The Model Employment Termination Act (META): Does It Violate the Right to Trial by Jury?

I. INTRODUCTION

The Model Employment Termination Act (META) was drafted by the National Conference of Commissioners on Uniform State Laws in August of 1991.[1] Its purpose is to serve as a statutory model for states to adopt in order to improve the ever-changing and unstable common-law doctrine of employment at will.[2] In short, the employment at will doctrine has traditionally meant that employment relationships of unspecified duration have been presumed to be at the will of either the employer or employee; either party may, without legal consequence, terminate the relationship without notice and for good cause, bad cause, or even cause that is morally wrong.[3]

In more recent years, however, because of its sometimes harsh results and the fact that the typical employer stands in a superior position to the average employee, some courts and state legislatures have created exceptions to the doctrine to aid the terminated employee.[4] These exceptions have not necessarily been applied consistently by the courts.[5] In fact, besides the uncertain court decisions, other defects in the present system include its expense and time-consuming nature.[6] These consequences have led to the whittling away of the traditional employment at will doctrine and the creation of a much more unstable application of employment law to the workplace.

META is an initiative to address these concerns. The Model Act removes the right of trial by jury for those employees who now can sue for breach of contract and tort with respect to unfair terminations and installs the use of binding arbitration. In return, the employer must meet a "good cause" termination standard.[7] It has been said by some of its promulgators

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[1] MODEL EMPLOYMENT TERMINATION ACT (1991) [hereinafter M.E.T.A.].

[2] Mary A. Bedikian, *Transforming At-Will Employment Disputes into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RESOL. 113, 113.

[3] Payne v. Western & A.R.R., 81 Tenn. 507, 518 (1884).

[4] Bedikian, *supra* note 2, at 113. Only Montana has a statute preventing the discharge of employees without just cause. *Id.* The additional protections have been accomplished through case law, workers' compensation, or whistleblowers' legislation. *Id.*

[5] Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 500, 500 n.1 (1992).

[6] *Id.*

[7] Leonard B. Mandelbaum, *Employment at Will: Is the Model Termination Act the Answer?*, 44 LAB. L.J. 275, 275 (1993). The "good cause" standard is meant to be applied

and supporters that the act is a compromise between employee and employer in that the act extinguishes all common-law rights, including trial by jury, and claims of a terminated employee against the employer in return for the employer meeting a higher justification for employee discharge, a "good cause" discharge.[8] The new cause of action is brought before a binding arbitrator. This quid pro quo between employer and employee, however, raises the constitutional issue of a possible violation of the employee's right to trial by jury. So far, no state, with the exception of Montana, which already had a pre-existing wrongful discharge statute,[9] has adopted the Model Act.

This Note will raise the issue of whether the mandatory binding arbitration and the creation of the "good cause" termination right in place of the common-law rights of the employee in META violates the employee's constitutional right to a trial by jury. Section II will introduce the employment at will doctrine and the META answer to the current problems of the wrongful discharge claim. Section III will discuss the applicable standard for judging jury trial violations. Section III will also discuss the application of the right to a jury trial standard to META and analyze whether the arbitration approach used in META is a violation of the employee's right to trial by jury.

II. THE EMPLOYMENT AT-WILL DOCTRINE AND THE DEVELOPMENT OF META

A. Development of the At-Will Employment Doctrine and Certain Exceptions Created by the Courts

In the first half of the nineteenth century, the United States developed a unique rule regarding the employment relationship of the employer and employee.[10] The rule, which became known as the "at-will doctrine," held that employers, absent a fixed-term contract, could dismiss their employees "for good cause, for no cause or even for cause morally wrong."[11] This

somewhat differently from the traditional "just cause" standard used in collective bargaining agreements between labor unions and management. "Good cause" means job-related conduct, including performance. It allows the employer greater flexibility in the good faith exercise of business judgment, including setting its economic or institutional goals and determining methods to achieve those goals. M.E.T.A. § 1(4).

[8] Mandelbaum, *supra* note 7, at 279-80.

[9] MONT. CODE ANN. § 39-2-901 (1993).

