January 1985

Employment-at-Will and the South Carolina Experiment

Leonard Bierman
Stuart A. Youngblood

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38V635

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcea@law.berkeley.edu.
Employment-at-Will and the South Carolina Experiment

Leonard Bierman†
Stuart A. Youngblood††

The following article addresses the doctrine of employment-at-will, in the context of one state's attempt to mitigate the doctrine's effects by the use of mediation. The authors discuss the early development of the at-will doctrine, and examine various judicially developed exceptions to it. They note the disadvantages of challenging at-will dismissals by litigation. They then proceed to examine the success of the South Carolina Labor Management Services Division of the State Department of Labor, which engages in the mediation of at-will discharges. The authors find that the mediation of at-will discharges results in the reinstatement of a high number of discharged employees, at considerably less cost than litigation. The authors conclude that mediation is a viable alternative to the litigation of at-will discharges, and suggest that the statutory authorization for the establishment of agencies like that of South Carolina presently exists in many states.

I
Introduction

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. New State Ice Co. v. Leiberman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Currently, the most controversial issue in the field of industrial relations is perhaps that of “employment-at-will”. Should employers lawfully be permitted to fire employees “at will”, i.e., at any time and for any reason, or should the right of employers to discharge their employees be of a more limited nature?

Although frequently overlooked, American courts, during the first century of our nation’s history, followed the English rule that a term of employment was presumed to be for one year, unless another period

† B.S., Cornell University; J.D., University of Pennsylvania; M.A. (in economics), University of California, Los Angeles. Assistant Professor, Texas A&M University, College of Business Administration.

†† B.S., M.S., Ph.D., Purdue University. Associate Professor, Texas A&M University, College of Business Administration.
was specified or could be implied from the surrounding circumstances. But in his classic 1877 treatise on the topic of master and servant, H. G. Wood argued for reversal of this presumption stating that “[a] general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.”

Wood’s notion of “at will” employment gained rapid acceptance among American jurisdictions. It generally remained in full force for approximately the following century. Wood’s “at will” notion became popular during a historical period of tremendous “laissez faire” economic growth. With jobs plentiful, a certain symmetry and equality of bargaining power between employers and employees existed; employees could quit their jobs at any time and for any reason while, conversely, employers could discharge employees at any time and for any reason.

During the past decade or so, however, the “at will” rule has come under strong attack as being anachronistic and completely unsuited to economic realities, such as the structural unemployment that has prevailed in the latter part of the twentieth century. Further, the rule’s continued application has created a glaring disparity of rights among unionized employees, who under collective bargaining agreements can traditionally be discharged only for “just cause”, other groups who are protected to some degree by Title VII of the Civil Rights Act of 1964 and other legislation, and the vast majority of employees who are afforded no protection from “unjust dismissal” whatsoever.

Thus, the rule of “yearly hiring” was changed, arguably in response to the shifting economic environment of the late nineteenth century. Similarly, scholars and practitioners currently are pushing strongly to reform the “at will” rule so that it may conform more accurately to the economic realities of this century. While there has been some minor legislative action by states in this area, the primary battleground for change of the doctrine has been the state courts. To date,
literally thousands of cases challenging the continued application of the "at will" rule have been brought in state courts.

II
STATE COURT LITIGATION AND ITS PROBLEMS

A. State Court Cases

It first should be noted that, despite the recent onslaught of state court cases challenging the legal theory, the "at will" doctrine remains generally applicable throughout the nation. Recent court decisions following the "at will" rule, for example, have upheld employee discharges for reporting a superior for soliciting and receiving kickbacks, for refusing to falsify medical records, and for warning superiors that one of the employer's products was not adequately tested and, therefore, constituted a serious danger to consumers.

Nevertheless, some state courts have, in recent years, made significant inroads into the alteration of the traditional "employment-at-will" rule. State court decisions limiting the rule have rested essentially on three types of legal theories: a public policy exception based in contract or tort law, a finding or an implied-in-fact contractual right to continued employment, and a finding of an implied in-law covenant of fair dealing and good faith.

The most widely accepted limitation on the "at will" rule is the "public policy exception". Presently, approximately twenty state judiciaries clearly recognize an exception to the mandates of "employment-at-will" for employees who are discharged for reasons which are deemed to contravene fundamental principles of "public policy." The "public policy exception" has generally been applied in three categories of cases: (1) those involving an employee being fired for refusing to commit an unlawful act such as committing perjury at a trial, (2) those involving an employee being discharged because of the employee's performance of an important public obligation such as jury duty, and (3) those involving an employee being dismissed from employment because the employee exercised a protected statutory right or

Whistleblower's statute). See also S.D. CODIFIED LAWS ANN. § 60-1-3 (1978) (reinstating presumption of "yearly hiring" for persons hired at an annual salary).


8. Comment, supra note 1, at 945 & nn.22-27.


10. See Wotring & Lewis, Employment at Will: Public Policy Themes Debated, Legal Times of Washington, January 9, 1984 at 11.
privilege such as filing for workers compensation.\textsuperscript{11}

The public policy exception of the “at will” rule was first applied in the 1959 California case of \textit{Petermann v. International Brotherhood of Teamsters}.\textsuperscript{12} In that case, a California appeals court, in striking down the discharge of an employee who was fired for refusing to commit perjury during an investigation of illegal acts, stated:\textsuperscript{13}

It would be obnoxious to the interest of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury . . . To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the Penal Code . . . would be seriously impaired if it were held that one could be discharged by reason of his refusal to commit perjury.

Exceptions to the “at will” rule based on implied-in-fact contracts and implied-in-law covenants of fair dealing are fewer than those based on “public policy” grounds, but are of increasing importance. Courts created the implied-in-fact contractual rights exception by reading into the employment relationship a contractually based promise by the employer to refrain from arbitrary dismissal of the employee. A leading case applying this theory is \textit{Toussaint v. Blue Cross & Blue Shield of Michigan}\textsuperscript{14} where the Michigan Supreme Court in 1980 held that certain representations to the employee during the recruitment process and in the firm’s personnel manual created an implied-in-fact contract protecting the employee from arbitrary dismissal.\textsuperscript{15}

Finally, courts in two states, California\textsuperscript{16} and Massachusetts,\textsuperscript{17} have established an implied-in-law covenant of good faith and fair dealing exception to the “at will” rule. This exception is predicated on a judicial finding of a contractual duty of good faith and fair dealing in the employment relationship. Thus, in the leading Massachusetts case

\begin{itemize}
\item \textsuperscript{11} Note, \textit{Protecting At Will Employees}, supra note 4, at 1936-37 & nn.49-54.
\item \textsuperscript{12} 174 Cal. App. 2d 184, 29 Cal. Rptr. 399, 344 P.2d 25 (1959).
\item \textsuperscript{13} \textit{Id.} at 188-89, 29 Cal. Rptr. at 400, 344 P.2d at 27.
\item \textsuperscript{14} 408 Mich. 579, 292 N.W.2d 880 (1980).
\item \textsuperscript{16} \textit{See}, e.g., Cleary v. American Airlines, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980).
\end{itemize}
of *Fortune v. National Cash Register Co.*\(^{18}\) the Massachusetts Supreme Court, in 1977, held that the firing of salesman, just prior to the time he was to receive a large commission on equipment he sold allegedly because the company wanted to avoid payment of the commission, was unlawful as a breach of the contractually implied covenant of "good faith and fair dealing" between the parties.

