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Midgett v. Sackett-Chicago, Inc.: A Union Employee's Modern Day Giant against Retaliatory Discharge, 19 J. Marshall L. Rev. 147 (1985)

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MIDGETT v. SACKETT-CHICAGO, INC.:* A UNION EMPLOYEE'S MODERN DAY GIANT AGAINST RETALIATORY DISCHARGE

The Illinois Supreme Court recently recognized the tort of retaliatory discharge[1] to prevent employers from discharging employees in contravention of public policy.[2] Considerable disagreement had developed in the Illinois appellate courts regarding the tort's applicability to a union employee covered by a collective bargaining agreement.[3] In *Midgett v. Sackett-Chicago, Inc.*,[4] the Illinois Su-

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* Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 105 S. Ct. 3513 (1985).

1. *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The *Kelsay* court recognized a cause of action against an employer who terminated an at-will employee for filing a workers' compensation claim. For discussion of *Kelsay*, see *infra* note 18. For a general discussion of *Kelsay*, see Comment, *Kelsay v. Motorola, Inc.-A Remedy for the Abusively Discharged At-Will Employee*, 1979 S. ILL. L.J. 563 (discussing need to expand retaliatory discharge action to areas of public policy unrelated to workers' compensation); Note, *Tort Remedy for Retaliatory Discharge: Illinois Workmen's Compensation Act Limits Employer's Power to Discharge Employees Terminable-At-Will—Kelsay v. Motorola, Inc.*, 29 DEPAUL L. REV. 561 (1979)(criticizing the adoption of the tort of retaliatory discharge); Note, *Kelsay v. Motorola, Inc.: Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims*, 12 J. MAR. J. PRAC. & PROC. 659 (1979)(tort of retaliatory discharge creates a more equitable balance in the employment relationship); Note, *Kelsay v. Motorola, Inc.—Illinois Courts Welcome Retaliatory Discharge Suits Under The Workmen's Compensation Act*, 1980 U. ILL. L.F. 840 (tort of retaliatory discharge necessary to protect public policy).

2. Some jurisdictions limit the tort to cases in which the discharge violates a legislatively defined expression of public policy. *See, e.g.*, Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. App. 1980)(no statutory duty imposed on employees to report violations of drug company reporting regulations); Campbell v. Ford Industries, Inc., 274 Or. 243, 546 P.2d 141 (1976)(no cause of action for stockholder-employee discharged for asking to examine corporate records because public policy concerns underlying statutory rights of employees and stockholders are distinct); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974)(no cause of action for employees discharged for reporting product defects because there is no statutory duty to report dangerous products). Other jurisdictions allow a cause of action based upon judicial pronouncement of public policy. *See, e.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981)(cause of action based upon public policy favoring the reporting of crimes); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980)(cause of action is based upon judicial determination of public policy, not a code of ethics that serves only professional interests).

3. Five Illinois Appellate Courts were divided on the issue of whether a union employee, covered by a collective bargaining agreement, must exhaust his contract remedies prior to bringing an action in tort. The Second, Third, Fourth and Fifth Districts held that if a collective bargaining agreement protects an employee, he may not sue in tort for a retaliatory discharge. Mouser v. Granite City Steel Div. of National Steel Corp., 121 Ill. App. 3d 834, 460 N.E.2d 115 (1984)(Fifth District holding that employee covered by a collective bargaining agreement cannot sue his employer

preme Court resolved this conflict. The court held that a union member can maintain a cause of action for retaliatory discharge regardless of whether a collective bargaining agreement governs his employment[5] or whether he exhausted all administrative remedies before filing his tort claim.[6]

On January 31, 1979, Terry Midgett was injured in a job-related accident at Sackett-Chicago[7] and filed a workers' compensation claim.[8] While his claim was pending, Sackett-Chicago discharged him from its employ.[9] Midgett filed an action in tort alleging that Sackett-Chicago discharged him in retaliation for filing the workers' compensation claim.[10] The Circuit Court of Cook County dismissed the complaint for failure to state a cause of action because a collective bargaining agreement which covered Midgett precluded his bringing an action.[11] On Midgett's appeal, the Illinois Appellate Court for the First District reversed,[12] finding that although Midgett was a union member, the strong public policy embodied in the

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in tort); Suddreth v. Caterpillar Tractor Co., 114 Ill. App. 3d 396, 449 N.E.2d 203 (1983)(Second District holding that employee who fails to exhaust grievance procedures cannot sustain a suit directly against his employer); Deatrick v. Funk Seeds Int'l. 109 Ill. App. 3d 998, 441 N.E.2d 669(1982)(Fourth District holding that failure to exhaust grievance procedures precludes filing an action in tort); Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980)(Third District holding that union employee must exhaust his contract remedies prior to bringing a tort action). *See also* Lamb v. Briggs Mfg., 700 F.2d 1092 (7th Cir. 1983)(retaliatory discharge actions available only to at-will employees). Prior to *Midgett*, the First District would have provided a cause of action to a union employee notwithstanding the existence of a collective bargaining agreement. *See* Wyatt v. Jewel Cos., Inc., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982)(First District holding that existence of a union contract remedy does not preclude a tort remedy).

4. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

5. *Id.* at 152, 473 N.E.2d at 1284.

6. *Id.* at 152, 473 N.E.2d at 1285.

7. Midgett injured his back while lifting a heavy steel reel. Affidavit in Support of Plaintiff's Opposition to Motion to Dismiss, Midgett v. Sackett-Chicago, Inc., No. 80-L-30776 (Cir. Ct. Cook County 1980).