[10] Jeanne Duquette Gorr, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?*, 31 DUQ. L. REV. 111, 112 (1992).

[11] Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884).

rule, while likewise permitting employees to leave under the same conditions, flourished in the late nineteenth and early twentieth centuries.[12]

After World War II, however, employees began to gain greater employment protection as the result of the rise of labor unions, statutory provisions against unjust discrimination because of race, religion, sex, age and national origin, and the recognition of employment as a property right protected by the due process clause of the Fourteenth Amendment.[13] As a consequence of such enactments, many more state courts have become "increasingly sensitive to issues of fairness and due process"[14] and have enacted exceptions to the at-will doctrine.

During the past few decades, the state courts in forty to forty-five jurisdictions have employed three main theories to carve out certain exceptions to the previously prevailing employment at will doctrine.[15] The theories include: (i) "tort violations of public policy, or 'abusive' or 'retaliatory' discharge;"[16] (ii) "breach of an express or implied contract, embodied in a personnel manual or an oral assurance at the time of hiring;"[17] (iii) "breach of the covenant of good faith and fair dealing."[18] These theories have brought greater protection to the discharged employee.

The "public policy" exception is a doctrine usually based on tort theory and "'recognizes a cause of action for retaliatory discharge when an employer discharges an employee for a reason that is contrary to an important public policy.'"[19] It typically arises for three reasons:

1. An employee is discharged for "'refusing to commit an unlawful or

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[12] Gorr, *supra* note 10, at 112.

[13] *Id.*

[14] *Id.* at n.7.

[15] Theodore J. St. Antoine, *The Model Employment Termination Act: Fairness for Employees and Employers Alike*, 43 LAB. L.J. 495, 496 (1992).

[16] St. Antione, *supra* note 15, at 496 n.7 (citing Peterman v. Teamsters Local 396, 344 P.2d 25 (1959); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (1980)).

[17] St. Antione, *supra* note 15, at 496 n.8 (citing Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (1980); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (1982)).

[18] St. Antione, *supra* note 15, at 496 n.9 (citing Fortune v. National Cash Register Co., 364 N.E.2d 1251 (1977)).

[19] Debra D. Cyranoski, Comment, *The Model Employment Act: A Welcome Solution to the Problem of Disparity Among State Laws*, 37 VILL. L. REV. 1527, 1543 (1992) (quoting Comment, *Employment-At-Will — Employers May Not Discharge At-Will Employees for Reasons that Violate Public Policy* — Wagenseller v. Scottsdale Memorial Hosp., 1986 ARIZ. ST. L.J. 161).

wrongful act,'"[20]

2. An employee is dismissed for "'performing a public obligation;'"[21] or

3. An employee is terminated for "'exercising a legal right or privilege.'"[22]

As an example of the first basis, a public policy exception to an employee discharge is found where an employee has refused to violate a consumer credit and protection law.[23] In the second instance, for example, a public policy exception is determined when an employee has reported the criminal conduct of a fellow worker.[24] Finally, as an example of the last reason, courts have found a public policy exception to aid an employee terminated for filing a worker's compensation claim.[25]

The breach of an express or implied contract is the next exception to employment at will doctrine. It is based on a contract theory and "'permits

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[20] Cyranoski, *supra* note 19, at 1544.

[21] *Id.*

[22] *Id.* at 1546.

[23] *Id.* at 1544 n.116. The facts in *Harless* are as follows:

> Plaintiff alleged that he was discharged for requiring his employer to comply with the state and federal consumer credit and protection laws. The plaintiff was summarily fired without being given reason. The defendant-employer asserted that the plaintiff had been an at-will employee with nofixed duration of employment and thus it had a right to terminate without giving any reason for doing so.
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> The Supreme Court of West Virginia recognized that the rule giving the employer the absolute right to discharge an at-will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

Id. (quoting Harless v. First Nat'l Bank, 246 S.E.2d 270, 276 (W. Va. 1978)).

[24] Cyranoski, *supra* note 19, at 1545-46. In *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380 (Ark. 1988), the court stated, "the public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law." *Id.* at 386.