**B. Problems with State Court Litigation and Reform**

Despite the bold inroads that some state courts have made, there are problems inherent in addressing the continued viability of the "at will" rule in the state courts. First, whenever one attempts to achieve broad changes in the law by way of case-by-case state court adjudication, there results an inevitable lack of clarity as to what precisely the law has become. Even within a given state there may be sharp disagreement among various segments of the judiciary as to how exactly the "at will" rule applies.\(^{19}\) In short, state court litigation regarding the "at will" rule has left us with a hodge-podge of different holdings based on a hodge-podge of different theories, any of which are subject to change at a moment's notice.

In addition to the uncertainty involved in addressing the issue at the state court level, important philosophical questions are involved when state judges are permitted to make decisions regarding such significant public policy concerns. Should not such "legislated" changes in public policy be left to the state legislature?\(^{20}\)

Perhaps most critically, though, and from a more "micro" perspective, the prospect of taking a case to state court is not, frequently, a very happy one for discharged employees who believe they have received a "raw deal" from their employer. Litigation is often very costly and time consuming. The average employee, much less one who was fired recently, simply cannot afford to challenge an employer decision in court.\(^{21}\)

Moreover, cost and time issues aside, the courtroom may not be the best place to resolve "at will" employment and related issues. Litig-
EMPLOYMENT-AT-WILL

1984

Employment-at-will is a purely adversarial process: plaintiff versus defendant. Is this the type of procedure best suited to an employee who seeks, as a remedy, reinstatement to his or her previous job, or even, simply, a good reference? Given such problems with state litigation, it is not surprising that one study found that over ninety-five percent of the employees who had been reinstated pursuant to adversarial National Labor Relations Board discriminatory discharge proceedings, ultimately left their jobs after being rehired, and that nearly ninety percent left within the first year.\(^2\)

Relying on all the above reasons, and others, various commentators have argued that the "at will" issue must be addressed by state statute and that individual disputes must be resolved by means other than courtroom litigation. Professors Clyde Summers and Jack Stieber, for example, both have argued forcefully that states should adopt statutes protecting employees from "unjust," i.e., not for "just cause," dismissal and providing employees the right to have such cases resolved by an impartial arbitrator.\(^2\)^ Under the Summers and Stieber proposals, employees who are not members of a union would enjoy essentially the same rights enjoyed by unionized employees under collective bargaining contracts.

Therein, however, may lie a problem. First, as Professors Cornelius Peck\(^2\) and Stephen Goldberg\(^2\) have observed, unions may not be enthralled with the idea that all employees would, by statute, receive the same grievance procedure protections that unions have been using as a key selling point in attempts to recruit new members. Indeed, extensions of such protection might well, as Professor Benjamin Aaron has predicted,\(^2\) have an important inhibiting effect on union growth.

In addition, as Professor Julius Getman\(^2\) and others\(^2\) have cogently argued, there may be problems, in the absence of a representative union, with obtaining employer obedience to arbitration decisions and protecting reinstated employees from employer retaliation. The presence of the union may well serve as a buffer between the employer

---

23. Stieber, Protection Against Unfair Dismissal: A Comparative View, 3 Comp. Lab. L. 229 (1980); Summers, supra note 5.
26. Aaron, Labor Relations Law In the United States From A Comparative Perspective, 39 Wash. & Lee L. Rev. 1247, 1261 (1982). See also Blumrosen, supra note 21, at 254 (availability of arbitration protection for all employees may reduce their perceived need for unionization).
and individual employee, and, because of the union's ongoing relationship with management, the union may be able to effectively monitor employer actions. The absence of such union monitoring and buffering is likely to render arbitration an ineffective remedy for "at will" disputes involving unorganized employees.\(^29\)

Further, one certainly can expect many managers to resist the idea of having a third party arbitrator with binding decision-making power making decisions concerning the managers' workforce that they believe only an employer ultimately should have the power to make.\(^30\) Finally, grievance arbitration procedures, particularly in unionized settings, have been criticized strongly for becoming increasingly expensive, prolonged, and legalistic.\(^31\)

In any event, in the midst of all this debate and rhetoric, one state, South Carolina, has actually taken positive action. Indeed, the South Carolina approach of engaging in non-binding mediation of employee discharge disputes, to which we now turn, may offer more than just a glimmer of hope.

III

THE SOUTH CAROLINA APPROACH

A. Background

Section 41-17-10 of the South Carolina Code, i.e., the State of South Carolina's statutes, grants the State's Commissioner of Labor or his agents broad powers to deal with "industrial disputes" that arise between "employer and employees or capital and labor."\(^32\) The Commissioner or his agents are given the power to investigate such disputes, to ascertain their cause or causes, to make findings of fact with respect to them and to try to remove misunderstandings between the parties, and to induce the parties to reach an agreement. More specifically, section 41-17-10(f) of the Code states that the Commissioner or his agents should "in general, remove as far as possible the causes for industrial disputes of . . . and induce an amicable settlement of them."\(^33\)

As a means of enforcement, section 41-17-40 of the state Code gives the Labor Commissioner the power to summon witnesses involved in industrial disputes and to compel their testimony.\(^34\) Further,

---

29. See Getman, supra note 27, at 934-38.
33. Id.
34. Id. § 41-17-40.
South Carolina Code section 14-17-50 grants to the Commissioner, or his agents, in investigating these disputes, the power to compel production of relevant books and documents and to inspect relevant premises.  

Nowhere, however, in this array of statutory provisions, does the state code define the term "industrial dispute" to encompass disputes involving employee discharge. Indeed, that employee discharges are to be subject to state conciliation procedures is not mentioned anywhere in the relevant statutory provisions or legislative history.

Nevertheless, by way of broad executive interpretation of given statutory mandates, the state of South Carolina has embarked on one of the boldest innovations in the field of industrial relations prevalent in the United States today. Within the State Department of Labor, South Carolina has established a Division of Labor/Management Services (LMS). One of the central duties of this eleven year old Division, which during 1983 had a budget of $268,319, is to mediate "at will" employee dismissal cases.

B. LMS Operation and Procedure

LMS does not publish comprehensive public information concerning its operation. This article relies instead on information gathered from: (1) internal agency reports for the period 1978-1984, (2) personal communications with the agency's director and several staff members, (3) a fiscal year 1981, in-depth study of randomly sampled LMS cases conducted by research colleagues at the University of South Carolina, and (4) analysis of an independent survey of 740 South Carolina households participating in a 1980 University of South Carolina consumer panel. Together the information reveals that while South Carolina's Labor Management Service employee discharge mediation program may lack explicit statutory authority, it certainly has not lacked for activity.

Each year approximately 3000 workers contact LMS. Almost all of these seek information regarding a complaint against their employer. Approximately ninety percent, or 2700, of these complaints involve instances of involuntary termination or discharge. The rest of these

35. Id. § 41-17-50.
37. The agency deals with a wide variety of cases presenting a wide variety of problems. For example, in one recent case, an employee with less than one year of service with a construction company encountered health problems. Because of these problems, the employee missed a few days of work, and because the absences were not formally excused, was dismissed by his supervisor. The employee then sought intervention by LMS.

When a mediator from LMS contacted the company, the company's owner stated that the real problem was probably not the employee's unexcused absences/health problems, but rather the existence of a conflict between the employee and his supervisor. It was this conflict that likely
complaints concern unfair hiring or promotional practices, as well as general employee grievances.