8. Workers' Compensation Act, ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (Supp. 1985).

9. *Midgett*, 105 Ill. 2d at 146, 473 N.E.2d at 1282. The letter of termination, dated December 21, 1979, stated that Midgett was terminated for misconduct and insubordination. Affidavit in Support of Plaintiff's Opposition to Motion to Dismiss, Midgett v. Sackett-Chicago, Inc., No. 80-L-30776 (Cir. Ct. Cook County 1980).

10. *Midgett*, 105 Ill. 2d at 146-47, 473 N.E.2d at 1282. Midgett did not file a grievance with his union. *Id.* at 146, 473 N.E.2d at 1282. Rather, Midgett filed a tort action in his own name and on behalf of his wife and minor children. *Id.* The appellate court later dismissed his wife and children as plaintiffs. Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 10, 454 N.E.2d 1092, 1095 (1983), *aff'd*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

11. *Midgett*, 105 Ill. 2d at 146, 473 N.E.2d at 1282. Midgett filed a cross motion in opposition to Sackett's motion to dismiss. The cross motion alleged that the union and Sackett-Chicago had conspired to disallow his filing a grievance for his discharge. *Id.* at 147, 473 N.E.2d at 1282.

12. Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1983), *aff'd*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 105 S. Ct. 3513 (1985).

Workers' Compensation Act demanded protection beyond that provided in his collective bargaining agreement.[13] Sackett-Chicago appealed this appellate court decision.

The Illinois Supreme Court affirmed the appellate court's reversal of the dismissal of Midgett's complaint.[14] In reaching its decision, the court addressed whether a union employee protected by a collective bargaining agreement could bring a cause of action for retaliatory discharge.[15] The court held that a union employee could bring such a suit[16] without first exhausting his contract remedies.[17]

The supreme court began its analysis by examining the guidelines set forth in *Kelsay v. Motorola, Inc.*,[18] where it determined that the heart of the tort of retaliatory discharge was the protection of public policy.[19] The *Kelsay* court found that the Workers' Compensation Act[20] expressly mandated the public policy[21] of encourag-

13. *Midgett*, 118 Ill. App. 3d at 10, 454 N.E.2d at 1094.

14. *Midgett*, 105 Ill. 2d at 153, 473 N.E.2d at 1285. *Midgett* was a consolidated appeal involving two other appellants. *Id.* at 145-46, 473 N.E.2d at 1281. In similar factual circumstances, two other employees had filed separate actions in Livingston County, Illinois, alleging that their employer discharged them in retaliation for their filing workers' compensation claims. *Id.* The circuit court dismissed their complaints for failure to state a cause of action because collective bargaining agreements covered the plaintiffs. The Illinois Appellate Court for the Fourth District consolidated their appeals and summarily affirmed the trial court's dismissals. Gonzalez v. Prestress Eng'g, 118 Ill. App. 3d 1167, 470 N.E.2d 663 (1983), *rev'd*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). In *Midgett*, the Illinois Appellate Court for the First District, however, reversed the trial court's dismissal on the same grounds and held that Midgett's complaint stated a cause of action. Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1983), *aff'd*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

15. The Illinois Supreme Court held that, because Sackett did not raise the federal preemption issue in the trial court or in the appellate court, Sackett waived review of this issue. *Id.* The court granted Midgett's motion to strike the portion of Sackett's brief discussing federal preemption. *Id.*

16. *Midgett*, 105 Ill. 2d at 152, 473 N.E.2d at 1285.

17. *Id.*

18. 74 Ill. 2d 172, 384 N.E.2d 353 (1978). In *Kelsay*, the plaintiff filed a worker's compensation claim. *Id.* at 179, 384 N.E.2d at 356. Upon receiving notice of the claim, Motorola's personnel manager told the plaintiff that it was company policy to terminate employees who filed worker's compensation claims. *Id.* at 175, 384 N.E.2d at 356. After the plaintiff refused to reconsider filing her claim, Motorola discharged her. *Id.*

19. *Midgett*, 105 Ill. 2d at 148, 473 N.E.2d at 1283.

20. The *Midgett* court relied on both Section 6 ILL. REV. STAT. ch. 48, § 138.6 (1983) and Section 26, ILL. REV. STAT. ch. 48, § 138.26 (1983) of the Workers' Compensation Act as the sources of the public policy.

21. *Kelsay*, 74 Ill. 2d at 180-81, 384 N.E.2d at 357. Workers' compensation statutes have proven to be an abundant source of public policy supporting retaliatory discharge causes of action. *See* Smith v. Piezo Technology & Prof. Adm'rs., 427 So. 2d 182 (Fla. 1983) (holding worker's compensation law created a cause of action for retaliatory discharge); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (seminal case recognizing employee's right to sue based on workmen's compensation statutes as a source of public policy); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (recognizing cause of action for retaliatory discharge based on protection of public policy in Workers' Compensation Act); Murphy v. City of Topeka-Shawnee City, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) (recognized tort action to protect public policy in Workers' Compensation Act); Firestone Textile Co.

ing workers to seek compensation for their job-related injuries. Adopting this reasoning, the *Midgett* court determined that a tort remedy, separate and distinct from any contract remedy available under a collective bargaining agreement, would protect this policy by deterring employers who interfere with their employees' rights under the Act.[22] The court concluded that the only requirements one need illustrate to establish a retaliatory discharge cause of action were that he was discharged in retaliation for an activity as an employee and that the discharge violated a clearly mandated public policy.[23]

The court rejected Sackett-Chicago's contention that the employee must demonstrate he was employed at-will.[24] Sackett-Chicago contended that *Kelsay* only protected at-will employees[25] because a collective bargaining agreement providing grievance procedures and "just cause" termination requirements already protected union employees.[26] The court found, however, that based on the Act's public policy mandate it was irrelevant whether a collective bargaring agreement protected the employee.