[25] Cyranoski, *supra* note 19, at 1546. In *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), the plaintiff was fired one month after she received a settlement as a result of the workers' compensation claim that she had filed. According to the complaint, the employer gave no reason for her discharge. The Supreme Court of Indiana found that the plaintiff stated a claim for which relief could be granted. *Id.*

a plaintiff to recover for breach of contract when the employer dismisses the employee in violation of promises of employment tenure made orally or implied from a course of conduct or from employee policies or handbooks.'"[26] As an example, when an employer has orally assured an employee of job security, has given him an employee handbook which stated job termination only upon "just cause," and has subsequently fired that employee, the employee has a rightful cause of action against the employer for unlawful discharge.[27] In addition, implied promises may not only be derived from employer representations, but also from an "employee's length of service and conduct."[28]

Finally, the last employment at will exception involves the breach of the implied covenant of good faith and fair dealing. It is based on tort or contract theory, depending on the particular jurisdiction, and "'encompasses an obligation to refrain from interfering with the one party's right to receive the benefits of the contract.'"[29] Under this exception, a court implies an employer promise of good faith and fair dealing into the employment contract to rectify bad faith discharge actions. Such bad faith actions include firing a worker for refusing an employer instruction to make false statements to a state legislative committee and for refusing to go on a date with a supervisor.[30]

B. Current Status of the Law

Notwithstanding these advancements, however, employees are still generally left unprotected.[31] A tort claim recovery will usually require rare,

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[26] Cyranoski, *supra* note 19, at 1538 (quoting HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 2 (1987)).

[27] *See, e.g.*, Toussaint v. Blue Cross Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980).

[28] Cyranoski, *supra* note 19, at 1538.

[29] *Id.* at 1535 (quoting ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 34 (1987)).

[30] Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (discharge of employee for refusing to follow his employer's instruction to make false statements in his testimony to a state legislative committee); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (discharge by employee's foreman because she refused to go on a date with him).

[31] St. Antoine, *supra* note 15, at 496. It is estimated that "[s]ome 60 million U.S. employees that are subject to the employment at-will doctrine and about 5 million of them are discharged each year." *Id.* Furthermore, "around 150,000 of these workers are discharged unfairly under the standards applicable in unionized industries." *Id.* For the large number of employees who may be wrongfully discharged, the current exceptions to the employment-at-

egregious acts on the part of the employer.[32] To avoid a contract claim, all the employer has to do is to refrain from future promises about job security.[33] Furthermore, even if an employer has made a promise to the employee in an employee handbook, courts generally allow the employer to revoke it unilaterally as long as the employee has adequate notice.[34] Finally, the covenant of good faith and fair dealing, which has the potential of providing the most protection for employees, has only been accepted by eleven states.[35]

Estimates of the American workforce subject to arbitrary discharge under the employment at will doctrine range from fifty-five million to sixty-five million employees.[36] In all, two million "nonprobationary, nonunion, non-civil service" employees are discharged per year.[37] Of this number, approximately 150,000 to 200,000 employees would have a legitimate claim under a "good cause" standard.[38] Under the current system, however, the great majority of "successful plaintiffs are professionals or upper-level management personnel."[39] Rank-and-file workers "who are fired usually have too little money at stake to make their cases worthwhile for lawyers operating on a contingent fee basis."[40]

On the other side, an employer found to have been liable under a common-law wrongful discharge action may pay dearly.[41] Studies of California lawsuits have found that an employee who could get his claim to

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will doctrine "constitute a weak reed, a fragile safeguard for the worker who has been wronged." St. Antoine, *supra* note 15, at 496.

[32] *Id.* at 487.

[33] *Id.*

[34] *Id.*

[35] *See* Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (2 Dist. 1980); Magnan v. Anaconda Indus. Inc., 479 A.2d 781 (Conn. 1984); Sorensen v. Comm Tek, Inc., 799 P.2d 70 (Idaho 1990); Cort v. Bristol-Myers Co., 431 N.E. 2d 908 (Mass. 1981); Prout v. Sears, Roebuck & Co., 772 P.2d 288 (Mont. 1989); D'Angelo v. Gardner, 819 P.2d 206 (Nev. 1991); Albee v. Wofeboro R.R. Co., 489 A.2d 148 (N.H. 1985); McQuitty v. General Dynamics Corp., 499 A.2d 526 (N.J. 1985) (requiring an actual employment contract exist before an implied convenant of good faith and fair dealing can be found); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

[36] Mandelbaum, *supra* note 7, at 277.