Upon receiving a complaint, the LMS staff must first determine whether the agency exercises jurisdiction over the grievance. The agency does not handle complaints involving allegations of race, age, sex, national origin or religious discrimination in employment. LMS refers these grievances to the South Carolina Human Affairs Commission which has primary jurisdiction over complaints of this nature.\(^3\) In addition, LMS does not process complaints from government employees or employees of unionized firms. Civil service laws and collective bargaining protect these employee groups. Finally, the agency does not handle cases involving probationary employees\(^3\) or those of individu-

prompted the supervisor to discharge him. The owner recognized that the employee had generally performed his work well.

Given this situation, the LMS mediator was able to work out a settlement of the situation. The owner agreed to reinstate the employee on a probationary basis and assign him to a different supervisor. Telephone interviews with Maude Hartzog and Margaret Potashnick, LMS mediators, (April 9, 1984).


Title VII of the Civil Rights Act provides for the initial deferral of employment discrimination claims to state and local commissions, such as the one in South Carolina, where such state and local commissions exist. 42 U.S.C. §§ 2000e-5(c)-(d) (1982). It should be noted, however, that case handling procedures under Title VII and state and local laws tracking Title VII are in many ways similar to those adopted by LMS.

Under Title VII, the federal Equal Employment Opportunity Commission (EEOC) (as well as state and local commissions with similar statutory mandates) first investigates charges brought to it to determine whether there is "reasonable cause" to believe the given charge is true. 42 U.S.C. § 2000e-5(b) (1982). If the EEOC after its investigation finds no "reasonable cause to believe the charge is true" it must dismiss the case. Id. However, should the EEOC find such reasonable cause to exist, it is required to make an attempt to conciliate the dispute. See generally Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977). The EEOC cannot bring a direct civil lawsuit under the statute without first attempting to conciliate the conflict. 42 U.S.C. § 2000e-5(f)(1) (1982); EEOC v. Hickey-Mitchell Co., 507 F.2d 944 (8th Cir. 1974).

Private parties are, though, allowed to bring private lawsuits regarding the charge if the EEOC hasn't taken action regarding it within 180 days. 42 U.S.C. § 2000e-5(f)(1). (1982). Frequently, because of a backlog of cases at the EEOC, private parties bring cases in federal court before the EEOC has even attempted conciliation or completed the administrative process. See, e.g., Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841 (8th Cir), cert denied, 434 U.S. 920 (1977). Thus, in many such cases, conciliation never occurs despite the expression of a strong desire by Congress, in Title VII, that attempts be made to resolve employment discrimination claims outside of court. See generally Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970).

In many respects, and as will be developed below, LMS follows procedures roughly analogous to the EEOC's in terms of determining whether a given charge has merit and then pursuing conciliatory efforts if it does. See infra notes 41-45 and accompanying text. Unlike the EEOC, however, LMS does not have the power to pursue civil lawsuits should conciliatory efforts fail. Thus, the LMS approach represents much more of a pure mediatory model than does the approach taken under Title VII and related employment discrimination statutes. See generally infra notes 62-73 and accompanying text.

39. The agency, however, has established no standardized rules regarding precisely who is a "probationary" employee, instead apparently accepting the given employer's definition of probationary status. See infra text accompanying notes 76-77.
als who first file their complaint later than ninety days after the dispute arises. 40

To screen complaints, LMS staff members rely on both personal conversations with complainants and "investigation reports," a standardized complaint form filled out by most complaining individuals. Based on the initial screening procedures, LMS eliminates fifty percent of the initial complaints from any further consideration. This leaves, on an annual basis, about 1350 involuntary termination cases for further investigation by LMS. 41

At the next stage, the cases are assigned to one of the agency's six full-time conciliators/mediators for follow-up. The conciliator/mediator ensures that the complainant, if he or she hasn't already done so, fills out a formal "investigative report" or complaint form. In this report the complainant formally states the nature and circumstances surrounding the complaint. 42

Upon completion of this form, the conciliator/mediator sends a copy of the form along with a letter to the complainant's former employer. The letter requests the employer to review the complaint and the circumstances leading to the employee's discharge, and to send LMS a statement of the results of the employer's review. The letter also stresses that the purpose of LMS is to seek fair and equitable treatment for employees and employers in South Carolina, and states that the agency looks forward to working with the employer in resolving the case. 43 LMS receives, in effect, a one hundred percent response rate from employers to these letters. LMS can always legally compel a reluctant employer to provide such information. 44 Employers generally respond to LMS's request for information by letter, although some do so by telephone.

Upon receipt of the employer's response to LMS's letter and the employee's complaint, the conciliator/mediator handling the case must decide whether to drop or pursue the case. The agency itself, has not

40. The agency also has no explicit procedural rules regarding the operation of this "statute of limitations," the possible "tolling" of the statute, etc.
41. In arriving at this estimate particular weight was given to 1983 internal LMS reports (on file, Texas A&M Business School).
42. The "investigative report" form starts off with a number of basic questions such as: name, address, name of employer, date of termination, responsible employer official, company reason for termination, etc. As the form goes on, however, the queries become more detailed and pointed. For example, complainants are asked what remedy would be satisfactory, whether they have filed complaints with a union or other agency, and so forth. State of South Carolina, Department of Labor, Division of Labor/Management Services, Investigative Report (on file, Texas A&M Business School).
43. The approach is a non-adversarial one, emphasizing the need to keep people gainfully employed and the state's economy productive. Emphasis is not placed on getting the employee reinstated. See generally infra notes 66-71 and accompanying text.
established procedural standards to guide this decision. In about half the cases which reach this stage, the LMS conciliator accepts the employer’s explanation for the termination and drops the case, making no further effort to persuade the employer to modify his or her position. In the remaining cases, the conciliator/mediator vigorously pursues the case and attempts to obtain, through mediation and conciliation, some consensual modification of the employee’s discharge. 45 The complainant can not appeal the decision.

In approximately fifty percent of the cases pursued by LMS, the agency obtains clear consensual modification of the terms of the employee’s discharge. In forty percent, of the consensual modifications, the employer agrees to reinstate the discharged worker. 46

In thirty-three percent of the resolutions, LMS obtains agreements from given employers to provide discharged employees with “good references.” In these instances the former employer writes a positive letter or letters of reference for the discharged employees and/or makes telephone calls in an effort to help the employee obtain a new job. 47

In addition to the other types of settlements, LMS gets the employers to “clear” or “clean” the former employee’s record in approximately twenty-six percent of the settled cases. A former employer’s agreement to “clear” or “clean” the record of a discharged employee does not involve the employer’s providing the employee with a positive reference. Instead, it merely involves modification of the employee’s personnel record. For example, in a case where a dispute with a supervisor was the reason for termination, the employer may change the reason for the termination from “insubordination” to “personality conflict.” This step ensures that the employee’s record does not impede the employee’s attempt to obtain a new job should, for example, a prospective employer inquire about the former employee. Such action might also facilitate the discharged employee’s ability to obtain unemployment compensation. 48

Finally, in a handful of cases the agency obtains money damages or other relief for the discharged employee. Unlike under the United Kingdom’s Unfair Dismissal Law, 49 however, and as will be discussed

45. See infra notes 76-78 and accompanying text.
46. See infra chart accompanying note 52.
47. Id.
further below, awards of money damages are relatively rare in the context of the LMS operation.