The court also rejected the contention that, based on federal labor-law policy, a union employee must exhaust his administrative

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Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983) (employer interference with rights under Workers' Compensation Act violates public policy); Sventko v. Kroeger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (recognizing retaliatory discharge action for filing workmen's compensation claim); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984) (retaliatory discharge for filing workers' compensation claim actionable in tort); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981) (retaliatory discharge action complements administrative remedies provided in Workers' Compensation Act); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978) (civil cause of action for retaliatory discharge implied in workers' compensation statute); Clayton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984) (retaliatory discharge action necessary to enforce employer's duty to carry out intention of legislature). *But see* Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980) (at-will employee dismissed for filing workers' compensation denied right to trial on merits in absence of express statutory cause of action); Segal v. Arrow Indus., 364 So. 2d 89 (Fla. App. 1978) (upholding dismissal of at-will employee for filing workers' compensation claim).

22. *Midgett*, 105 Ill. 2d at 149-50, 473 N.E.2d at 1283.

23. *Id.* at 148, 473 N.E.2d at 1283, (citing Palmateer v. International Harvester Co., 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981)).

24. The employment at-will doctrine has its roots in H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 134 (1877). *See* Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976) (arguing for state statutes to protect against retaliatory discharge). According to wood, unless a time period had been specified, an employment contract was presumed to be terminable at-will for any reason. H. WOOD, *supra*, at 134. Despite lack of precedential authority for Wood's rule, it subsequently became the law of the land. *See* Adair v. United States, 208 U.S. 161 (1908) (an employer has the absolute right to dispense with the services of an employee); *See generally* Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (history of at-will rule).

25. *Midgett*, 105 Ill. 2d at 149, 473 N.E.2d at 1284.

26. *Id.* at 150, 473 N.E.2d at 1283-84.

remedy before bringing a tort action.[27] The court reasoned that a tort remedy merely allows a union employee an additional remedy in situations involving strong public policy,[28] noting that the United States Supreme Court does not require a union employee to exhaust his arbitration remedy when he bases his claim on federal statutory rights.[29] The court also noted that where an employee's cause of action was founded on state statutory rights,[30] other jurisdictions had reached similar conclusions. The court followed this trend, holding that a union employee need not exhaust his contract remedies prior to bringing an action for retaliatory discharge.[31]

The court further found that to promote public policy effectively, punitive damages must be available to all employees, both union and at-will.[32] The court reasoned that without punitive damage awards, an employer would not be deterred from discharging an employee for exercising his rights under the Workers' Compensation Act because collective bargaining provisions providing for reinstate-

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27. *Id.* at 151, 473 N.E.2d at 1284. Federal labor-law policy favors the use of arbitration in settling employment disputes. For a discussion of federal labor policy, see *infra* note 82.

28. *Midgett*, 105 Ill. 2d at 151, 473 N.E.2d at 1284.

29. *Id.* The *Midgett* court cited several United States Supreme Court decisions which allowed union employees covered by collective bargaining agreements with arbitration provisions to bring suit directly against their employers. McDonald v. City of West Branch, 104 S. Ct. 1799 (1984) (holding that in a § 1983 action, an arbitration award does not preclude a suit against an employer); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (arbitration provision in collective bargaining agreement does not bar civil action for wage claim under FLSA). Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (employee need not exhaust contract remedies when seeking enforcement of civil rights under Title VII).

30. *Midgett*, 105 Ill. 2d at 152, 473 N.E.2d at 1284-85. The *Midgett* court relied on Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981)(union employee need not exhaust contract remedies when cause of action based upon workers' compensation statute); Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 586 P.2d 564 (1978) (existence of a collective bargaining agreement does not abridge a worker's rights under a workers' compensation statute); Puchert v. Agsalud, 677 P.2d 449 (Hawaii 1984)(union employee not limited to arbitration remedy when source of his claim is a workers' compensation statute); Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281 (1980) (arbitration is not exclusive remedy where an employee is seeking to vindicate rights under a Workers' Compensation Act); Carnation Co. v. Borner, 610 S.W.2d 450 (Tex. 1980) (filing a grievance under a collective bargaining agreement does not preclude an employee from filing suit for retaliatory discharge).

31. *Midgett*, 105 Ill. 2d at 147, 473 N.E.2d at 1283.

32. The *Midgett* court stated:

> In the absence of a deterrant effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim. . . . The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge which mocks the public policy of this state.

Id. at 149-50, 473 N.E.2d at 1283 (quoting Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186-87, 384 N.E.2d 353, 359-60 (1978)).

ment and back pay alone could not provide a sufficient deterrence.[33] The court stated that to provide a complete remedy for an employee and the public,[34] a union member must be entitled to bring an action for retaliatory discharge that is separate and distinct from any contract remedy under his collective bargaining agreement.[35]

Midgett's extention of the tort of retaliatory discharge to union employees is sound for several reasons. First, the court's holding is wholly consistent with the guidelines and reasoning of *Kelsay v. Motorola*. Second, the remedies available under a collective bargaining agreement do not provide adequate protection for a union employee discharged in contravention of public policy. Finally, a separate tort action does not conflict with federal labor policy favoring arbitration.[36]

The holding in *Midgett* is a logical extension of the guidelines set forth in *Kelsay v. Motorola*. The *Midgett* court simply applied the *Kelsay* rationale to a discharge situation involving a union employee.[37] Although *Kelsay* involved an at-will employee, that status was not the controlling factor. The *Kelsay* court based its holding on the desire to enforce the public policy embodied in the Workers' Compensation Act.[38] The court proclaimed that "to uphold and implement this public policy a cause of action should exist for retaliatory discharge."[39] Thus, because the Illinois Supreme Court determined that any employee qualified to bring a claim under the

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33. Midget, 105 Ill. 2d at 149-50, 473 N.E.2d at 1283.