[37] Peter M. Panken, *Uniform Law Comissioners' Model Employment Termination Act*, C821 A.L.I - A.B.A. 109, 115 (1993).

[38] *Id.*

[39] St. Antoine, *supra* note 15, at 497.

[40] *Id.*

[41] *Id.*

the jury won seventy-five percent of the time and the average verdict ranged between $300,000 and $450,000.[42] One can theorize that juries are more sympathetic to employee discharge claims since most jurors hold worker rather than management positions within companies. The average juror appears to have a self-interest in supporting the rights of a fellow worker. Thus, while in front of a jury composed of "working-class people and public and unionized employees, corporations are truly target defendants."[43] Once a plaintiff-employee makes it past the judge, the key to victory has often been delivered.

Furthermore, companies successfully defending wrongful discharge claims can still expect to pay between $100,000 and $200,000.[44] Additionally, hidden costs of avoiding litigation may amount to "one-hundred times more than the adverse judgments and other legal expenses."[45] Overall, it has been concluded that the central defects in the current common-law system "are that employees' substantive rights are too limited and uncertain, the remedies against employers are too random and often excessive, and the decisionmaking process is too inefficient for all concerned."[46]

Recognizing the shortcomings in judicial solutions for both employer and employee and the fact that the courts are unlikely to significantly expand protection against unjust dismissal,[47] scholars, practitioners, and legislators over the past twenty-five years have started proposing legislative solutions.[48] For instance, in 1980, a bill was introduced in the U.S. House of Representatives to make unjust dismissal an unfair labor practice under the National Labor Relations Act; the bill, however, did not reach non-union employees, the most unprotected workers in the system.[49] Furthermore, at the state level, in 1987, Montana became the first state in

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[42] St. Antoine, *supra* note 15, at 497.

[43] Cliff Palefsky, *Wrongful Termination Litigation: 'Dagwood' and Goliath,* 62 MICH. B.J. 776 (1983).

[44] St. Antoine, *supra* note 15, at 497.

[45] *Id.*

[46] *Id.*

[47] Mandelbaum, *supra* note 7, at 279.

[48] Gorr, *supra* note 10, at 116 n.33 (citing Lawrence E. Blades, *Employment At-Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967); Cornelius Peck, *Unjust Discharges From Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1 (1979); and Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976)).

[49] Gorr, *supra* note 10, at 116 (citing the Corporate Democracy Act, H.R. 7010, 96th Cong., 2d Sess. (1980)).

the nation to statutorily "protect" employees from "wrongful discharge."[50] In addition, over the past ten years, forty out of forty-five states and territories surveyed had indicated that bills had been introduced in their legislatures "concerning 'employment termination, at-will employment, or a related subject.'"[51] Building on this wave of activism at the state level, META is a recent uniform model for a solution to the problem.

C. The Model Employment Termination Act

The Commissioners on Uniform State Laws are a large cross-section of influential lawyers, judges, law professors, and legislators from around the country who meet annually in a national conference and quarterly in smaller committees to prepare and adopt bills to serve as model enactments for state legislatures.[52] In 1985, the Uniform Law Commissioners' Executive Committee approved the formation of a promulgating committee to draft a Uniform Wrongful Termination Act.[53] The approval was based in part on studies "indicating that recent judicial modifications in the doctrine of employment at will had created great uncertainty for both employers and employees."[54] After six years of intensive activity, the subcommittee produced the Model Employment Termination Act.[55] At the 1991 Annual Conference of Uniform Commissioners on State Laws, the Employment Termination Act was formally approved as a Model Act.[56]

The promulgating committee of the Commissioners on Uniform State Laws described the "underlying theme" of the Model Act as "one of compromise."[57] The quid pro quo includes the following: in exchange for the abandonment of the "at-will" standard, covered employees are granted an expanded substantive right to "good cause" protection against wrongful discharge in an arbitration setting.[58] Under section 1(4) of META, the "good cause" standard is defined as "(i) a reasonable basis related to an individual employee for termination . . . in view of relevant factors and

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[50] Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992). The act takes away all common law rights of the employee in return for a "good cause" (reasonable job-related basis) justification for termination of employment. *Id.* at 59.