Of course, in about fifty percent of the pursued cases, LMS does not secure a modification. That does not mean, however, that LMS fails in such cases. In only about half of the unmodified cases is there a complete stalemate, that is LMS cannot obtain any modification of the employer position. In the other half of such “unsuccessful” cases, the LMS engages in what it terms “positive referral counseling.” This involves a determination by the agency that, while the case is technically within its jurisdiction, the case would be better handled by an attorney or by another agency of government. In such instances, LMS conciliators meet with and counsel the complainant regarding the agency’s posture towards the case and arrange for referral of the case to what is perceived to be a more appropriate entity or individual. No data is currently available regarding the later disposition of cases in which “positive referral counseling” is made by LMS.

In sum, each year literally thousands of South Carolinians turn to LMS when they feel they have been discharged unjustly from their jobs. The agency initially screens these cases for jurisdiction. Thereafter, the staff contacts the employer to discuss the complainant’s case. Ultimately, the agency achieves a positive consensual modification of the terms of the discharge in many of these cases. In all, the system resolves effectively a large number of employee complaints.

50. A number of factors likely enter into these determinations, such as the ability of the complainant to afford outside counsel, and so forth.

51. If data, for example, were to show that little happened to such cases once they were so referred, the agency might well be more reluctant to make such referrals.
C. *Demographic and Background Analysis of LMS Complaints and Complainants*

LMS, perhaps due in part to its lack of explicit statutory authority, has maintained a distinctly low profile since its inception in 1973. Indeed, the agency has been, in many respects, a word-of-mouth operation. A large number of South Carolinians are completely unaware of the agency's existence and function. In a 1980 independent survey of South Carolina households participating in a University of South Carolina consumer panel, not one respondent mentioned LMS when asked "where would you go to complain if unjustly discharged."  

---

52. These figures are approximations based on multiple data sources. See supra text accompanying notes 36-37.

53. See Youngblood, DeNisi, Molleyesb & Mobley, *The Impact of Work Environment, In-
The absence of widespread knowledge about LMS's operation and the agency's lack of regional offices apparently affect the demographic composition of those filing complaints with the agency. The largest number of complaints filed with the agency come from Richland and Lexington Counties, the counties encompassing the state capital and LMS's headquarters. The number of complaints from this area exceeds by a large measure those received from equally or more industrialized areas in the state.  

Furthermore, the LMS program draws a distinctive mix of clients in terms of their race, age, sex, and occupation. In various respects, the demographic composition of those filing complaints with the agency differs from the demographic composition of the South Carolina workforce as a whole. For example, relatively few professional workers, technical workers, managers, administrators, or salespersons use LMS's services. These demographics might reflect either a relative lack of knowledge about LMS's activities on the part of such employees, greater alternatives for those workers to challenge their dismissal, fewer dismissals of such employees, or some other factor.

The screening process itself influences the composition of the client group. Of those individuals filing an initial complaint with the agency, fifty-one percent are males, fifty-four percent are whites and fifty-nine percent are under thirty-five years of age. In terms of individuals whose complaints are found to be within the agency's jurisdiction and subject to further investigation, however, fifty-six percent are males, sixty-three percent are white, and sixty-nine percent are under thirty-five years of age. These percentages appear to reflect the LMS determination that certain groups can find protection by alternative means, for example, under Title VII of the Civil Rights Act and other statutes. As discussed earlier, LMS refers dispute involving discrimina-

---

Finally, there are some limited data available regarding the types of discharges involved in complaints filed with LMS and found to be within the agency's jurisdiction. The largest number of such complaints, approximately twenty-two percent, involve discharges based on employee absenteeism or lack of punctuality. Excessive absenteeism on the part of the employee is by far the most frequent cause of such discharges, although unauthorized tardiness and leaving work early also account for a significant number of job terminations.

The second largest number of complaints investigated by LMS, approximately seventeen percent, involve discharges based on personal misconduct by the employee. In this category, bad attitude or conduct, insubordination, fighting, lack of cooperation with fellow employees or supervisors, and refusal to comply with job duties or transfer are the most frequent reasons for discharge.

Disputes involving discharges based on inadequate performance of work rank next, constituting approximately sixteen percent of the complaints found to be within LMS's jurisdiction. Within this category, discharges for poor quality or low quantity of work are most common, followed by terminations made because of inability or failure to perform the job. Significant numbers of complaints are also filed with the agency based on discharges due to employee violations of company rules, or other rules, and because of employee layoffs due to lowered company manpower needs.

To date, there has been no examination of the correlation between type of discharge involved and type of outcome achieved as decided upon by LMS. Nor has there been any study of the relationship between types of discharges involved in LMS complaints and types of discharges involved in cases taken to arbitration under various types of collective bargaining contracts. Both of these topics appear to be fertile ones for future research.

60. See infra note 61 and accompanying chart.
Chart II

*Demographic and Background Analysis of LMS Complaints and Complainants*  

I. Complainants By County/Counties
   
   25% - Richland/Lexington Counties (encompassing metropolitan Columbia)
   15% - Spartansburg/Greenville Counties (textile center)
   6% - York County (textile center)
   5% - Charleston County (encompassing metropolitan Charleston)
   49% - Other South Carolina Counties

II. Complainants By Occupation
   
   22% - Operatives
   15% - Craftspersons
   13% - Clerical workers
   13% - Service workers
   9% - Managers and administrators
   7% - Laborers
   6% - Transportation workers
   4% - Professional and technical workers
   3% - Sales workers
   8% - Others

III. Complainants by Race, Sex and Age

   - Filing initial complaints: 54% white
     51% male
     59% under age 35
   - Filing complaints found to be within agency’s jurisdiction:
     63% white
     56% male
     69% under age 35

IV. Types of Discharges Involved In Complaints Found To Be Within Agency’s Jurisdiction.

   22% - discharge based on employee absenteeism or lack of punctuality
   17% - discharge based on personal misconduct by employee
   16% - discharge based on poor employee work performance
   9% - discharge based on employee violation of company or other rules
   6% - discharge due to lay off, i.e., lack of manpower needs
   30% - other bases for termination

---

61. These figures are approximations based on multiple data sources. *See supra* text accompanying notes 36-37.
IV

MERITS, PROBLEMS AND PROMISE OF LMS APPROACH AND COMPARISON TO PROPOSED LEGISLATION

Achievements and Merits of the LMS Approach

As noted above, LMS has been remarkably successful in mediating and conciliating “unjust dismissal” cases in the state of South Carolina. With relatively few resources, LMS effectively processes a large volume of complaints. At the very least LMS has provided an avenue of recourse to literally thousands of employees with nowhere else to turn\(^{62}\) when faced with what they perceive to be an unmerited discharge from their job.\(^{63}\)

Analysis of the demographic composition of LMS complainants, particularly those whose complaints are accepted for further investigation by the agency, demonstrates that the agency is meeting an important and generally unsatisfied need. Discharged employees, whose complaints are accepted for further investigation by the agency, are mostly young, nonprofessional, white males. Such individuals may be wary of litigation and concerned about its expense.\(^{64}\) Similar concerns may exist among such individuals even in states where the courts have established more hospitable and clear-cut causes-of-action against “unjust dismissal” than has South Carolina,\(^{65}\) where such states do not afford statutory protections against unfair treatment in employment to the degree afforded members of other groups.\(^{66}\) For these individuals, LMS offers a review of the merits of their discharge that they, in all likelihood, would never otherwise receive.

The achievements of LMS prompt one to question the reasons for the agency’s success. The answer appears to center, in part, on the “global,” voluntary grievance mediation approach the agency takes.