34. *Id.* at 143, 473 N.E.2d at 1280.

35. A collective bargaining agreement provides an incomplete remedy against retaliatory discharge for both the union employee and the public. Under a collective bargaining agreement, a union employee is limited to contract damages of reinstatement and back pay. *See id.* at 150, 473 N.E.2d at 1284. These damages only partially compensate a union employee for the harm a retaliatory discharge causes. For example, a non-union employee, suing his employer in tort, could recover punitive damages in addition to compensatory damages. These punitive damages would offset his expenses for attorney's fees and compensate him for the emotional ordeal of being fired from his job. However, if limited to contract damages, a union employee could not recover for this type of harm.

In addition to a union employee being afforded an incomplete remedy, without the imposition of punitive damages, the public policy of protecting workers' rights under the Workers' Compensation Act is not completely implemented. Merely reinstating an employee with back pay can not deter union employers from violating public policy. Thus, without an adequate sanction against all violators of a strong state public policy, the public is denied a complete remedy against retaliatory discharge.

36. For a discussion of federal labor policy favoring the use of arbitration, see *infra* note 82.

37. For other cases applying the rationale in *Kelsay* to a union employee, see Elia v. Industrial Personnel Corp., 125 Ill. App. 3d 1026, 466 N.E.2d 1054 (1984); Midgett v. Sackett-Chicago, Inc., 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1983), *aff'd*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984); Wyatt v. Jewel Cos., Inc., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982).

38. ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1983).

39. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 178, 384 N.E.2d 353, 357 (1978).

Workers' Compensation Act should be able to bring a cause of action for retaliatory discharge, it was irrelevant whether the employee was a union or at-will employee.[40]

The *Midgett* court correctly extended the *Kelsay* rationale in allowing a tort action to both union and non-union employees.[41] The *Kelsay* court found that the policy embodied in the Workers' Compensation Act favors workers to seek compensation for injuries without fear of losing their jobs.[42] Thus, when an employer interferes with an at-will employee's rights under the Act, his conduct violates the Act's policy mandate.[43] Because a union employee has the same rights that an at-will employee has under the Act, the tort of retaliatory discharge applies equally to union employees who are discharged for seeking compensation for their injuries.[44]

The focus of the tort centers on public policy considerations and not upon the employee's status. Therefore, the mere existence of a collective bargaining agreement can not preclude the availability of a tort cause of action for a violation of public policy.[45] While a contract protects the private interest of having promises performed[46] based upon the parties' intentions,[47] tort actions protect societal interests from various types of infringing conduct without regard to the individuals' desires.[48] The law imposes the duty to uphold these social interests, coined public policy, upon all employers.[49]

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40. For other cases holding that the status of an employee is not a consideration for bringing a retaliatory discharge action, see *supra* note 37.

41. *See Midgett*, 105 Ill. 2d at 148, 473 N.E.2d at 1282-83.

42. *See Kelsay*, 74 Ill. 2d at 180, 384 N.E.2d at 357.

43. *Id.*

44. *See* ILL. REV. STAT. ch. 48, § 138.11 (1983) (Workers' Compensation Act).

45. *See* Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 407, 407 N.E.2d 95, 99 (1980) (Barry, J., dissenting). In *Cook*, the Illinois Appellate Court for the Third District refused to extend a cause of action for retaliatory discharge to an employee covered by a collective bargaining agreement. *Id.* at 406-07, 407 N.E.2d at 99 (majority opinion). The *Cook* court held that a union employee must exhaust his contract remedies under a collective bargaining agreement prior to bring suit. *Id.* In a vigorous dissent, Justice Barry argued that a union employee need not exhaust his grievance procedures prior to bringing an action for retaliatory discharge. *Id.* at 408, 407 N.E.2d at 100 (Barry, J., dissenting). Justice Barry argued that because a retaliatory discharge action is based upon the violation of public policy, not the terms of a collective bargaining agreement, a union employee's right to bring a tort action exists independently of any collective bargaining agreement. *Id.*

46. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (5th ed. 1984).

47. *Id.*

48. *Id.*

49. *Kelsay*, 74 Ill. 2d 172, 384 N.E. 2d 353; Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (holding an employer who discharges an employee for failing to commit a criminal act violates a duty the law imposes on all employers). In *Kelsay*, the court found that employers may not circumvent their duties under the Workers' Compensation Act. *Kelsay*, 74 Ill. 2d at 184, 384 N.E.2d at 358. Thus, an employer can not limit his duty to uphold public policy by entering into collective bargaining agreements which preclude the enforcement of

The *Kelsay* court's choice of a tort remedy for a retaliatory discharge also supports the *Midgett* court's interpretation that the holding in *Kelsay* should not be limited to an at-will employee. In *Kelsay*, the court created a tort remedy for employees who are subjected to a retaliatory discharge.[50] In doing so, the *Kelsay* court provided the basis for the recovery of punitive damages to protect public policy.[51] The *Midgett* court noted that punitive damages should also be awarded to union employees.[52] The *Midgett* court recognized that to discriminate between the types of employees who could recover such damages would lead to absurd results. The court considered that while an at-will employee could recover punitive damages in tort for a retaliatory discharge, a union employee covered by a collective bargaining agreement would not be able to collect punitive damages because he would be limited to contract damages.[53]

Such a restriction on a union employee's right to recover damages would be absurd because a collective bargaining agreement is intended to afford the employee greater rights and protection than mere contract remedies provide.[54] The remedies available under a collective bargaining agreement, however, are inadequate to protect public policy. The *Midgett* court's holding embraced the importance of allowing punitive damages in an action for retaliatory discharge.[55] The court found that the remedies under a collective bargaining agreement are not sufficient to protect public policy.[56] Punitive damages are, therefore, necessary to deter an employer from wrongfully discharging his employees.[57] Collective bargaining remedies are

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that policy.

50. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

51. The *Kelsay* court could have based the retaliatory discharge action on an implied contract theory rather than on a tort theory. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (holding that a bad-faith discharge was a breach of an employment contract). An implied contract places an at-will employee on equal footing with his union counterpart. Thus, an at-will employee would be protected from "bad-faith" discharges just as a union employee is protected from discharge without "just cause." Punitive damages, however, are not available in breach of contract actions. *See* S. WILLISTON, WILLISTON ON CONTRACTS 1340 (3d ed. 1968). *But see* Ledingham v. Blue Cross Plan, 29 Ill. App. 3d 339, 330 N.E.2d 540 (1975)(punitive damages recoverable when breach of contract constitutes independent tort), *rev'd on other grounds*, 64 Ill. 2d 338, 356 N.E.2d 75 (1976).

52. The *Midgett* court stated that "it would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The public policy against retaliatory discharge applies with equal force in both situations." *Midgett*, 105 Ill. 2d at 150, 473 N.E.2d at 1284.

53. *See Kelsay*, 74 Ill. 2d at 172, 189, 384 N.E.2d at 353, 361.

54. *See* Tobias, *A Plea For The Wrongfully Discharged Employee Abandoned By His Union*, 41 U. CIN. L. REV. 55 (1972)(remedies available under a collective bargaining agreement do not provide adequate protection against a wrongful discharge).

55. *Midgett*, 105 Ill. 2d at 149, 473 N.E.2d at 1283.

56. *Id.* at 150, 473 N.E.2d at 1284.

57. *See, e.g.*, Smith v. Piezo Technology & Prof. Adm'rs., 427 So.2d 182 (Fla.

clearly inadequate in this respect because they do not provide for punitive damages to vindicate public policy; contract remedies merely provide for reinstatement and back pay.[58]

The court's lack of confidence in relying solely on contract remedies to deter employer misconduct is also well-founded because of their inherent inaccessibility. Although collective bargaining agreements commonly contain[59] a provision requiring "just cause"[60] for termination, the employee must first resort to the grievance procedures set forth in the collective bargaining agreement.[61] The union employee, however, does not always have a full opportunity to use these procedures. A union has broad discretion in deciding whether to process an employee's grievance claim. In fact, a union can reject a grievance claim even if it is not frivolous.[62] Because a union maintains control over the grievance mechanism, a union employee is at the mercy of his union to have his cause redressed.[63]

1983) (allowing punitive damages in a retaliatory discharge action to deter wrongful conduct); *Kelsay* 74 Ill. 2d at 189, 384 N.E.2d at 361 (1978) (allowing punitive damages to deter the practice of retaliatory discharge).

58. Hyink & Liebman, *Midgett v. Sackett-Chicago, Inc.: The Short-Sighted Use of State Remedies to Protect Union Employees From Retaliatory Discharge*, 18 J. MAR. L. REV. 563, 565 (1985).

59. Approximately seventy-nine percent of all collective bargaining agreements provide that employees may not be terminated without "just cause." 2 COLLECTIVE BARGAINING, NEGOTIATION & CONTRACTS (BNA) 40 (1979). Midgett was a member of Production Workers Local 707. Article 3 of the collective bargaining agreement between the union and Sackett-Chicago provided that "[n]o regular employee employed by Employer for one hundred and twenty (120) days or more shall be dismissed, laid off, suspended or demoted without *just cause*." Affidavit in Support of Plaintiffs Opposition to Motion to Dismiss, Midgett v. Sackett-Chicago, Inc., No. 80-L-30776 (Cir. Ct. Cook County, 1980) (emphasis added).

60. No consistent definition exists for what constitutes "just cause." *See* M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 40 (1981). The test arbitrators most widely use in determining the existence of "just cause," was developed by Arbitratior Carroll Daugherty. *See* Enterprise Wire Co., 46 Lab. Arb. (BNA) 359, 361 (1966)(Daugherty, Arb.). This test includes a series of questions an arbitrator seeks to answer surrounding the discharge. These questions ask: whether the employee was forewarned of his actions' consequences; whether the discharge was related to the company's efficient operation: whether the company, prior to the discharge order, determined in fact if the employee disobeyed a company policy or management order, whether the company's investigation was objective; whether the evidence against the employee was substantial; whether the discharge order was discriminatory; and whether the discipline was reasonable in view of the gravity of the offense. *Id.* These factors do not take into consideration whether the discharge violated public policy.

61. Article 7, Section 4 of the collective bargaining agreement between the union and Sackett-Chicago contained a three-step detailed grievance procedure. Affidavit in Support of Plaintiff's Opposition to Motion to Dismiss, Midgett v. Sackett-Chicago, Inc., No. 80-L-30776 (Cir. Ct. Cook County 1980). The third step of the procedure outlined the process for binding arbitration. *Id.* The union's Grievance Board had the sole power to determine whether a union member's grievance was meritorious and should be arbitrated.

62. *See* Humphrey v. Moore, 375 U.S. 335, 349-50 (1964) (unions may take a position on meritorious disputes).