[51] Gorr, *supra* note 10, at 116 (citing M.E.T.A. § 4).

[52] St. Antoine, *supra* note 15, at 496.

[53] Bedikian, *supra* note 2, at 116.

[54] Panken, *supra* note 37, at 114.

[55] *Id.*

[56] *Id.* at 115.

[57] Mandelbaum, *supra* note 7, at 279.

[58] M.E.T.A. §§ 1(4), 6; *see also* Mandelbaum, *supra* note 7, at 279.

circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise job performance . . . , or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals."[59] Thus, the "good cause" standard is meant to be applied somewhat differently from the traditional "just cause" standard used in collective bargaining agreements between labor unions and management. META allows the employer greater flexibility in the good faith exercise of business judgment, including setting its economic or institutional goals and determining methods to achieve those goals.

Under section 2, the scope of the Act "displaces and extinguishes all common-law rights," including a right to a jury trial, of a terminated employee against the employer and replaces them with the discharge requirement that employers meet a standard of "good cause" before an arbitrator of the state.[60] When a successful claim is brought, the arbitration award is limited to reinstatement, with or without backpay, and severance pay when reinstatement is infeasible.[61] Also, compensatory and punitive damages are eliminated.[62] The arbitrator's decision is necessarily binding and only may be vacated or modified by a reviewing court of law if the court finds corruption, conflict of interest, excessive use of arbitral powers, or prejudicial error of law.[63]

META is similar to other alternative dispute resolution systems in that it searches for conflict resolution that is more efficient than the traditional process and provides a better quality of dispute resolution.[64] When arbitration is imposed by law for a claim currently decided by jurors, the constitutional issue of a right to trial by jury emerges. This aspect of the Act appears to have been a concern for some members of the Uniform Commission. That concern is why META has an alternative provision for states concerned about possible constitutional problems concerning the right to jury trial. In the appendix of the Model Act, under Alternative A, it provides an alternative of enforcement in the hands of a state administrative agency and, under Alternative B, under the care of the civil courts.[65]

By providing an alternative procedure for states to adopt, it is evident that a majority of the members of the Uniform Commission had a concern over the possible violation of an employee's constitutional right to a jury

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[59] M.E.T.A. §§ 1(4), 6.

[60] *Id.* § 2(c); *see also* Mandelbaum, *supra* note 7, at 279–80.

[61] M.E.T.A. § 7; *see also* Mandelbaum, *supra* note 7, at 279.

[62] M.E.T.A. § 7; *see also* Mandelbaum, *supra* note 7, at 279.

[63] M.E.T.A. § 8(c); *see also* Panken, *supra* note 37, at 132.

[64] Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 490 (1989).

[65] Alternative A reads, in pertinent part, as follows:

trial in wrongful discharge disputes. The question arises, then, whether the use of mandatory binding arbitration in the primary Act itself, which compels arbitration by law rather than by contract or volition, violates the employee's constitutional right to a jury trial.

III. DOES META VIOLATE THE EMPLOYEE'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY?

A. The Right to Jury Trial

The Seventh Amendment to the United States Constitution guarantees the right to trial by jury in civil actions in federal courts.[66] It explicitly provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[67] In *Beacon Theatres, Inc. v. Westover*,[68] the Supreme Court highlighted the importance of the Seventh Amendment jury right when it stated: "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'"[69] Nonetheless, the Supreme Court has declined to treat the Seventh Amendment civil jury trial as applicable to the states through the requirement of the Due Process Clause of the Fourteenth Amendment.[70] The constitutions of forty-eight states, however, contain a similar guarantee that the right to jury trial shall be preserved inviolate.[71] While there are

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SECTION 5. ADMINISTRATIVE PROCEEDINGS

Insert provisions consigning enforcement of the [Act] to a new or existing administrative agency, staffed by civil service or other governmental personnel, operating under applicable state statutes.