---

64. *See note,* Protecting At Will Employees, *supra* note 4, at 1942-45.
65. In 1979 the South Carolina Supreme Court reaffirmed the traditional rule that employment is terminable at will in the case of Ross v. Life Ins. Co., 273 S.C. 764, 259 S.E.2d 814 (1979). However, in 1981, this same court, in the case of Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981), in a suit asserting a tort of bad faith termination, refused to uphold a demurrer by the defendant made on the grounds that South Carolina did not recognize such an action. Consequently, it appears that the South Carolina Supreme Court had left the door open to possible court challenges to the “at will” doctrine in that state. *See Annual Survey of South Carolina Law,* S.C.L. REV. 240-43 (1982). Other state courts have established far broader and more clear-cut causes of action. *See generally* Catler, *supra* note 28, at 478-483.
66. These individuals are not protected under the myriad of statutes barring discrimination in employment on the basis of age, race, sex, national origin, religion, handicap, etc. *See generally* J. FRIEDMAN & G. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION (1983).
Like other forms of grievance conciliation, LMS's mediatory approach is informal, easily accessible, quick and inexpensive.\textsuperscript{67} Perhaps even more significant, though, the process is entirely voluntary. Employers who dislike the thought of having a third party arbitrator making a binding decision respecting their workforce should have no objection to the LMS approach. Employers are not bound to take any remedial action without their full consent.

Furthermore, the LMS staff, and particularly its administrators, enjoy a high degree of credibility.\textsuperscript{68} That fact appears to have enhanced the ability of the agency to obtain meaningful relief for those filing complaints with it.

The emphasis on a voluntary effort is combined with a "global" approach by the agency. LMS places primary emphasis on reengagement, or getting the employee back into the general workforce, rather than solely on reinstating the employee. Under this "global" approach, which is somewhat similar to that taken by the United Kingdom's Advisory, Conciliation and Arbitration Service ("ACAS") pursuant to that country's Unfair Dismissal Law,\textsuperscript{69} the agency seeks the cooperation of the employer simply in getting the employee back to work. Appeals are made to the employer from both an economic perspective, in terms of the benefit to the state's economy in having individuals gainfully employed and the drain on state welfare and other resources in having people unemployed, as well as from a more moral and religious perspective, in terms of being charitable to one's fellow human beings.\textsuperscript{70} The agency clearly operates under the notion that "good references," "cleared records," "positive referral counseling" and, in some limited instances, money damages, can be very helpful in facilitating the employee's re-entry into the workplace.

Notwithstanding the agency's clear emphasis on reengagement, as opposed to reinstatement, LMS has been successful in getting discharged employees reinstated. Indeed, the reinstatement rate achieved by LMS in cases which it vigorously mediates/conciliates compares roughly with the rate of reinstatement achieved by employees in cases


\textsuperscript{68} The state's Commissioner of Labor and LMS Director have both been in office continually since the inception of LMS.


\textsuperscript{70} The appeal of LMS is thus twofold: the "economic man" appeal is such that the return of the employee to the workforce will reduce costs to the government and employer; the "moral man" appeal is made to the employer's sense of good faith and fair dealing as illustrated in the religious training of the managers who represent the employer.
taken to arbitration under union-management collective bargaining contracts.\footnote{Based on conservative estimates, employees achieve reinstatement in over twenty percent of the cases vigorously mediated by LMS. See supra Chart accompanying note 52. Although only a few studies have examined the outcome of arbitration in discharge cases, and generally the discharge cases examined are not representative of the entire set of discharge cases, an upper bond estimate is that arbitrators overturn management discharge decisions in approximately 50% of the cases. See Holly, The Arbitration of Discharge Cases: A Case Study, 10 Nat’l Acad. of Arb. Proc. 16 (1957); Jennings & Walters, Discharge Cases Reconsidered, 31 Arb. J. 164, 166 (1976). Other estimates, however, have been considerably more conservative. See Protecting Unorganized Employees Against Unjust Discharge, Mich. St. Conf. 2 (J. Stieber & J. Blackburn eds. 1983) (statement of Robert Coulson, President, American Arbitration Association, estimating that one out of three discharge grievance cases appealed to arbitration ends up in reinstatement). See generally Labor Letter, Wall St. J., Feb. 7, 1984 (citing American Arbitration Association Study of a random sampling of 1789 arbitration cases in which unions won 29% of the cases, and won partial victories in 18% of the matters).}

Moreover, it appears that in all cases where LMS has been able to arrange the employee’s reinstatement, the employee has accepted this reinstatement.\footnote{No instance of employee refusal to accept reinstatement was found in any of the multiple sources of data researched and used.} This conclusion differs considerably from that of several studies which have shown that significant numbers of employees reinstated to their former positions by arbitrators nevertheless refuse to exercise their right to return to their former job in arbitration cases conducted pursuant to established collective bargaining contracts.\footnote{See G. Adams, Grievance Arbitration of Discharge Cases 41 (1978); Holly, supra note 63.} This seems to support the proposition that, in dismissal disputes, as one commentator has noted, employment ties may be more easily reconstituted “if the parties are able to create their own solution than if they are forced to submit to a remedy imposed by a third party at the conclusion of adversarial proceedings.”\footnote{See Note, Reforming At-Will Employment Law: A Model Statute, 16 U. Mich. J.L. Ref. 389, 406 (1983).} In any event, it cannot be denied that LMS’s unique mediatory/conciliatory approach to “unjust discharge” cases has had a distinctly positive effect on getting significant numbers of employees reinstated and, even more importantly, on generally assisting employees to re-enter the workforce.

\textbf{B. Problems and Weaknesses of LMS}

The one major and obvious weakness of the LMS approach is that it lacks teeth. If an employee is clearly discharged wrongfully, for example, LMS cannot order remedial action. Faced with a recalcitrant employer, the agency is essentially powerless.

The Service’s primary tool is simply moral suasion. This tool has been used very successfully by LMS particularly in cases which represent the first time the agency has ever contacted a given employer on a
discharged employee's behalf. (Very preliminary analysis of an in-depth sampling of fiscal year 1981 LMS cases interestingly reveals, however, that for employers contacted more frequently by LMS involving multiple cases of discharge the agency becomes less successful in obtaining reinstatement.) Perhaps, however, employers formally contacted for the first time by the South Carolina Department of Labor, Labor Management Services Division mistakenly overestimate the power which the agency possesses. If so, the LMS program may prove less effective with more sophisticated or experienced employers. In addition, it is unclear whether LMS’s “moral suasion” approach would work as well as it does in South Carolina, in larger, more cosmopolitan and less religiously oriented states.

From a technical perspective, one of the greatest problems of LMS, as presently constituted, is that it is essentially a “seat of the pants” operation. While the agency’s informal nature has likely contributed to its success in many cases, this informality has, it can be argued, sharply impeded fair treatment and positive results in many others.

For one, the agency which operates “sub rosa” and without any direct statutory mandate, has no established procedural rules. While the agency does not investigate cases involving “probationary employees,” for example, treating such cases as outside its jurisdiction, the agency has adopted no clear standards defining precisely who is a “probationary employee.” Instead, it appears that the agency simply accepts the given employer’s definition of probationary status, even though the agency has never clearly articulated that the use of the employer’s definition is the proper standard.

