University of Baltimore Law Review

Volume 18
Issue 3 *Spring 1989*

Article 6

1989

Comments: Public Policy and Preemption: Union Employees' State Wrongful Discharge Actions

Marlene Lange Budd
University of Baltimore School of Law

PUBLIC POLICY AND PREEMPTION: UNION EMPLOYEES' STATE WRONGFUL DISCHARGE ACTIONS

I. INTRODUCTION

The viability of a union employee's state cause of action for wrongful discharge is dependent upon the outcome of two issues: (1) whether the cause of action is preempted by Section 301 of the Labor Management Relations Act (Section 301) which grants employees covered by collective bargaining agreements a federal cause of action for violations of those agreements;[1] and (2) whether the state's laws provide a union employee with the right to seek a remedy for wrongful discharge based on certain exceptions to the at-will doctrine.[2]

If a claim is preempted by Section 301, a federal or state court[3] will interpret and enforce the agreement according to federal law, not state law.[4] In such a case, a union employee's state claim for wrongful discharge will either be dismissed as preempted, or treated as a Section 301 breach of contract case.[5] Dismissal of the action is proper if the union employee pursued a Section 301 claim prior to exhausting all grievance and arbitration procedures within their collective bargaining agreement.[6] Furthermore, a union employee's remedy in a Section 301 action is generally limited to reinstatement and back pay.[7]

If the claim is not preempted by Section 301, however, it will be decided under state law.[8] The benefit of suing under state law is that an employee may be able to recover punitive and compensatory damages in a wrongful discharge suit.[9]

---

1. Section 301 provides:
   > Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a) (1982).
2. *See infra* notes 65-70, 92, 103, 110-12 and accompanying text.
3. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) (federal and state courts have jurisdiction over Section 301 claims).
4. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957); *see also* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-05 (1962).
5. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985); *see also* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).
6. *Maddox*, 379 U.S. at 652. Failure to exhaust grievance and arbitration procedures may result in dismissal regardless of whether the Section 301 claim is pursued in federal or state court.
7. *See* Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of* Lingle v. Norge: *Wholly Independent or Inextricably Intertwined?*, 34 S.D.L. REV. 63, 76 (1989) [hereinafter Yonover, *Preemption of State Tort Remedies*].
8. *See infra* notes 111-14 and accompanying text.
9. *See, e.g.*, Hanna v. Emergency Medicine Ass'n, 77 Md. App. 595, 551 A.2d 492 (1989); Lally v. Copygraphics, 413 A.2d 960 (N.J. Super. 1980), *aff'd*, 428 A.2d

Although the recent Supreme Court decision in *Lingle v. Norge Division of Magic Chef, Inc.*[10] sheds light on the issue of federal preemption, there are wrongful discharge actions based on public policy and other exceptions to the at-will rule that the Supreme Court has not yet addressed. With respect to the issue of the viability of state causes of action, in union employee wrongful discharge suits, there is a split of authority among the states as to whether a union employee may successfully maintain a wrongful discharge action in state court.

This comment first discusses the development of Section 301 preemption in wrongful discharge actions with reference to Supreme Court decisions in this area. Next, it analyzes the divergent state law approaches regarding a union employee's right to bring a wrongful discharge claim in state court. Finally, this comment delineates which wrongful discharge actions based on at-will exceptions should properly be preempted by Section 301.

II. THE DEVELOPMENT OF SECTION 301 PREEMPTION

The doctrine of preemption is derived from the Supremacy Clause of the United States Constitution.[11] Under the Supremacy Clause, Congress has the power to preempt state laws that either conflict with federal law or thwart the intent of Congress in enacting the federal laws.[12]

Federal preemption became a significant issue in Section 301 actions with the Supreme Court's decision in *Textile Workers v. Lincoln Mills of Alabama*.[13] In *Lincoln Mills*, the Court declared that Section 301 not only grants federal courts jurisdiction over suits involving violations of contracts between employers and unions, but also "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."[14] As such, the *Lincoln Mills* Court emphasized that "[f]ederal interpretation of the federal law will govern, not state law."[15]

According to the Supreme Court, there are two congressional goals which impact the preemptive scope of Section 301: (1) enforcement of arbitration clauses to promote and achieve industrial peace;[16] and (2) de-

---

1317 (N.J. 1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *see also infra* notes 122-24 and accompanying text.

10. 486 U.S. 399 (1988) (union employee's state retaliatory discharge claim based on state policy against discharge in retaliation for filing worker's compensation claim was not preempted by Section 301).
11. U.S. CONST. art. VI § 32, cl. 2.
12. *See generally* Yonover, *Preemption of State Tort Remedies*, *supra* note 7, at 77; Bakaly & Kohn, *Wrongful Discharge Actions*, 41st N.Y.U. Conf. Lab. 9-1, 9-13 to -14 (1988) [hereinafter Bakaly & Kohn].
13. 353 U.S. 448 (1957).
14. *Id.* at 452.
15. *Id.* at 457.
16. See *id.* at 455 ("the agreement to arbitrate is the *quid pro quo* for an agreement not to strike"); *see also* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 656 (1965) (contract grievance procedures are the preferred method for stabilizing plant com-

velopment of a uniform interpretation of collective bargaining agreements to ensure the peaceful negotiations and administration of those agreements.[17] These two congressional goals form the basis for the federal common law that has developed and are relevant factors in determining which claims are preempted by the operation of Section 301.[18]

Since its decision in *Lincoln Mills*, the Supreme Court has held that union employees' claims involving interpretations[19] and/or violations[20] of collective bargaining agreements are claims that arise under Section 301. Consequently, these actions are preempted by Section 301 and governed by federal labor law, not state contract law.[21]

The Supreme Court has also held that state claims based on tort theories are actions under Section 301 when the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."[22] A claim is deemed "inextricably intertwined" if the resolution of the claim is "substantially dependent upon analysis of the

---

mon law); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 581 (1960) (grievance machinery is the heart of industrial self government).

