussion of Darlington, see \textit{supra} notes 103-10 and accompanying text.
refrain from developing a common law that encourages further overburdening the state and federal judicial system with these disputes.\textsuperscript{151} The \textit{Banas} \textit{II} decision confirmed this, in that it resulted in the need for additional litigation to determine what constitutes "just cause" or "just cause by clear implication," for the purpose of rendering handbook and employment policies binding upon an employer.\textsuperscript{152} Perhaps the time has come to begin a thoughtful dialogue which will realistically address this area of employment law through a statutory solution.\textsuperscript{153}

\begin{itemize}
\item[151.] \textit{Darlington}, 350 Pa. Super. at 191, 504 A.2d at 310.
\item[152.] \textit{See Banas} \textit{II}, 348 Pa. Super. at 481-86, 502 A.2d at 646-48. For a discussion of \textit{Banas} \textit{II}, see \textit{supra} notes 35-41 and accompanying text.
\item[153.] For suggested drafts of model state statutes governing wrongful dismissal, see H. \textit{Perritt}, \textit{supra} note 5, at 407-14; Decker \textit{Proposal}, \textit{supra} note 4, at 202-09.
\end{itemize}