Perhaps even more significant, the agency has established no procedural guidelines regarding whether or not the agency will vigorously pursue mediation and conciliation in cases found to be within LMS’s jurisdiction. Given the agency’s high rate of success in obtaining some modification of the employer’s position in cases it does decide to concil-

75. Personal communication from Dr. Joseph Ullman of the College of Business Administration, University of South Carolina. Dr. Ullman sampled LMS cases of discharge from fiscal year 1981 for employers who had two or more contacts with LMS. His preliminary analysis reveals that for this group the reinstatement remedy was obtained less frequently.

76. The South Carolina Commissioner of Labor has the power to promulgate regulations necessary to carry out the work of the department. S.C. Code Ann. § 41-3-40 (Law. Co-op 1976). Such regulations would be promulgated pursuant to the South Carolina Administrative Procedures Act. Id. § 1-23-10. One major problem with the promulgation of such formal regulations, though, is that they can only achieve final status if approved by both houses of the South Carolina Legislature. Id. § 1-23-120. Given the absence of direct statutory authority for LMS, achievement of legislative approval of such formal rules or regulations might, however, be very difficult to accomplish. Adoption by the agency of more specific internal procedures might be a reasonable alternative.
This is an extremely critical juncture. Nevertheless, determinations of whether to proceed with mediatory efforts in a given case appear to be made on an “ad hoc” basis by the agency’s six full-time conciliators/mediators, without the benefit of any uniform standards. Further, complainants appear to have no right of appeal from an agency staff member’s decision not to pursue actively a mediatory resolution of the case. This differs markedly from the roughly analogous model of the National Labor Relations Board (“NLRB”) where refusals by an NLRB regional office to pursue further an unfair labor practice charge, i.e., issue a formal “complaint” in the case, are directly appealable to the NLRB’s General Counsel based in Washington, D.C.78

Finally, LMS, until 1983, had not kept precise records on the outcome of cases it handles. In addition, the agency has been unable to conduct follow-up research regarding its cases. There is absolutely no evidence regarding the eventual outcome of cases where the agency engages in “positive referral counseling” or whether such referrals are indeed having a “positive” effect. While the absence of such data provides scholars with a wealth of potential research studies, it, at least presently, throws into question the long-term effectiveness of many of the agency’s activities.

C. Comparison of LMS Approach To Current Proposed Legislation

I. Proposed Legislation

Having analyzed some of the problems and weaknesses of the LMS approach, it is worthwhile to examine some of the recent legislative proposals in the “employment-at-will” area and the extent to which these proposals incorporate positive and/or negative aspects of the LMS model. Of particular interest are bills currently being considered in the California79 and Michigan80 legislatures.

a. Proposed California Legislation

The California proposal, Assembly Bill No. 3017, was introduced in the California Legislature on February 14, 1984 and is an outgrowth of a report issued February 8, 1983 by an “Adhoc Committee on Termination at Will and Wrongful Discharge,” of the State Bar of California.81 The bar committee called for legislation providing “just cause”

77. See supra notes 45-52 and accompanying text and chart.
81. See To Strike A New Balance, A Report of the Adhoc Committee on Termination at Will and Wrongful Discharge, Appointed by the Labor and Employment Law Section of the State Bar
discharge protection for all California private sector employees and grievance procedures culminating in binding third-party arbitration.\textsuperscript{82} Assembly Bill No. 3017 follows essentially the bar committee's recommendation in this regard.\textsuperscript{83}

Under the proposed California legislation, employees who contend they have been discharged by private employers (defined as persons employing fifteen or more employees) without "just cause" would be able to file a claim of wrongful discharge with the California State Mediation and Conciliation Service\textsuperscript{84} within one year of the discharge.\textsuperscript{85} Within ten days after the employee's filing of the claim, both the employee and the employer charged with wrongful discharge would be required to deposit $500 with the Conciliation Service for the costs of resolving the dispute.\textsuperscript{86} Within thirty days after the initial filing of the claim, the employer would be required to file an answer to the employee's charge of wrongful discharge, setting forth the reasons for the discharge.\textsuperscript{87}

After the Conciliation Service receives the employer's response to the employee's charge, the Conciliation Service would be required, under the proposed legislation, to appoint a mediator "who shall attempt to facilitate discovery and exchange of information, and to bring about a settlement by resolving the differences between the parties."\textsuperscript{88} The mediator would be able to issue subpoenas for purposes of discovery, but would not be permitted to take depositions or issue interrogatories.\textsuperscript{89}

The proposed California bill provides that the mediator is to have \textit{fifteen days}, following the filing of the employer's answer, to attempt to resolve the parties' differences and to seek a voluntary settlement through conciliation.\textsuperscript{90} If settlement is not achieved within fifteen days, the Conciliation Service would certify that the dispute could not be resolved through mediation, and would forward the case for binding final resolution by a third party arbitrator who would possess broad remedial powers.\textsuperscript{91} Arbitration awards would, absent "fraud or corruption," be enforceable in state courts.\textsuperscript{92} Finally, the proposed Cali-
California legislation would specifically repeal section 2992 of the current California Labor Code which statutorily codifies the doctrine of "employment-at-will."

b. Proposed Michigan Legislation

In Michigan, State Representative Perry Bullard and others introduced, on December 1, 1983, House Bill No. 5155 to be known and cited as the "Michigan unjust discharge act." The proposed Michigan legislation clearly states that employers (defined as persons/organizations with ten or more employees) shall not discharge employees except for "just cause," and is similar, in general respects, to the proposed California legislation.

Under the proposed Michigan bill, an employer who discharges an employee would be required to notify the employee orally at the time of discharge, and in writing, by registered mail, within fifteen days after the discharge, of all the reasons for the discharge. The employer also would be required to appraise the discharged employee of the employee's right, under the proposed statute, ultimately to have the merits of the discharge reviewed by an impartial third party arbitrator.

After receiving the employer's written notification and explanation of his/her discharge, the employee would have thirty days to file a formal complaint under the act if he/she feels the discharge was "unjust." Complaints would be filed with the Michigan Employment Relations Commission (MERC). Upon receipt of the employee's complaint, MERC immediately would appoint a mediator "to assist the employer and the discharged employee in attempting to resolve their dispute."

If the dispute is not resolved within thirty calendar days after the commencement of mediation, the proposed legislation would require the mediator to explain to the parties the process of binding and final arbitration and the discharged employee's right under the statute to have the merits of the discharge reviewed by an arbitrator. The proposed legislation also provides, however, that the discharged employee, after being so informed, would have the option either of filing a written request with MERC for arbitration of the dispute or of requesting con-

93. Id. § 2.
94. H.B. 5155, § 1.
95. Id. § 3(1).
96. Id. § 3(2).
97. Id.
98. Id. § 4(1).
99. MICH Co-op LAWS ANN. § 423.3-7(a) (1978).
100. H.B. 5155, supra note 80.
101. Id. § 5(2).
tinuance of mediation if the employee believes that "a mutual resolution of the dispute is possible." The employer and employee would be required to share equally the costs of arbitration, if conducted, and arbitrators would have broad remedial powers. The proposed bill specifies that if the parties settle their dispute during the course of the arbitration proceeding, the arbitrator would be able to set forth the terms of their agreement in his/her arbitration award. Arbitration awards would be enforceable in state court.

2. Analysis of Proposed Legislation and the Special Promise of the LMS Approach

Unlike some scholarly, statutory and other proposals in this area, both the proposed California and Michigan bills do incorporate mediation as a step in the resolution of "unjust discharge" disputes. Nevertheless, the basic thrust of both proposals would not be the voluntary resolution of such disputes. By statutorily outlawing employee discharges which are not made for "just cause," and mandating binding third party arbitration as a final step for resolving such discharges, such legislation would have considerably more teeth than the LMS system which involves mediating employee discharge disputes under the guise of the state labor commissioner's power to conciliate labor conflicts. Both pieces of proposed legislation also contain explicit procedural guidelines for the handling of such cases, in stark contrast to LMS's relative lack of administrative regulation.