17. *See* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-05 (1962). The Court recognized that the "existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." *Id.* at 104. The Court also noted that in "enacting Section 301 Congress intended doctrines of federal labor law *uniformly* to prevail over inconsistent local rules." *Id.* (emphasis supplied).
18. *See generally* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957). The Court acknowledged that the Labor Management Relations Act expressly provides some substantive law. *Id.* Where the Act is silent, however, the Court suggested that federal law be formulated from an examination of the policies behind the legislation. *Id.* The principle that parties must attempt to exhaust the grievance and arbitration procedures established in the collective bargaining agreement when the claim falls within the scope of Section 301 is an example of federal substantive law. *Id.* at 451 (federal law under Section 301 requires that "the agreement to arbitrate grievance disputes . . . be specifically enforced"). Courts, however, cannot review the merits of an arbitration award in a Section 301 proceeding. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Instead, the "judicial inquiry under [section] 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made." *Warrior & Gulf*, 363 U.S. at 582. If, however, the union has breached its duty of fair representation, the employee is not required to exhaust the procedures before instituting a Section 301 action. Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967).
19. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 658-59 (1965); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co. , 369 U.S. 95, 104-05 (1962).
20. *See Lucas Flour*, 369 U.S. at 104-05 (state breach of contract claim preempted by Section 301); *Maddox*, 379 U.S. at 657.
21. *See Lucas Flour*, 369 U.S. at 103 ("the dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the *area covered by the statute*") (emphasis supplied); *Lincoln Mills*, 353 U.S. at 456 ("the substantive law to apply in *suits under Section 301* . . . is federal law") (emphasis supplied).
22. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

terms of an agreement."[23] Only if a claim is based on state law which confers "nonnegotiable state-law rights . . . independent of any right established by contract" will the claim survive Section 301 preemption.[24]

The "inextricably intertwined" test was first applied in *Allis-Chalmers Corp. v. Lueck*,[25] where the Supreme Court held that a state tort action for bad-faith handling of an insurance claim was preempted by Section 301. In *Allis-Chalmers*, a union employee, who suffered a back injury, was not receiving disability benefits from his employer and its insurance company as required under the collective bargaining agreement.[26] Instead of utilizing the grievance procedures as mandated by the labor agreement, the employee initiated a state court action asserting that the insurance company and the employer breached their duty to act in good faith in handling his disability claim under state law.[27] The lower courts granted and affirmed the employer's motion for summary judgment on Section 301 preemption grounds,[28] but the Supreme Court of Wisconsin reversed.[29]

The United States Supreme Court reversed and held that Section 301 preempted the claim. Applying the Section 301 preemption test, the Court concluded that under Wisconsin law, the tort asserted "intrinsically relates to the nature and existence of the contract . . . [and] the duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract."[30] Because state law required an examination of the collective bargaining agreement to establish if a duty of good faith existed, resolution of the state claim was substantially dependent upon an analysis of the agreement.[31] The *Allis-Chalmers* Court reasoned that:

> the whole range of disputes traditionally resolved through arbitration could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under Section 301 that it is the arbitrator, not the court, who has the

23. *Id.* at 220.
24. *Id.*
25. 471 U.S. 202 (1985).
26. *Id.* at 204-05.
27. *Id.* at 206.
28. *Id.*
29. *Id.* at 206-08. The Court relied on standards for determining NLRA preemption as announced in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) and Farmer v. Carpenters, 430 U.S. 290 (1977). Allis-Chalmers Corp. v. Leuck, 471 U.S. 202, 208 (1985). The Court, however, noted that preemption under the NLRA was not at issue. *Id.* at 211 n.6. NLRA preemption is beyond the scope of this comment.
30. *Allis-Chalmers*, 471 U.S. at 216-17.
31. *Id.* at 217-21.

responsibility to interpret the labor contract.[32]

According to the Court, the meaning of disability-benefit provisions, if left to state courts, would undermine the goal of a uniform federal interpretation of collective bargaining agreements.[33]

The *Allis-Chalmers* "inextricably intertwined" test was subsequently applied in *International Brotherhood of Electrical Workers v. Hechler*[34] to a state tort claim which alleged that a union breached its duty of care to provide union employees with a safe workplace. The Court held that the claim was preempted by Section 301 because it was necessary to interpret the labor agreement to ascertain whether the union had an implied duty of care to provide a safe workplace, and if so, the nature and scope of that duty.[35]

III. *LINGLE V. NORGE DIVISION OF MAGIC CHEF, INC.*

After the decision in *Allis-Chalmers*, federal courts split with respect to the preemptive effect of Section 301 on wrongful discharge claims, particularly discharges grounded in violation of state public policies.[36] The Supreme Court granted certiorari in *Lingle v. Norge Division of Magic Chef, Inc.*,[37] to resolve this conflict.

In *Lingle*, the employee was covered by a collective bargaining agreement which provided that employees could only be discharged for just cause.[38] The employee was discharged for allegedly filing a false workers' compensation claim.[39] While her arbitration proceeding was pending, she initiated an action in state court alleging that she had been

32. *Id.* at 219-20.
33. *Id.* at 220.
34. 481 U.S. 851 (1987). *But cf.* Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) (employee's breach of individual employment contract claim was not preempted because employee did not rely on the collective bargaining agreement for relief and therefore claim resolution was not substantially dependent upon an analysis of the labor agreement).
35. *Hechler*, 481 U.S. at 862.
36. *Compare* Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) (contractual employee's wrongful discharge claim based on public policy preempted), *rev'd*, 486 U.S. 399 (1988); Vantine v. Elkhart Brass Mfg., 762 F.2d 511, 517 (7th Cir. 1987); Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 1001 (9th Cir. 1987); Johnson v. Hussmann Corp., 805 F.2d 795, 795-97 (8th Cir. 1986); Durrette v. UGI Corp., 674 F. Supp. 1139, 1143 (M.D. Pa. 1987); Smith v. Union Carbide Corp., 664 F. Supp. 290, 290-93 (E.D. Tenn. 1987); Edwards v. Western Mfg., 641 F. Supp. 616, 619 (D. Kan. 1986); Messenger v. Volkswagen of Am., 58 F. Supp. 565 (S.D. W.Va. 1984) *with* Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (wrongful discharge founded on state public policy not preempted by Section 301); Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 105 (2d Cir. 1987); Herring v. Prince Macaroni of N. J., Inc., 799 F.2d 120, 124 (3d Cir. 1986); Orsini v. Echlin, Inc., 637 F. Supp. 38 (N.D. Ill. 1986).
37. 486 U.S. 399 (1988).
38. *Id.* at 401.
39. *Id.*