M.E.T.A. app A § 5.

Alternative B reads (in pertinent part) as follows:

SECTION 5. JUDICIAL REMEDIES

Alternative B would leave the enforcement of the statute to the civil courts.

M.E.T.A. app. A § 5.

[66] U.S. CONST. amend. VII.

[67] *Id.*

[68] 359 U.S. 500 (1959).

[69] *Id.* at 501 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

[70] Walker v. Sauvinet, 92 U.S. 90 (1876).

[71] *See, e.g.*, CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 21. Colorado and

some differences among the provisions,[72] they have been given an essential uniform effect for the purposes of this discussion.

B. The Historical Test of the Right to Jury Trial

The right to jury trial is preserved and reviewed by what is called the historical test.[73] This standard generally means that the state and federal constitutions preserve "the right of jury trial as it existed in English history at some past time, either in 1791 when the Seventh Amendment was adopted or, in the case of the states, at the date of the first state constitution."[74] Under the historical test, litigants are entitled to have a claim presented to a jury if "the claim would have received a jury trial under the common law of England at the time the Constitution was ratified."[75]

At common law, not all civil matters were tried to a jury. A jury trial was customary in suits brought in English law courts, while it was not in courts of equity.[76] Thus, at common law, if a claim was a legal action before a law court so that it might receive a "legal" remedy, a jury trial right existed; if a claim was an equity action so that it might receive an equitable remedy, there was no jury trial right.

In addition, the Supreme Court has construed the language of the Seventh Amendment to require a "jury trial on the merits in those actions that are analogous to 'Suits at common law.'"[77] In *Parsons v. Bedford*,[78] the Supreme Court stated the term "Suits at common law" refers to "'suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and

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Louisiana have no constitutional guarantee of jury trial for civil actions.

[72] *See* Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 657 n.15 (1963)) (quoting LOUISELL & HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 938 (1962)("In the states which have them, the constitutional guarantees of jury trial in civil cases usually are phrased in strong but not very detailed language. The constitutional authors generally were content to provide that trial by jury 'shall remain inviolate forever,' 'shall remain inviolate,' 'shall be secured,' 'shall remain as heretofore,' etc. . . . At least implicitly the purport is that the right shall remain in substance as it was when the state constitutional provision was adopted.")).

[73] James, *supra* note 72, at 657.

[74] *Id.* at 655.

[75] Golann, *supra* note 64, at 503 (citing Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916)).

[76] Tull v. United States, 481 U.S. 412, 417 (1987).

[77] *Id.*

[78] 28 U.S. (3 Pet.) 433 (1830).

equitable remedies [are] administered.'"[79] The Supreme Court went on to state, "[t]he Amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."[80] This analysis applies not only to common-law forms of action, but extends to causes of action created by Congress where legal rights are at stake.[81]

The historical test's legal/equitable remedy distinction remains the standard today. This is so even though the American court system has merged the equity/legal distinction into one united procedure. With the merger of procedures for claims at law and claims at equity in the American court system today, this historical test seems antiquated and even "irrational."[82] Nevertheless, neither the courts, the state legislatures, nor Congress has changed the applicable historical test standard for determining right to jury trial violations.

To determine whether a particular action will resolve legal rights, both the nature of the issues involved and the remedy sought are examined.[83] Thus, the historical test analysis has two steps: first, the modern statutory action in dispute is compared to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity; second, the remedy sought is examined by determining whether it is legal or equitable in nature.[84] The Supreme Court has stated that the second inquiry is the more important of the two.[85]

Under the first prong, if an action would have been brought before a court of law in England, then it is legal in nature and generally requires a trial by jury. Otherwise, it is an equitable action. An example of an action legal in nature is breach of contract since this type of action was brought before a court of law under the common law of England. Under the second prong, if the remedy sought is one for which only a court of law in England had the power to institute, then the remedy is a legal one. Otherwise, the damage is equitable. An example of a legal remedy is punitive damages. An example of an equitable damage award is an injunction.

Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry [86] is a

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[79] *Parsons*, 28 U.S. (3 Pet.) at 447.

[80] *Id.* at 447.

[81] Tull v. United States, 481 U.S. 412, 417 (1987).

[82] Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 74-75.

[83] Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990).

[84] *Id.* (citing *Tull*, 481 U.S. at 417-18).

[85] *Id.*

[86] 494 U.S. 558, 558.

recent example of an application of the historical test. In this case, a laid-off truckdriver of McLean Trucking Company brought suit against his employer alleging that the employer breached the collective bargaining agreement by revoking the special seniority rights "guaranteed" to him in return for agreeing to transfer to a terminal in another town and against his union for violating the duty of fair representation for failing to process his employee grievance.[87] In the meantime, McLean Trucking Company filed for bankruptcy, and the action against it, and all claims for injunctive relief were dismissed.[88] While hearing the remaining duty of fair representation claim in which the employee sought relief in the form of backpay, the trial court denied the union's motion to strike the plaintiff's demand for a jury trial.[89]

After the court of appeals affirmed,[90] the U.S. Supreme Court, in applying the two-step historical test, upheld the trial court decision as well.[91] The Court took note that whether the employee sues both the labor union and the employer or only one of them, he "must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation."[92] In applying the first prong of the historical test to that distinction, Justice Marshall, speaking for a plurality of four, stated the breach of the collective bargaining agreement claim against the employer is analogous to the legal claim of breach of contract while the duty of fair representation issue is analogous to an equitable claim against a trustee for breach of fiduciary duty.[93] Therefore, the nature of the employee's action encompasses both legal and equitable issues and so the first part of the Seventh Amendment inquiry leaves the analysis in "equipoise" or a state of equilibrium.[94]

Applying the second inquiry of the historical test, the Court majority stated that an action for money damages in general was "'the traditional form of relief offered in the courts of law.'"[95] The Court stated first that,

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[87] *Chauffers, Teamsters & Helpers, Local No. 391*, 494 U.S. at 561-62.

[88] Id. at 562.

[89] Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 676 F. Supp. 659 (M.D.N.C. 1986), *aff'd*, 863 F.2d 334 (4th Cir. 1988), *aff'd*, 494 U.S. 558 (1990).

[90] Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 863 F.2d 334 (4th Cir. 1988), *aff'd*, 494 U.S. 558 (1990).

[91] Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 562 (1990).

[92] *Id.* at 564.

[93] *Id.* at 569-70.

[94] *Id.* at 570.

[95] *Chauffers, Teamsters and Helpers, Local No. 391*, 494 U.S. at 570. (quoting Curtis

even though the restititution of wages and benefits may be an equitable remedy against an employer, it is a legal remedy against a labor union since the union's failure to process the employee's grievance properly cost the employee wages and benefits he would have received from the employer.[96] The Court argued that such relief is not restititutionary. Second, it asserted that a monetary award "'incidental to or intertwined with injunctive relief'" may be equitable but since, in this case, the employee was only seeking monetary damages, the remedy sought is legal in nature.[97] The Court then concluded that since the first part of the historical test was a "toss-up" while the second part was "clearly" legal in nature and more important to the Seventh Amendment determination, the employee, therefore, has a right to a trial by jury on his action against the union.[98]

C. Application of the Historical Test and Supreme Court Precedent to META

To determine whether META violates the right to trial by jury by failing to properly resolve the legal rights of a discharged employee, both the nature of the issues involved and the remedy sought will be examined.[99] As was noted earlier, the historical test analysis involves two steps: first, the modern statutory action in dispute is compared to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity; second, the remedy sought is examined by determining whether it is legal or equitable in nature.[100]

1. Analyzing the Nature of the Issues Involved

Under the first prong of the historical test, the pre-merger custom is analyzed. In applying this step, the "question then arises whether the [historical test] freezes the right absolutely as it was in England in 1791, or whether it has some elasticity so as to accomodate extensions or contractions of jury trial and, if so, what the limits of this elasticity may be."[101] META would appear on its face not to violate an employee's right to jury trial because the right of "good cause" wrongful discharge did not exist under

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v. Loether, 415 U.S. 189, 196 (1974)).