The extent to which third party arbitration can be successful in providing meaningful resolution of "unjust discharge" disputes in the non-unionized sector is questionable, as discussed above. Given LMS's success in mediating such disputes, it would seem that any proposed legislation in this area should strongly emphasize the use of mediation in resolving such conflicts. In this regard, the proposed Michigan bill appears to offer considerably more promise than the proposed legislation in California. The Michigan bill, for example, provides for up to thirty calendar days of mediation, as opposed to fifteen days under the California proposal. In addition, the discharged employee is given the option, under the Michigan bill, to request a continuance of mediation even after thirty days have passed if the employee feels that

102. Id. § 5(3).
103. Id. § 7(1).
104. Id. § 10(2).
105. Id. § 10(3).
106. See, e.g., Blumrosen, supra note 21.
107. See supra notes 76-78 and accompanying text.
108. See supra notes 24-31 and accompanying text.
further mediation would be useful in seeking a mutual resolution of the
dispute. This contrasts sharply with the proposed California legisla-
tion under which the state Conciliation Service would summarily cer-
tify, after mediation has been conducted for fifteen days, that the case
cannot be resolved through mediation and directly submit the case for
final resolution by a third-party arbitrator.

Another positive element in the proposed Michigan bill, which is
absent from the California bill, is the provision allowing an arbitrator
to make use of employer/employee efforts to settle the dispute under-
taken during the arbitration proceedings. It would seem that efforts
toward voluntary and mutual resolution of the dispute should be en-
couraged, even after arbitration proceedings have commenced, and
such language in the proposed Michigan statute represents a positive
step in this direction.

Finally, a major apparent weakness in the proposed California
legislation is the bill’s requirement that within ten days after the initial
“unjust discharge” claim is filed by the employee, both employees and
employers must file a deposit of $500 each with the Conciliation Ser-
vice for the costs of resolving the dispute. While there may well be
some merit in assessing parties some fee to help offset the Conciliation
Service’s costs in mediating the dispute, an upfront fee of $500 seems
rather steep and might discourage use of the process and/or create ani-
mosity towards it. A better approach would seem to be to assess, at
most, a rather small upfront fee in the hope that the dispute will be
resolved quickly by means of mediation/conciliation. Then, if media-
tion turns out to be unsuccessful, an approach similar to that of the
proposed Michigan bill calling for equal sharing of costs might be
viable. Such an approach would also have the advantage of giving the
parties some monetary incentive to voluntarily settle the dispute.

In sum, LMS’s success in mediating “at will” discharge disputes
argues forcefully for the inclusion of strong mediation provisions in any
potential legislation in this area. In this regard, the proposed Michigan
legislation is much more promising than that currently being consid-
ered in California. In particular, the proposed Michigan bill allots
more time for initial mediatory intervention, provides the aggrieved
party with the opportunity for extending the mediation process, and

110. See H.B. 5155 § 5(3).
111. See A.B. 3017 § 2882(a) (amended May 3, 1984).
112. See H.B. 5155, § 10(3).
114. See infra notes 154-56 and accompanying text.
115. This may be particularly true for non-professional/managerial workers who are less
likely to have large capital resources. See generally 1983 Harvard Note, supra note 4, at 1943.
116. See H.B. 5155 § 7(1).
does not include potential monetary disincentives for use of mediation of the kind contained in its California counterpart.

The most critical weakness of both bills, however, appears to lie not with questions regarding the substantive merit of submitting "at will" disputes to binding third party arbitration, but rather with the fact that, presently, hope for legislative adoption of such an approach is probably not politically realistic. In a sense, a somewhat paradoxical situation has developed. The current attacks on "employment-at-will" being conducted in the courts arguably have evolved into something akin to "Russian roulette." Although few individuals actually win such cases, those who do, win big!! Indeed, a recent study of California court challenges to the "at will" doctrine found successful plaintiffs receiving median awards of $548,000. As a result, and as Professor Clyde W. Summers has insightfully noted, considerable incentive exists for employers to seek enactment of statutory proposals with simple procedures and remedies to replace the present adjuditatory system which is marked by uncertainty and high litigation costs.

On the other hand, legally overruling the "at will" doctrine and having allegations of "unjust discharge" submitted for binding resolution to outside third party arbitrators appears presently to be just a bit too much for a good number of American employers to handle. For example, responding to recent article about the proposed Michigan legislation, one businessperson stated:

"[t]he day I lose the right to fire any one or all of my employees is the day I will close forever the door on this 73-year-old, third-generation retail store.

How about a law that protects employers from employees that quit to work for a competitor? How about my rights to operate my business as I deem necessary to turn a profit?

Other management representatives have, albeit somewhat less stridently, echoed similar themes. Commenting on the Michigan proposal, Daniel Solin, a New York management labor attorney, stated that it would "add costs and procedures which are going to further hamper the effective functioning of corporations." The minority members of the California State Bar "At Will" Termination Committee filed a separate report writing that while they perceived a clear need to clarify and limit existing California "at will" judicial decisions, there was no reason to

---

120. Let's Keep The Right To Fire, Bus. Week, April 9, 1984, at 9.
go so far as to establish “just cause” protection culminating in binding third party arbitration for all private sector employees. The Committee’s minority members stated that legislation calling for such all-encompassing “just cause” protection likely would be opposed not only by employers, but by unions as well.

In this context, the special promise of the LMS approach is startlingly clear. LMS, whatever its shortcomings, has been remarkably successful in obtaining positive solutions in numerous “unjust dismissal” cases, a success which reinforces data from West Germany and Great Britain regarding the general effectiveness of mediatory/conciliatory techniques in resolving “at will” disputes. In addition, it is unlikely that a voluntary LMS-type mediation approach, if instituted elsewhere, would be strongly opposed by any major interest group. Finally, and as will be developed below, implementation of such an approach in other states would, in many instances, require no new major legislation and, in some cases, perhaps no new legislation at all. Thus, there may be considerable merit in looking to the LMS mediatory approach as a politically viable model for states to adopt in taking a first step in addressing the “at will” problem.

V

POTENTIAL FOR IMPLEMENTATION OF LMS MODEL IN OTHER JURISDICTIONS

One of the distinct beauties of the LMS mediation approach in terms of possible implementation in other states is that, in many instances, the statutory framework for such implementation already exists. A number of states already have statutes similar to the one in South Carolina giving broad powers to the state commissioner of labor to mediate/conciliate labor disputes. A statutory provision in the laws of the state of Louisiana, for example, provides that the state labor commissioner shall “[d]o all in his power to promote the voluntary conciliation of disputes between employers and employees to avoid the necessity of resorting to discriminations and legal proceedings in employment.” The Louisiana statute also requires the state labor commissioner to designate a deputy to execute the above provisions.

123. Id. at 2.
125. See supra notes 24-31 and accompanying text (discussing possible objections of unions, employers and individual employees to use of arbitration model).
126. See infra notes 127-46 and accompanying text.
129. Id.
Powers almost identical to the ones outlined above are given to the state labor commissioner in Georgia. A variety of other states including Alaska, Alabama and Idaho specifically grant to their state labor commissioner or similar official the power to mediate/conciliate industrial or labor "disputes."