discharged for exercising her rights under the Illinois Workers' Compensation Act.[40] The employer removed the case to federal district court and filed a motion to either dismiss the case on preemption grounds or stay further proceedings pending the resolution of the arbitration.[41] The district court held that the employee's retaliatory discharge claim fell within the scope of Section 301 because it was "inextricably intertwined with the collective bargaining provision prohibiting wrongful discharge or discharge without cause."[42] As a result, the claim was one under Section 301 and the employee's failure to exhaust grievance and arbitration procedures, as required under federal labor law, warranted dismissal.[43]

On appeal, the Seventh Circuit affirmed the decision of the district court.[44] In the interim, the arbitrator found for the employee and awarded her reinstatement with full back pay.[45]

The Supreme Court, in a unanimous opinion, reversed the decisions of the lower courts.[46] The Court held that because resolution of the employee's wrongful discharge claim under state law did not require a court to interpret any term of the collective bargaining agreement, Section 301 did not preempt state law application.[47] In reaching this conclusion, the Court examined how the state court would resolve the wrongful discharge claim.[48] Under Illinois law, to substantiate retaliatory discharge, the employee was required to introduce facts from which it could be inferred that she was discharged for exercising her rights under the Illinois Workers' Compensation Act and the employer's motive in discharging her was to deter her from exercising those rights.[49] The employer could defend its actions by establishing a non-retaliatory reason for discharging the employee.[50] The Court reasoned that these factual issues only involved the conduct of the parties and the motivation behind the employer's decision to discharge the employee.[51] Accordingly, neither the elements of the remedy nor the defenses to the claim required a court to interpret any term of the collective bargaining agreement.[52] Therefore, the Court rationalized that the state-law claim was "independent" of the collective bargaining agreement for preemption purposes.[53]

---

40. *Id.* at 402.
41. *Id.*
42. Lingle v. Norge Div. of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985), *aff'd*, 823 F.2d 1031 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988).
43. *Id.* at 1450.
44. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1033 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988).
45. *Lingle*, 486 U.S. at 402.
46. *Id.* at 413.
47. *Id.* at 408-13.
48. *Id.* at 407.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 410. This two-step analysis is evident from the Court's pronouncement that "as long as the state-law claim can be resolved without interpreting the agreement

The Court explicitly disagreed with the Seventh Circuit's reasoning that the claim was "inextricably intertwined" with the labor agreement in that the state court and the arbitrator arguably might be examining the same facts to decide the same issue.[54] According to the Court, such "parallelism" did not render the state law analysis dependent upon the contractual determination of whether the employee was discharged for just cause.[55] As the Court aptly observed:

> [S]ection 301 preemption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. . . . [E]ven if dispute resolution pursuant to [an] agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is independent for Section 301 preemption purposes.[56]

Although the Court rejected Section 301 preemption of the retaliatory discharge claim after the employee successfully proceeded through arbitration, the Court explained that its decision did not undermine the need to preserve the effectiveness of arbitration and the concern for uniform federal labor laws.[57] Nevertheless, the *Lingle* decision does impact on the collective bargaining and arbitration processes. For instance, union employees who have an "independent" claim against their employer for wrongful discharge based on a violation of a state public policy

---

itself, the claim is 'independent' of the agreement for Section 301 [preemption] purposes." *Id.* Accordingly, a court must first examine the state law to determine if it requires reference to a collective bargaining agreement to resolve the dispute. Only when a court is not required to interpret the labor agreement can the claim be considered "independent" of the agreement. If, however, a court is required to analyze the terms of a labor contract because the state law is "inextricably intertwined" with consideration of the terms of the labor contract, "the claim will be treated as a Section 301 claim . . . or dismissed as preempted by federal labor-contract law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 220 (1985). The test espoused in *Allis-Chalmers* remains applicable because the *Lingle* Court only created a modified, but similar, test for determining if an application of state law is preempted. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 (1988). The *Lingle* Court, in essence, clarified when a claim is "independent" under *Allis-Chalmers*.

54. *Lingle*, 486 U.S. at 408-09. The identical issue, according to the Seventh Circuit, would be "whether there was 'just cause' to discharge the worker." *Id.* at 408 (citation omitted).

55. *Id.*

56. *Id.* at 409-10 (citations omitted).

57. *Id.* at 410-11. "The result we reach today is consistent . . . with the policy of fostering a uniform, certain adjudication of disputes over the meaning of collective bargaining agreements. . . . [The] interpretation of collective bargaining agreements remains firmly in the arbitral realm." *Id.* The Court reiterated that if a state court is permitted to first interpret a provision in a labor contract before the arbitrator, arbitration, as a method of dispute resolution in the collective bargaining area, would lose most of its effectiveness. *Id.*

may be permitted to proceed in state court without invoking the arbitration procedures provided for in their collective bargaining agreement.[58] Alternatively, a grievant could exhaust the contractual procedures, obtain relief, and subsequently bring a wrongful discharge action in state court seeking additional damages.[59] The availability of such a variety of methods to resolve the dispute significantly diminishes the possibility that employees will invoke only arbitration.[60] Not only does the availability of a state action make arbitration a less valuable choice of dispute resolution, but the mere existence of those alternative mechanisms frustrates the promotion of industrial peace.[61]

An employer typically agrees to an arbitration clause in a collective bargaining agreement in order to obtain another clause in the agreement which is favorable to management. In fact, the Supreme Court has held that "the agreement to arbitrate is the *quid pro quo* for an agreement not to strike."[62] If employees value the state law remedy more than the arbitration procedures, the employer may not be able to persuade the union

58. *See* Bakaly & Kohn, *supra* note 12, at 9-29-30. If, however, a claim is not "independent" but arises under Section 301 (because it involves an interpretation or a violation of the agreement) a union employee will still be required to exhaust the grievance and arbitration procedures found in the labor agreement. *See* Republic Steel Corp. v. Maddox, 376 U.S. 650 (1965). In such a case, the grievance and arbitration procedures would be the employee's exclusive remedy.