63. *See* Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 186 (2d Cir. 1962) (chaos would result if a union did not have a right to screen griev-

Even if a union decides to process the grievance claim, the union still has broad discretion in deciding whether to proceed to the final and most important step of the grievance process: arbitration. If a discharged employee is a member of a small or impoverished union, a union official may be overburdened or ill-equipped to handle a complicated retaliatory discharge case. Thus, a union official may not recommend arbitration because he lacks the knowledge, ability or funds to prepare and present the case.[64] In addition, because arbitration procedures are expensive,[65] union politics often enter into the decision to arbitrate.[66] Other members' grievance claims may be politically more attractive because the issues involved benefit a larger group of union members.[67] The wrongfully discharged union member, therefore, may not be able to persuade the grievance board to arbitrate his discharge.[68]

If a union abuses its discretion in determining which grievance to pursue, federal labor law provides a union employee other avenues of redress. An employee may bring suit directly against his employer for breach of its collective bargaining agreement,[69] or he may sue his union for breach of its duty of fair representation.[70] However, the burden an employee must overcome in proving the breach

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ances and press only those it concludes should be pressed).

64. *See* Tobias, *supra* note 54, at 60.

65. Unions may consider cost in determining whether to process a grievance to arbitration. Higdon v. United Steel Workers of Am., 537 F. Supp. 653, 660 (S.D. Ga. 1982), *aff'd*, 706 F.2d 1561 (11th Cir. 1983).

66. *See* Tobias, *supra* note 54, at 61-62 (factors unrelated to the merits of the grievance include the popularity of the grievant and pressures related to intra-union or intracompany politics).

67. *See* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975) (unions are concerned with the rights of the collective body at the expense of the individual) [hereinafter cited as Note, *Abusively Discharged Employee*]. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) (individual's interests may be subordinated to collective bargaining).

68. One labor relations commentator has stated:

> A discharged employee generally is no longer a dues paying member. At the time his case is being considered, there is often an unspoken spirit of "he is gone, we are here" which influences union deliberations. If the dischargee vigorously has no spokesman to champion his case and he is unable to vigorously articulate his own position to union leaders, he is particularly vulnerable. If he is unpopular or unknown and his "crime" appears to lack good defenses, his grievance generates little support. Unable to muster the facts and arguments in his favor in an attractive manner, he is powerless to prevent the union from voting against arbitration.

Tobias, *supra* note 54, at 62.

69. Labor Management Relations Act, 29 U.S.C. § 185 (1982).

70. *E.g.*, Vaca v. Sipes, 386 U.S. 171, 187 (1967) (cause of action for breach of duty of fair representation exists under Section 301 of the Labor Management Relations Act); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (imposed duty on unions to represent union members with "an honest effort to serve the interests of all"). *See generally* Comment, *Breaching the Duty of Fair Representation: The Union's Liability*, 17 J. MAR. L. REV. 415 (1984) (evolution of fair representation doctrine with emphasis on apportionment of damages between union and employer).

of a union's duty may leave an employee remediless for a retaliatory discharge.[71] For example, illustrating that a grievance is meritorious does not establish that a union breached a duty.[72] Additionally, mere negligence in handling the grievance does not establish the union's breach of its duty.[73] Rather, the employee has the difficult task of showing that the union acted arbitrarily, discriminatorily, or in bad faith.[74] Therefore, as the *Midgett* court envisioned, these remedies do not protect public policy.[75] If a union employee can overcome the burden of establishing a breach of the duty of fair representation, then federal labor law would allow him to sue his employer.[76] In such an action, the employee is required to show that he has exhausted all contract grievance procedures.[77]

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71. *See* Tobias, *supra* note 54, at 76; Note, *Abusively Discharged Employee, supra* note 67, at 1459.

72. Vaca v. Sipes, 386 U.S. 171, 193 (1967); *see* Woods v. North Am. Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973) (union refusal to process meritorious grievance did not breach duty of fair representation).

73. Rupe v. Spector Freight Sys., Inc., 679 F.2d 685, 691-92 (7th Cir. 1982); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980); Bazarte v. Union Transp. Union, 429 F.2d 868 (3rd Cir. 1970). *See* DeArroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.) (duty of fair representation does not include a duty of care), *cert. denied*, 400 U.S. 877 (1970). *See also* Comment, *Breaching the Duty of Fair Representation: The Union's Liability*, 17 J. MAR. L. REV. 415, 422 n.3 (1984) (survey of circuits on negligence issue). *But see* Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) (negligent conduct is sufficient to constitute an arbitrary breach of the union's duty of fair representation).

74. Vaca v. Sipes, 386 U.S. 171, 193 (1967). Most suits against the union have resulted in summary judgments against the employer. Tobias, *supra* note 54, at 67 (setting forth grounds employers and unions use for summary judgment).

75. Punitive damages are not recoverable in an unfair representation action against a union. International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48-52 (1979). *But see* Note, *Punitive Damages In Fair Representation Actions*, 64 MARQ. L. REV. 224, 236-42 (1980)(arguing for punitive damages to protect individual rights).

Without the allowance of punitive damages, a union employee may find it difficult to obtain competent legal representation. *See* Tobias, *supra* note 54, at 83 (counsel is reluctant to take the case where there is no sure prospect of substantial attorney's fees). An unfair representation case may involve hundreds of hours of pre-trial work. *Id.* Because a discharged employee is usually unemployed, he is unable to pay a retainer fee. Under a contingent fee arrangement, attorneys are discouraged from handling discharge cases in which the employee can recover only lost wages. *See* Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1943 (1983) (advocating an expansion of the tort of retaliatory discharge).

In *Midgett*, the court was concerned with providing a union employee with a "complete" remedy for retaliatory discharge. *Midgett*, 105 Ill. 2d at 146, 473 N.E.2d at 1282. Even if a discharged employee is able to retain counsel and sue his union or employer, the attorney's contingency fee, between 33 and 45 percent, will reduce any damages he recovers. Tobias, *supra* note 54, at 84.

76. *Vaca*, 386 U.S. at 186-87.