Other states have already gone somewhat further, having established either within the state department of labor or on an independent basis boards, commissions, or services whose role is to mediate private sector labor disputes. Thus, the proposed California "employment-at-will" legislation would grant to the California State Mediation and Conciliation Service mediation and arbitration powers. This Service, which was established in 1978 and is technically a part of the state's Department of Industrial Relations, is already statutorily empowered to "investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention." Similarly, the proposed Michigan legislation would entrust such powers to the currently existing Michigan Employment Relations Commission (MERC), which has independent statutory authority to exercise a mediatory function in enforcing various existing Michigan labor statutes.

Other states that have already established state mediation boards, services, or commissions include Connecticut, Massachusetts, Minnesota, New Jersey, and New York.

Given the above, the implementation of a program for mediating private sector employee discharge disputes, modelled along the lines of that currently being conducted in South Carolina by LMS, would, in a number of states, be a relatively easy matter. Laws establishing state mediation boards for private sector disputes could simply be amended and amplified to specify that the term "disputes" includes employee discharges. If necessary, language of a kind that would establish clear agency jurisdiction over such industrial conflicts, while leaving the given mediation board considerable flexibility in determining precisely how to go about resolving individual cases, could be added to the perti-

131. Alaska Stat. § 23.05.060(2) (1972).
ent statutes. For example, such boards could be required by statute to vigorously pursue conciliatory efforts "where a bona fide dispute regarding the discharge existed," or "where some possibility of working out the problem was feasible." In some cases, it might simply be enough to give the relevant mediation agency statutory jurisdiction over such disputes and to let the agency process such cases under existing administrative rules.

A similar approach could be taken easily in states where the state labor commissioner has been granted broad powers to mediate "labor disputes," even in the absence of a formal state mediation board or agency. Again, in such states, the term "disputes" could simply be clarified so as to include instances of private sector employee discharge. Indeed, in some such states, it seems at least questionable whether any clarifications or amendments to existing statutes are even necessary. In both Louisiana and Georgia, for example, the state labor commissioners' power to promote voluntary mediation/conciliation of employer/employee disputes so as to avoid "legal proceedings" would seem already broad enough to encompass allegations of unfair discharge or termination. Certainly the absence of mediation in such cases might well lead to future "legal proceedings," and the commissioners in these states may, thus, already have statutory authority to institute mediation programs modelled after South Carolina's LMS. In fact, it could be argued that a discharged employee for whom the Louisiana and/or Georgia labor departments refused mediatory intervention, would be able to state a legal claim based on existing legislation.

In any event, it appears that, in many states, a program of mediating employee discharge disputes could easily be implemented, given minor amendments, within an existing statutory framework. In addition, it seems unlikely that unions, employers or individual employees would raise any serious objections to such a program. Further, it is highly unlikely that existing state mediation boards or state labor departments would object to programs which would expand their staffs, budgetary allocations and power.

The only major stumbling block to the establishment of such programs in other states would appear to be their potential cost. It costs

---

143. The authors thank Professor Clyde W. Summers of the University of Pennsylvania Law School for his insights on this point.

144. See, e.g., Rules of Michigan Employment Relations Commission, reprinted in LAB. REL. REP. (BNA), State Laws SLL 32:256(a)-262(b).

145. See, e.g., supra note 128 and accompanying text.

146. To the authors' knowledge, however, no such case has, in either state, been brought to date.

147. See generally W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).
nearly $300,000 a year to run a low-visibility operation in South Carolina, and implementation of similar, but more visible program in larger states, such as California and New York, could cost a million dollars each year or more.¹⁴⁸

Nevertheless, in terms of cost-benefit analysis,¹⁴⁹ the establishment of such program might be a very worthwhile investment. Not only might such programs help reduce unemployment compensation expenditures and generally help promote the existence of a more harmonious and productive workforce,¹⁵⁰ but they would also help keep cases out of state court.

In recent years increased attention has been focused on the overcrowding and overburdening of our judicial system. Each year over thirteen million civil suits are filed in the various state courts.¹⁵¹ In the recent case of Southland Corp. v. Keating¹⁵² the U.S. Supreme Court recognized the massive civil litigation burden facing the state courts, and the need for use of alternative methods of dispute resolution, such as mediation, which might enable cases to be resolved outside the courthouse.¹⁵³ Thus, to the extent LMS-type mediation programs are able to reduce litigation and the consequent need for increased governmental expenditures on judicial resources, the true costs of such programs will be lower than might appear on first impression.

Further, it would certainly be possible to partially offset costs for such programs by charging a small filing fee of employees seeking state mediatory intervention with respect to their discharges.¹⁵⁴ The $500 deposit required of both employer and employee before mediation is to commence under the proposed California legislation seems extremely unrealistic and likely to have a chilling effect on the use of the program.¹⁵⁵ On the other hand, since 1979, parties using the services of the Connecticut Board of Mediation and Arbitration have, for example,

¹⁴⁸ Mediators in South Carolina earn approximately $20,000 per year. Telephone Interview, Margaret Potashnick, South Carolina LMS, April 9, 1984. Individuals working as mediators in more urbanized states would probably have to be paid more. In addition, such cases would likely have to employ a considerably larger staff.


¹⁵⁰ See generally supra notes 62-73 and accompanying text.


¹⁵² Id.


¹⁵⁴ Such a small fee might also have the advantage of discouraging frivolous use of the program.

¹⁵⁵ See generally supra notes 114-16 and accompanying text.
been required to pay filing fees of twenty five dollars each. A fee of this denomination seems quite reasonable, and would help offset program expenses while probably not discouraging program use.

Finally, other sources of funds may be available for financing programs of this kind, particularly in their initial stages. In Texas, for example, the state legislature, in an effort to encourage the use of alternative methods of resolving legal disputes, recently enacted legislation giving the county governments in the state permissive authority to levy a surcharge on county court filing fees and to use such funds to establish alternative dispute resolutions programs. In addition, various philanthropic organizations may have some interest in providing partial support for such programs in their developmental stages.

Thus, in sum, it appears that the potential for implementation of LMS-type mediation programs in other states is great. Indeed, in a variety of states, the necessary statutory authority already exists. Further, it seems that such programs can be instituted without placing a significant net financial drain on state and/or local governments.

VI
SUMMARY AND CONCLUSION

The vast majority of American employees continue to be employees "at will." They can be fired at any time and for any reason.

In recent years, however, the "at will" employment rule has come under increasing criticism as being unsuited to modern economic realities. Finding workable solutions to the problem of "at will" employment, though, has proven difficult.

The State of South Carolina, however, has embarked on a novel and creative approach to the issue. The State's Department of Labor through its Labor Management Services Division engages in the mediation of "at will" employee discharge cases.

The agency's successful resolution of a high volume of cases, particularly in the context of its extremely low profile, speaks well for the viability and potential of the LMS approach as a model for other jurisdictions. The potential for implementation of the LMS approach in other states is further enhanced by the fact that, in a number of such states, the statutory framework for implementation already exists. Thus, in formulating a comprehensive solution to the "at will" prob-

---

158. One such organization might be the recently established National Institute for Dispute Resolution set up with money from five foundations. One of the Institute's missions is to support projects which develop alternative ways of dealing with disputes. See New Ways to Cut Legal Costs, Dun's Bus. Monthly, February 1984, at 63, 65.
lem, the South Carolina experiment is one which should be studied, and closely.