59. Bakaly & Kohn, *supra* note 12, at 9-29 to -34. In their article, Bakaly and Kohn identify three alternative methods whereby a union employee could obtain a dual remedy. First, the discharged union employee could bring an "independent" wrongful discharge action without first utilizing the grievance and arbitration procedure. Second, she could bring the action "after commencing the grievance and arbitration procedure under the labor agreement by filing a lawsuit during a step of a multi-level grievance procedure." *Id.* at 9-30. Finally, the employee could bring the action after a favorable or unfavorable arbitration award. *Id.* A state, however, may preclude an employee from seeking a remedy in state court even if the claim is independent of the labor agreement. *See infra* notes 111-14 and accompanying text.

60. *But see Preemption of State Tort Remedies, supra* note 7, at 92-94. Professor Yonover posits that because the employee will have the burden of proof in an "independent" wrongful discharge action, an arbitrator could award punitive or compensatory damages, and because there are expensive litigation costs inherent in any state court proceeding, union employees "may resort, by choice, only to the grievance/arbitration process." *Id.* at 93. Professor Yonover, however, fails to take into consideration the employees' increased bargaining power in the collective bargaining process if employees bring, or there is a threat that union employees may initiate, such "independent" causes of action in state court. *See infra* notes 62-63 and accompanying text. This factor may weigh in favor of union employees' "independent" tort actions.

61. Bakaly & Kohn, *supra* note 12, at 9-30. Bakaly and Kohn suggest that the "court's holding undoubtedly will have a significant impact on the future direction of labor-management relations in connection with agreements to arbitrate." *Id.* They correctly identify that the "conflicting substantive outcomes . . . could impede the parties willingness to agree to a uniform system of private dispute resolution." *Id.* Conversely, the possibility that the arbitrator and the state court could find for the employee may have the same effect, even though the Supreme Court has focused primarily on the dangers of "conflicting legal concepts." *See* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

62. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).

to agree to grievance and arbitration procedures in order to secure a no strike clause. Consequently, union strike activity may increase because there will be no provision in the agreement forbidding such action. To avoid this possible result, it may be beneficial for an employer to agree not only to grievance and arbitration procedures, but also to a liquidated damage clause providing for reasonable damages in the event of a successful wrongful discharge action.[63]

Although the *Lingle* decision does not further the Supreme Court's proclaimed goal of industrial peace in the collective bargaining area, it does not undermine the attainment of uniform federal labor laws. If a wrongful discharge claim survives Section 301 preemption, a state court will not be interpreting any term in the collective bargaining agreement.[64] Accordingly, the development of a cohesive and uniform set of labor laws regarding the meaning of a clause in a collective bargaining agreement will rest in the singular discretion of the arbitrator.

IV. CONTRACTUAL EMPLOYEE'S ABUSIVE DISCHARGE ACTIONS AFTER *LINGLE*

A. Wrongful Discharge Claims Based on the Public Policy Exception

A majority of states have recognized various public policy exceptions to the rule that employees can be discharged for any or no reason (the "at-will" doctrine).[65] For example, as the *Lingle* Court noted, in Illinois it is verboten for an employer to discharge an employee solely for exercising her rights under the state's workers' compensation statute.[66] Other discharges recognized by state courts and legislatures as violative

63. Bakaly and Kohn, *supra* note 12 suggest that the parties to a labor agreement may want to amend their arbitration clauses to be assured that the arbitration mechanisms will be the employees' exclusive remedy. The use of a liquidated damage clause, however, may serve as an incentive; the employer can be certain that liability will extend only so far and the employees will find it desirable to avoid the time and costs of litigation. *See* Belko v. AVX Corp., 204 Cal. App. 3d 894, 251 Cal. Rptr. 557 (1988) (punitive damages available if parties previously agreed that the arbitrator can award them). Therefore, if the parties agree to an arbitration clause, the employer will have an agreement not to strike, which will preserve industrial peace. *Cf. Lincoln Mills*, 353 U.S. at 448. Of course, this method should only be instituted if the state views the wrongful discharge action as a tort claim and allows union employees to bring the action. States that view wrongful discharge actions as sounding in contract do not grant punitive or compensatory damages. *See, e.g.*, Lopus v. L & L Shop-Rite, Inc., 171 Mich. App. 486, 430 N.W.2d 757 (1988); Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380, 385 (1988). Thus, an employee will resort to the grievance and arbitration procedures because she has nothing to gain by bringing an "independent" state court action.

64. *See supra* note 57 and accompanying text.

65. *See generally* Yonover *Preemption of State Tort Remedies*, *supra* note 7; Robbins & Norwood, *State Wrongful Discharge Law: Are Unionized Employees Covered?* 12 E. REL. L.J. 19, 20 (1986) [hereinafter Robbins & Norwood, *State Wrongful Discharge Law*].

66. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (citing Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985)).

of state public policies include discharging an employee (1) for taking leave to serve on a jury;[67] (2) for opposing and exposing illegal activities of an employer;[68] (3) for refusing to take a polygraph examination,[69] and (4) for filing a workers' compensation claim.[70]

Based on the *Lingle* decision, Section 301 arguably would not preempt wrongful discharge claims based upon violations of either state common law or statutory public policies.[71] A state which recognizes a public policy exception has created a right which exists independently of the collective bargaining agreement under the test set forth in *Lingle*. In order to enforce either the statutory or common law public policy, a state court would not be required to refer to or interpret any of the terms in the labor agreement. Instead, a court would focus on whether the employer violated the independent right according to the statutory or common law principles. Since most of these public policy exceptions were developed originally to protect at-will employees who are not, by definition, covered by labor agreements with just cause clauses,[72] the substantive test, logically, does not require a court to interpret any type of agreement. The resolution of the claim depends on the outcome of factual inquiries.[73] For example, application of the public policy exception in wrongful discharge actions generally requires the resolution of two issues: (1) whether the employee is discharged in retaliation for engaging in protected activities; and (2) whether the discharge violated some clearly mandated public policy.[74]

Several recent federal and state court decisions have found that wrongful discharge claims based on a specific state public policy are not preempted, and thus, follow the precedent set in *Lingle*.[75] For example,

---

67. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978).
68. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (employee discharged for refusing to participate in illegal price-fixing scheme); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee discharged for reporting criminal activity).
69. *See, e.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1969); Leibowitz v. H.A. Winston, 342 Pa. Super. 456, 493 A.2d 111 (1985).
70. *See, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).
71. *See* Yonover, *Preemption of State Tort Remedies*, *supra* note 7, at 94; *see also infra* notes 76-89 and accompanying text.
72. *See* Robbins & Norwood, *State Wrongful Discharge Law*, *supra* note 66.
73. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988).
74. Yonover, *Preemption of State Tort Remedies*, *supra* note 7, at 73.
75. *See, e.g.*, Jackson v. Southern Cal. Gas Co., 881 F.2d 638 (9th Cir. 1989) (contractual employee's claim for wrongful discharge in violation of public policy against racial discrimination not preempted); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (9th Cir. 1989) (age discrimination claim in violation of California's public policy against discriminatory discharges not preempted); Ackerman v. Western Elec. Co., 860 F.2d 1514 (9th Cir. 1988) (handicap discrimination claim not preempted); Kraft, Inc. v. City of Peoria, 531 N.E.2d 1106 (1988) (racial discrimination claim not preempted). There are also several opinions which were decided prior to *Lingle* where wrongful discharge claims founded on public policies survived Section 301 preemption. *See, e.g.*, Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th

in *Miller v. AT&T Network Systems*[76] the Ninth Circuit found that an employee's wrongful discharge action based on a violation of the Oregon statute forbidding discrimination respecting physical handicap was not preempted by Section 301. The court, relying on the *Allis-Chalmers* test, concluded that the discrimination claim was based on a nonnegotiable[77] state law right, independant of any right established by the contract.[78] In order to prove a discriminatory discharge under Oregon tort law, an employee is required to show that she can adequately perform her functions without the risk of incapacitating herself.[79] Under the Oregon statute,[80] in order to determine the employee's capacity to adequately perform her job, a court is not required to interpret the standards governing discharges found within the labor agreement.[81] Instead, the state courts "look to independent expert opinions of what skills a particular job requires without regard to minimum standards set out by the employer."[82] Consequently, the court decided that the state statute set forth an independent standard that was not "inextricably intertwined" with the provisions in the collective bargaining agreement.[83] In addition, the specific statutory right was nonnegotiable because the state had declared the practice of discrimination unlawful and granted the right to be free from discrimination in the workplace to all of its citizens.[84]

Similarly, the Sixth Circuit in *Smolarek v. Chrysler Corp.*,[85] held that two employees' handicap discrimination discharge claims under the Michigan Handicappers' Civil Rights Act (MHCRA), were not preempted by Section 301.[86] In its analysis, the court recognized that the *Lingle* Court clarified the language in *Allis-Chalmers* by explaining that "independent" state law actions are those that do not require an interpre-

---

Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (employee's claims for wrongful discharge for failing to work under unsafe conditions in violation of states public policy expressed in health and safety laws not preempted); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (wrongful discharge claim based on public policy against discharges in retaliation for an employee's refusal to participate in unlawful conduct not preempted), *cert. denied*, 471 U.S. 1099 (1985); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981).

76. 850 F.2d 543 (9th Cir. 1988).
77. Miller v. AT & T Network Sys., 850 F.2d 543, 546 (9th Cir. 1988) ("A right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement.").
78. *Id.* at 545-46. The court stated: "Independent rights are those state-law rights that can be enforced without any need to rely on the particular terms, explicit or implied, contained in the labor agreement." *Id.* at 546.
79. *Id.* at 549 (citations omitted).
80. *See* OR. REV. STAT. §§ 659.121, 659.405, 659.425 (1987).
81. *Miller*, 850 F.2d at 549.
82. *Id.*
83. *Id.* at 549-50. According to the Ninth Circuit, its decision was consistent with the approach adopted by the Supreme Court in *Lingle*. *Id.* at 551 n.6.
84. *Id.* at 550.
85. 879 F.2d 1326 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 539 (1989).
86. *Id.* at 1328. Two employees brought claims against the Chrysler Corporation alleging various tort theories. *Id.* at 1328-29.

tation of a collective bargaining agreement for their resolution.[87] Consequently, the court found that an employee's claim under the MHCRA would involve the same factual inquiries that were discussed in *Lingle*.[88]

In *Smolarek*, the employer asserted that because the agreement contained a provision regarding reinstatement, the claim was a breach of contract case within the parameters of Section 301.[89] The court, however, disagreed with the employer's position and noted that even though the employee could have decided to bring a claim alleging a violation of the agreement under Section 301, the fact that he decided to initiate an independent state tort action did not render the claim preempted.[90]

B. Application of the Lingle *Decision*

Although the *Lingle* decision extends to other wrongful discharge actions based on specific state public policies as the lower courts have already decided, it should not be interpreted to apply to abusive discharge claims based on the implied covenant of good faith and fair dealing or the implied contract exceptions to the at-will rule. The *Lingle* case deals specifically with an employer's violation of a state public policy expressed in a statute. In addition, states that have adopted the public policy exception have invoked a test similar to the one used by Illinois courts, which the *Lingle* Court recognized focuses on factual determinations. The implied covenant of good faith and fair dealing and the implied contract exceptions to the at-will rule, however, would require a court to construe the terms in the collective bargaining agreement. Therefore, these wrongful discharge claims are not "independent" for Section 301 preemption purposes.