77. Republic Steel v. Maddox, 379 U.S. 650 (1965)(unless contractually altered, employee must allow union the opportunity to act on his behalf). *See* United Steel Workers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

Employee error, however, in following strict procedures for filing grievances found in the collective bargaining agreement has been held to preclude a cause of action.[78] In addition, employers have successfully defended wrongful discharge suits by asserting that the employees failed to exhaust internal union remedies.[79] These remedies provide a system of internal procedures[80] in which a union employee may seek redress against his union for violation of his union's constitution. Because employees frequently are not familiar with these procedures, an employee's failure to use them may allow an employer a complete defense against an action for retaliatory discharge.[81] Recognizing these deficiencies in the remedies under the collective bargaining agreement, the *Midgett* court correctly held that a union employee need not exhaust these remedies as a prerequisite for bringing an action in tort.

Finally, the *Midgett* decision is sound because allowing a union employee a cause of action for retaliatory discharge does not conflict

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78. *E.g.*, Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968) (employee denied judicial relief for failing to pursue grievance procedures); Steen v. Local 163, UAW, 373 F.2d 519 (6th Cir. 1967) (no cause of action where employee failed to initiate grievance proceeding); Broniman v. Great Atl. & Pac. Tea Co., 353 F.2d 559 (6th Cir. 1965) (employee denied judicial relief for failing to follow contract grievance procedures). *See* Breish v. UAW, Local 771, 84 L.R.R.M. (BNA) 2596 (E.D. Mich. 1973) (employee mistaken as to time period in which to file grievance denied relief). *See generally* Flynn & Higgins, *Fair Representation: A Survey Of The Contemporary Framework And A Proposed Change In The Duty Owed To The Employee*, 8 SUFFOLK U. L. REV. 1096 (1974) (problems an employee may encounter when not following grievance procedures).

79. *E.g.*, Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978) (union member under obligation to exhaust internal union remedies); Bshara v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968) (employee obligated to follow contract grievance procedures); Orphan v. Furno Constr. Co., 325 F. Supp. 1220 (N.D. Ill. 1971) (union members required to initially seek intra-union remedies); Anderson v. Ford Motor Co., 319 F. Supp. 134 (E.D. Mich. 1970). *Cf.* Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI. KENT L. REV. 259 (1979) (arguing for consistent application of doctrine in suits against the union and employer)[hereinafter cited as Comment, *Exhaustion Of Internal Union Remedies*]. *Contra* Clayton v. Union Auto Workers, 451 U.S. 679 (1981) (exhaustion of internal remedies not required if remedies can not result in reactivation of employee's grievance). *Accord* Rupe v. Spector Freight Sys., Inc., 679 F.2d 685 (7th Cir. 1982) (union's failure to plead that employee's grievance could have been reactivated precludes union from asserting exhaustion defense).

80. Internal union remedies are procedures provided for in union constitutions and by laws which enable a union member to appeal violations of the union constitution. *See* Comment, *Exhaustion Of Internal Union Remedies*, *supra* note 79, at 259. Some union constitutions provide that a member may appeal an executive board's decision not to arbitrate to the general membership meeting of the local. *Id.* at 262. If the general membership decides not to overrule the executive board, the member may appeal to a general executive board, and then to the national convention. *Id.* Some union constitutions provide for a final appeal to an impartial review board. *See* Note, *Public Review Boards: A Check On Union Disciplinary Powers*, 11 STAN. L. REV. 497 (1959) (advocating use of review boards of prominent citizens to insure the democracy of unions).

81. *See* Tobias, *supra* note 54, at 68.

with federal labor law favoring the use of arbitration as Sackett-Chicago suggested.[82] A tort action merely complements the arbitration process when disputes are not suited for arbitration.[83] The right to bring suit for retaliatory discharge was created in order to protect public policy.[84] Although federal labor law favors the use of arbitration in resolving contract disputes, arbitration remedies do not address protection of public policies.[85] Even though arbitrators have expertise in the area of labor relations,[86] many are not attorneys. Thus, they may lack the expertise to resolve the complex legal issues surrounding a retaliatory discharge.[87]

The primary issue in retaliatory discharge cases is whether a discharge contravenes a clearly mandated public policy.[88] In a tort

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82. Federal labor policy favors using arbitration to resolve disputes which arise under a collective bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) (contract grievance procedure is the preferred relief method); United Steel Workers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steel Workers v. American Mfg. Co., 363 U.S. 564 (1960). The general rule developed that grievances may not be litigated in court when the collective bargaining agreement provides for binding arbitration. United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). An exception to this general rule exists. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (employee has standing to sue his employer and his union if union breaches its duty of fair representation). When arbitration procedures provide an inadequate forum for enforcement of statutory rights, an employee is not required to exhaust his arbitration remedies. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (civil action for wage claim under FLSA not barred by arbitration provision in collective bargaining agreement); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (employee need not exhaust contract remedies when seeking enforcement under Title VII).

83. *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981). *See also* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (arbitration not exclusive remedy for retaliatory discharge where provided by state statute); Peabody Gallion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (union employee discharged for filing worker's compensation claim not limited to arbitration as exclusive remedy); Messenger v. Volkswagen of Am., 585 F. Supp. 565 (S.D.W.Va. 1984) (separate nature of a tort action for retaliatory discharge precludes arbitration as sole remedy).

84. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876, 880 (1981) (tort of retaliatory discharge based upon protection of public policy); Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 404, 407 N.E.2d 95, 99 (1980) (Barry, J., dissenting) (cause of action for retaliatory discharge based upon violation of public policy).

85. *See* Peabody Gallion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (arbitratiors are powerless to address protection of public policies).