1. Wrongful Discharge Claims Based on the Implied Covenant of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing theory of wrongful discharge, unlike the public policy exception, has been adopted by only a few courts.[91] These courts have found the covenant to be implied in every employment contract.[92] The implied covenant "imposes on the stronger party 'a heightened duty not to act unreasonably in breaching the contract, and to consider the interest of the other party as tantamount to its own.' "[93] An at-will employee states a cause of action in tort for a breach of this covenant if the employer has discharged the

87. *Id.* at 1330.
88. *Compare id.* at 1331-34 *with* Lingle v. Norge Div. of Magic Chef, 486 U.S. 399 (1988).
89. *Smolarek*, 879 F.2d at 1332.
90. *Id.*
91. Yonover, *Preemption of State Tort Remedies*, *supra* note 7, at 70.
92. Robbins & Norwood, *See State Wrongful Discharge Law*, *supra* note 65, at 23.
93. Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1, 4-5 (1986) [hereinafter Wheeler & Browne, *Federal Preemption*].

employee in bad faith.[94] Most courts, however, require an employee to prove that she satisfactorily performed her obligations for a long period of time and that the employer had a policy of dealing with its employees fairly and in good faith.[95]

Both before and after the *Lingle* decision, union employees' claims which alleged a breach of the implied covenant of good faith and fair dealing were found to be preempted by Section 301.[96] For example, in *Newberry v. Pacific Racing Association*,[97] the Ninth Circuit reasoned that the employee's claim for breach of the implied covenant of good faith and fair dealing required the interpretation of the collective bargaining agreement because under state law, the tort was designed to protect non-unionized employees who lack job security. Since there was a contractual provision giving union employees greater protection than the implied covenant, the court found no need to imply the good faith and fair dealing covenant.[98]

The *Newberry* opinion is indicative of how federal courts will narrowly interpret the *Lingle* decision. The state tort action for breach of an implied covenant of good faith, unlike the public policy theory of wrongful discharge, was "inextricably intertwined" with the agreement because the covenant was implied from a collective bargaining agreement.[99] Consequently, the tort action was preempted by Section 301 because the court would have to examine the contract's language to determine whether the employer, by implication, agreed to provide job security.[100]

---

94. *See* Hames, *The Current Status of the Doctrine of Employment-at-Will*, 39 LAB. L.J. 19, 27 (1988) [hereinafter Hames, *Employment-at-Will*].

95. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

96. *See infra* notes 98-101 and accompanying text; *see also*, Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987); Harper v. San Diego Transit Corp., 764 F.2d 663 (9th Cir. 1985).

97. 854 F.2d 1142 (9th Cir. 1988).

98. *Id.* at 1147; *see also* Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286 (9th Cir. 1989). The *Newberry* court noted that the scope of Section 301 preemption "is not based on how the complaint is framed, but whether the claims can by resolved only by referring to the terms of the bargaining agreement." Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1146 (9th Cir. 1988). Nevertheless, the court considered the structure of the employee's complaint in determining that her claim required a court to interpret the agreement. *Id.* at 1147. Moreover, the court considered it relevant that the employee sought her remedy under the collective bargaining agreement. *Id.* Other courts, however, have recognized that employees can maintain one claim under the labor agreement and another claim independent of it. The fact that an employee chooses to utilize both remedies does not render her independent claim preempted by virtue of the fact that the evidence also alleges a Section 301 breach of contract claim. *See* Smolarek v. Chrysler Corp., 879 F.2d 1326, 1332 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 539 (1989); Kraft, Inc. v. City of Peoria, 177 Ill. App. 3d 197, 531 N.E.2d 1106, 1109-11 (1988).

99. *See* Bakaly & Kohn, *supra* note 12, at 9-33. Bakaly and Kohn suggest that this state law action should be preempted by Section 301 because the implied covenant is derived from the parties' employment relationship or contract, which in a union setting, is the parties' collective bargaining agreement. *Id.*

100. Wheeler & Browne, *Federal Preemption*, *supra* note 93, at 27-28. "The duty arises

2. Wrongful Discharge Claims Based on the Implied Contract Exception

The implied contract exception to the at-will doctrine provides that an employer's promise (express or implied) of job security contained in its policies or handbooks may constitute a binding contractual obligation.[101] The union employee, in action for breach of an implied contract, is relying on an interpretation of the collective bargaining agreement by alleging that the rights under the implied contract are more favorable to her than the terms of the collective bargaining agreement.[102] As such, these claims are preempted by Section 301.[103]

In *Sewell v. Genstar Gypsum Products Co.*,[104] a federal district court case decided after the *Lingle* decision, the court held that an employee's claim of breach of an implied contract of job security was not based on a nonnegotiable state law right independent of the rights under the labor agreement.[105] Rather, the resolution of the claim was "inextricably intertwined" with consideration of the terms of the bargaining agreement because it was structured upon reference to, and an interpretation of, the bargaining agreement.[106] The labor agreement specifically defined the employer's ability to discharge employees for "just cause." Thus, the claim that there was an implied right stemming from the labor agreement could not survive Section 301 preemption.[107]

---

as a matter of law from the employment relationship created by the contract. . . . '[W]hat that duty embraces is dependent upon the nature of the bargain struck between [the parties] and the legitimate expectations of the parties which arise from the contract.' " *Id.*

101. Touissant v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980); *see also* Hames, *Employment-at-Will*, *supra* note 94, at 24-25.

102. Wheeler & Browne, *Federal Preemption*, *supra* note 93, at 24. ("An action for breach of implied contract is, in essence, a claim that the employee enjoys rights under an individual contract and that the individual contract rights are more beneficial to the employee than the terms of the collective bargaining agreement."); *see also* Bakaly & Kohn, *supra* note 12, at 9-32-33 (discussing why a claim under this exception should be preempted).