86. Arbitrators have confidence in "law of the shop," not state law. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (arbitration inappropriate forum for resolution of rights under Title VII). A majority of labor arbitrators are not attorneys. *Id.* Although an arbitrator is competent to decide factual questions surrounding a discharge, such as whether the employee had warning of the consequences of his activities, arbitrators are not conversant with the public policy considerations underlying retaliatory discharge. Thus, even though an employee's discharge violates public policy, an arbitrator might decide, based upon "law of the shop," that the employer had "just cause" because the employer forewarned the employee of the consequences of his actions.

87. *See* Elia v. Industrial Personnel Corp., 125 Ill. App. 3d 1026, 466 N.E.2d 1054 (1984) (arbitration not the proper forum for protection of public policy).

88. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876

action, this determination is made by the court as a matter of law.[89] Arbitrators, however, are confined to questions of fact found in the terms of the collective bargaining agreement.[90] In deciding a discharge case, the arbitrator might not take into consideration the public policy against discharge.[91] Where this occurs, public policy is left unprotected. Therefore, a union employee is not entitled to redress for being discharged for acting in compliance with a strong public policy. Thus, the *Midgett* court was correct in recognizing the unsuitability of arbitration to protect a worker's rights against retaliatory discharge.

The recent analogous decision of the United States Supreme Court further supports the *Migett* court's conclusion. In *Barrentine v. Arkansas-Best Freight System,*[92] the Court recognized the unsuitability of arbitration to protect non-contractually created rights.[93] The Court held that employees need not exhaust the arbitration procedures under a collective bargaining agreement when seeking to

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(1981). The *Palmateer* court stated that the requirements for a cause of action for discharge are "that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." *Id.* at 134, 421 N.E.2d at 881. For a discussion of the holding in *Palmateer,* see Comment, *Illinois Relaxes The Standard of Review For Retaliatory Discharge Actions: Palmateer v. International Harvester Co.,* 15 SUFFOLK U. L. REV. 1355 (1981) (predicting trend toward expansion of retaliatory discharge); Note, *Palmateer v. International Harvester Co.—Retaliatory Discharge of an Employee for Refusing to Obstruct Justice Held Actionable,* 30 DE PAUL L. REV. 521 (1981) (arguing that *Palmateer* casts doubt on prior decisions that limited tort of retaliatory discharge to at-will employees).

89. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). In *Palmateer,* the court held that an employee may bring suit for a retaliatory discharge if the termination offends a judicial pronouncement of public policy. *Id.* at 133-34, 421 N.E.2d at 880. Thus, a court may decide on a case-by-case basis whether the discharge contravenes some public policy.

90. *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 744 (1981) (an arbitrator's power is derived from, and limited by, the collective bargaining agreement); Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (arbitrator has no power to invoke public laws that conflict with the bargain).

91. A hypothetical illustrates this situation. If the collective bargaining agreement contains a "just cause" provision for termination, the arbitrator must decide whether the employee was discharged for "just cause." (for a discussion of "just cause," see *supra* note 60). Assume that a supervisor orders a worker not to inform the police of a co-worker's theft of company property. The supervisor bases his order on an unwritten company policy of avoiding negative publicity. If the employee disobeys the supervisor, then the supervisor may terminate the employee for insubordination. Based on "the law of the shop," a discharge for insubordination is a discharge for "just cause." Because an arbitrator is confined to interpreting the collective bargaining agreement, he would be powerless to consider the public policy against the discharge. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52-54 (1974) (arbitrators are confined to interpreting the collective bargaining agreement). Furthermore, even if the arbitrator looked to prior case law, a court may not have decided whether such a discharge violates public policy.

92. 450 U.S. 728 (1981).

93. *Id.* at 738.

vindicate rights the Fair Labor Standards Act created.[94] The Court reasoned that, although courts should defer to arbitration when the employee's claims are based upon rights arising under the collective bargaining agreement, arbitration is not the proper forum when the employee's claim is based on statutory rights.[95] While the claim in *Barrentine* was based upon federal law, the Court's reasoning applies with equal force to a cause of action arising under state law because the focus of *Barrentine* was the preclusive effect of arbitration, not the preemptive effect of federal law.[96]

The underlying rationale of *Barrentine* was that an employee's individual statutory rights can not be waived or abridged by the collective bargaining agreement.[97] In *Midgett,* the court implied that the public policy embodied in the Workers' Compensation Act is not waived because of the existence of a collective bargaining agreement.[98] However, because arbitration is not the proper forum to address the protection of public policy, an employee's right to redress for a retaliatory discharge would be lost if arbitration was his sole remedy. Therefore, a separate tort action for retaliatory discharge would not conflict with federal labor law favoring the use of arbitration.

In conclusion, the *Midgett* court provided a sound basis for extending the tort of retaliatory discharge to a union employee protected under a collective bargaining agreement. The court accurately interpreted that *Kelsay v. Motorola* had created this tort in order to protect public policy against offending employers. The *Midgett* court correctly found that a union employee should receive the same protection as an at-will employee. The *Midgett* court recognized that the remedies available under a collective bargaining agreement are inadequate to protect public policy. The court's recognition that arbitration is not the proper forum to protect public policy was likewise correct; a civil remedy does not conflict with federal labor policies favoring the use of arbitration. Thus, the *Midgett* court's exten-

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94. *Id.* at 745.

95. The *Barrentine* court stated its reasoning as follows:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Id. at 737.

96. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1375 n.13 (9th Cir. 1984) (Section 301 of LMRA does not preempt cause of action for retaliatory discharge).

97. *Barrentine,* 450 U.S. at 740.

98. *Midgett,* 105 Ill. 2d at 151, 473 N.E.2d at 1284.

sion of the availability of the retaliatory discharge cause of action to union employees, not only preserves the right of every employee to receive compensation for work-related injuries but, more importantly protects the interest and values of society which underly safety and fairness in the work-place.

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