103. *See supra* notes 97-99; *see also* Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984) (because "the agreement provides the same or greater protection of job security that state tort law seeks to provide for nonunionized employees" and policy manuals and other independent agreements are effective as part of a labor agreement, claims alleging an implied right not to be dismissed without cause are preempted); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984) (employee could not invoke the implied contract theory under state law because the employee's collective bargaining agreement provided him with a remedy, and thus his action was a section 301 breach of contract case).

104. 699 F. Supp. 1443 (D. Nev. 1988).

105. *Id.*

106. *Id.* at 1447, 1449.

107. Wheeler & Browne, *Federal Preemption*, *supra* note 93, at 24; Bakaly & Kohn, *supra* note 12, at 9-32. "This claim is tantamount to a claim that employment has been terminated without 'cause.' " *Id.*

V. UNIONIZED EMPLOYEES' RIGHTS UNDER STATE WRONGFUL DISCHARGE LAWS

If a court finds that an employee's claim is not preempted by Section 301, it must then determine whether the state's laws protect union employees from wrongful discharges against public policy. Of course, a court could initially dismiss the action for failure to state a claim, without reaching the preemption issue, if the state in fact did not recognize the right of union employees' to bring wrongful discharge actions.[108] Therefore, a union employee's claim for wrongful discharge will not reach a jury unless the claim not only survives preemption but the state court also recognizes a union employee's right to bring such a claim.

Although most states have adopted the public policy exception to the at-will rule,[109] some states only recognize this wrongful discharge theory for non-unionized or at-will employees.[110] There is a trend within the states, however, to grant the same opportunity to receive punitive and compensatory damages in wrongful discharge actions to union employees.[111] Nevertheless, some states that permit union employees to bring these actions either require employees to exhaust the grievance and arbitration procedures found within the bargaining agreement before initiating the state tort action[112] or treat an arbitrator's finding of "just cause" as precluding a subsequent state action under rules of issue preclusion.[113]

Although the *Lingle* court left the decision of whether to grant the

---

108. *See* Washington v. Union Carbide Corp., 870 F.2d 957 (4th Cir. 1989).

109. *See* Yonover, *Preemption of State Tort Remedies, supra* note 7, at 70; Hames, *Employment at Will, supra* note 94, at 20.

110. *See, e.g.*, Phillips v. Babcock & Wilcox, 349 Pa. Super. 351, 503 A.2d 36 (Pa. 1986); *see also* Washington v. Union Carbide Corp., 870 F.2d 957 (4th Cir. 1989); Dragone v. M.J. Raynes, Inc., 695 F. Supp. 720 (S.D.N.Y. 1988) (because New York does not recognize the tort of wrongful discharge based on the public policy exception, such an action brought by a union employee would involve an analysis of the terms of the agreement).

111. *See, e.g.*, Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (1988), *cert. granted*, 778 P.2d 1370 (Colo. 1989); Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988); Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988); Lepore v. National Tool & Mfg. Co., 224 N.J. 463, 540 A.2d 1296 (1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371, *cert. denied*, 110 S. Ct. 366 (1989); Bonner v. Fleming Cos. , 734 S.W.2d 764 (Tex. App. 1987); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985); *see also* Griess v. Consolidated Freightways Corp. of Del., 882 F.2d 461 (10th Cir. 1989).

112. *See, e.g.*, Childers v. Chesapeake & Potomac Tel. Co., 881 F.2d 1259, 1265 (4th Cir. 1989) (applying Maryland law); Schuyler v. Metropolitan Transit Comm'n, 374 N.W.2d 453 (Minn. Ct. App. 1985).

113. *See supra* note 111; *see also* Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988). Other state courts that have extended the public policy exception theory of wrongful discharge to union employees do not require a union employee to exhaust the procedures. *See, e.g.*, Beckman v. Freeman United Coal Mining Co., 121 Ill. 2d 570, 527 N.E.2d 303 (1988); Conaway v. Webster City Prods Co., 431 N.W.2d 795 (Iowa 1988); Ryherd v. General Cable Co., 124 Ill. 2d 418, 530 N.E.2d 431, 438 (1988); Bonner v. Fleming Co., 734 S.W.2d 764 (Tex. App. 1987); Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281 (1980).

right of union employees to bring wrongful discharge actions with state courts, state courts have erroneously relied on the ruling in *Lingle* to resolve this issue.[114] In *Lingle*, the particular state already recognized this wrongful discharge theory for union employees.[115] The Court only held that such actions are not preempted, and therefore, did not rule on what state law should provide.[116] Accordingly, states do not have to amend their wrongful discharge laws to reconcile the *Lingle* decision.

Given this situation, state courts should not rely on issue preclusion or exhaustion of remedies to either preempt an employee's wrongful discharge claim or preclude the action according to state law despite the negative effect *Lingle* has on the arbitration process. When an action is not preempted by the operation of Section 301, federal law does not apply. Hence, the federal law which provides that employees must exhaust the grievance and arbitration procedures is not applicable under these circumstances.[117] With respect to issue preclusion of an arbitrator's finding of just cause, one court has stated the following:

> The only factual difference between this case and *Lingle* is that the employee in *Lingle*, unlike the employee here, won her grievance. Nothing in the Supreme Court's opinion, however, indicates a prior resort to arbitration, whether or not successful, has any bearing on the preemption of a claim. . . .[118]

Furthermore, an arbitrator is neither considering the public policy of the state, nor is she considering the motive of the employer in resolving the labor dispute.[119]

One rationale for allowing contractual employees to bring wrongful discharge actions based on the public policy exception is that the public policies developed by the courts and legislatures are provided to all employees.[120] Another rationale is that courts realized that union employees only recovered damages under the contract which were generally

---

114. *See* Lathrop v. Entenmann's, Inc., 770 P.2d 1367, 1373 (1988), *cert. granted*, 778 P.2d 1370 (Colo. 1989).

115. Lingle v. Norge Div. of Magic Chef, Inc. 486 U.S. 399, 407 (1988).

116. *Id.*

117. A court might interpret *Lingle* narrowly and determine that because the union employee in *Lingle* went through arbitration, a claim avoids preemption only when this occurs. However, the federal law prior to *Lingle* specifically states that exhaustion is required only when federal law applies. *See supra* note 18.

118. Ryherd v. General Cable Co., 124 Ill. 2d 418, 530 N.E.2d 438 (1988).

119. *See* Coleman v. Safeway Stores , Inc., 242 Kan. 804, 752 P.2d 645, 651 (1988).

120. Ewing v. Koppers, 312 Md. 45, 49, 537 A.2d 1173, 1175 (1988). The *Ewing* court reasoned that the "availability of this cause of action to all employees, at will and contractual, will foster the state's interest in deterring particularly reprehensible conduct . . . [and that] it would be illogical to deny the contract employee access to the courts equal to that afforded the at-will employee." *Id.*; *See also* Lepore v. National Tool & Mfg. Co., 224 N.J. Super. 463, 540 A.2d 1296, 1300 (1988) (statutory public policy rights do not derive from the bargaining process and are rights applicable to all employees).

limited to reinstatement and back pay.[121] At-will employees, however, can recover punitive and compensatory damages in state wrongful discharge actions.[122] The courts expressed discomfort with this unequal treatment, and as a result, expanded public policy protections to union employees.[123] In addition, punitive damages deter employers from violating a state's public policy.[124] To enforce these worker's rights, the courts deemed it necessary to apply the tort theory to union employees.[125]

Third, according to some courts, "[a]rbitral procedures, while well suited to the resolution of contractual disputes, are comparatively inappropriate for the resolution of tort claims."[126] Finally, one state court reasoned that:

> [A] number of employees who may have voted not to enter into the agreement are forced to accede to the will of the majority. The employee subject to a collective bargaining agreement whose individual right has been violated, is forced to submit his grievance under an agreement which was never designed to protect individual workers, but to balance the individual against the collective interest.[127]

Conversely, a reason given by courts for not granting contractual employees a right to initiate wrongful discharge actions is that the public policy exception to the at-will rule was formulated to provide protection for those employees who were not covered by labor agreements.[128] Thus, an employee who is not at-will should not be permitted to rely on a theory of wrongful discharge which is an exception to the employment-at-will doctrine.[129] Furthermore, these courts justify their approach on contract principles.[130] The union and the employer agree to the remedies and provide that the grievance and arbitration proceedings are the employees' exclusive remedy, and the decision rendered by the arbitrator is

---

121. Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280, 1284 (1984).
122. *Id.* at 149-50, 473 N.E.2d at 1283.
123. *Id.* ("in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge claim be given an action in tort. . . ."); *Lepore*, 224 N.J. Super. at 473, 540 A.2d at 1301 ("we do not think . . . employees should be denied the same remedy simply because they are members of a union.").
124. *Midgett*, 105 Ill. 2d at 150, 473 N.E.2d at 1284.
125. *Id.*
126. Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645, 651 (1988); *Lepore*, 224 N.J. Super at 472, 540 A.2d at 1300 (an arbitrator normally cannot consider public interest and does not determine violations of law or public policy); *see also* Lathrop v. Entenmanns, Inc., 770 P.2d 1367, 1373 (1988), *cert. granted*, 778 P.2d 1370 (Colo. 1989) (public policy considerations may not be presented in a claim based upon a labor agreements definition of "just cause").
127. *Coleman*, 752 P.2d at 651.
128. Phillips v. Babcock & Wilcox, 349 Pa. Super. 351, 354, 503 A.2d 36, 37 (1986).
129. *Id.*
130. *Id.* at 355, 503 A.2d at 38; *see also* Embry v. Pacific Stationery & Printing Co., 62 Or. App. 113, 659 P.2d 436 (1983).

final and binding.[131] These courts reason that they should give effect to the intent of the parties to the contract.

Courts which do not extend wrongful discharge actions based on public policy to union employees have not been persuaded by the arguments advanced by the proponents for the extension of the tort to union employees. For example, one court acknowledged that "while the at-will employee may be entitled to punitive damages in a civil action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement. . . ."[132]

The arguments in support of extending this theory of wrongful discharge to union employees are persuasive. A state public policy is one that should protect union employees, not just at-will employees. A state should apply its laws uniformally in order to enforce its statutory or common law public policies and to prevent employers from violating these recognized principles. Moreover, most state courts have recognized that wrongful discharge is a tort, not an action arising out of contract.[133] Hence, the action is separate and distinct, and different issues must be resolved which arise outside of the collective bargaining agreement. The theories behind the *Lingle* decision logically should lead a state court to allow these actions, but state courts, however, should carefully scrutinize the *Lingle* decision before determining these issues of state law.

VII. CONCLUSION

As a result of the *Lingle* decision, union employees who bring wrongful discharge actions based on the public policy exception to the at-will rule may recover punitive and compensatory damages in state court actions.[134] Moreover, if the employee first utilizes the grievance and arbitration procedures, and is successful, the employee generally is reinstated with back pay. The ability of union employees to obtain a "dual remedy," therefore, is clear.

Although *Lingle* holds that Section 301 does not preempt a contractual employee's retaliatory discharge claim, the decision should not be interpreted to extend to wrongful discharge claims based on the implied contract or implied duty of good faith and fair dealing exceptions to the

131. *Phillips*, 349 Pa. Super. at 355, 503 A.2d at 38.
132. *Id.* at 354-55, 503 A.2d at 38.
133. *See* Bakaly & Kohn, *supra* note 12, at 9-8.
134. *But cf.* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 n.12 (1988). As the *Lingle* Court observed:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. . . . Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise preempted, would stand.

Id. at 413.

at-will rule. *Lingle* should apply only to wrongful discharge claims based on common law or statutory public policies.

Finally, state courts could refuse to permit union employees to initiate wrongful discharge actions in state court, despite the fact that such claims are not preempted by Section 301. Whether a state will extend this right to contractual employees is a matter of state law. The *Lingle* decision does not affect the outcome of this issue. Nevertheless, the arguments in favor of extending the right to union employees are persuasive.

Marlene Lange Budd