[96] Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 562 (1990).

[97] *Id.* (quoting Tull v. U.S., 481 U.S. 412, 424 (1987)).

[98] *Id.* at 573.

[99] *See id.* at 565.

[100] *Id.* (citing *Tull*, 481 U.S. at 417-18).

[101] James, *supra* note 72, at 657.

the English common law. However, one of the reasons the current wrongful discharge dispute requires a jury trial is because it is analogous to the common-law right of breach of contract. One could assert that the new "good cause" wrongful discharge dispute is similarly analogous to the common-law right of breach of contract.

Based on the traditional standard for extensions of a right to jury trial to claims that resemble common-law rights, a "good cause" wrongful discharge claim would appear to constitutionally require a jury trial. In *Ross v. Bernard*,[102] the Supreme Court, in upholding the traditional standard, held that a stockholders' derivative suit, a type of suit traditionally brought in courts of equity, requires a right to jury trial because the plaintiffs' case presented legal issues of breach of contract and negligence.[103]

META is somewhat different in that it extinguishes the employee's right to trial by jury for a legal cause of action, the wrongful discharge claim, and institutes a mandatory arbitration proceeding adjudicating a new cause of action, the "good cause" wrongful discharge action. One of the most serious constitutional questions raised by proposals to make dispute resolution mandatory is the potential impairment of a litigant's right to a jury trial. The phrase "mandatory alternative dispute resolution" includes "both those processes which require participation but allow disputants to reject the [alternative dispute resolution] outcome and try their cases in court, and those processes which have binding outcomes, enforceable with only limited appellate review."[104] META represents the latter.[105]

The key factors in analyzing the constitutionality of alternative dispute resolution are, "first, whether a [dispute] process applies to legal causes of action and, second, the extent to which the outcome of the process, as well as participation in it, is mandatory."[106] The claim of wrongful discharge closely resembles the old common law legal claim of breach of contract so that a jury trial is constitutionally required. Thus, legal claims such as wrongful discharge which are subject to mandatory arbitration violate the Seventh Amendment's jury trial requirement. However, META sidesteps the first issue by replacing the old wrongful discharge legal claim and creating a new cause of action, with a "good cause" standard, for the employee against the employer. Therefore, no need exists to reach the second issue.

This change appears constitutional since other new rights and remedies, over the course of U.S. history, have been created since the adoption of the

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[102] 396 U.S. 531 (1970).

[103] *Id.*

[104] Golann, *supra* note 64, at 494.

[105] Mandelbaum, *supra* note 7, at 279–80.

[106] Golann, *supra* note 64, at 503.

federal and state constitutions.[107] In a similar fashion, META creates a new right for the employee by holding the employer to a "good cause" standard for termination decisions. In devising new remedies, the "legislature has considerable latitude to determine whether they shall carry a right to jury trial."[108] Generally, because alternative dispute resolution does not provide jury trials, "the only way to apply binding dispute resolution to jury claims is to transform those claims so that they no longer carry jury trial rights."[109]

The above analysis is based on the fact that the U.S. Supreme Court has held, in *Mountain Timber Co. v. Washington*,[110] that a legislature may even abolish a common-law remedy, such as the right of an employee to sue his employer in tort for job-related injuries, and substitute for it an entirely new system of compensation for all industrial injuries to be administered by a board or commission which will determine factual disputes without resort to either court or jury (e.g., workers' compensation statutes).[111] This is constitutionally permissible because the traditional jury trial has been eliminated as an option since the removal of the element of fault from workers' compensation actions has transformed the actions to such an extent that they need not be tried by a jury.[112]

It is questionable, however, whether the new "good cause" standard adopted in META has transformed the wrongful discharge claim to such an extent that these claims no longer require a jury. Generally, "unless an action is transformed, . . . dispute resolution programs must allow participants with jury claims the option to reject [alternative dispute resolution] results and elect traditional jury trials."[113] Determining if a common-law action has been sufficiently transformed is dependent on how extensive is the modification of the traditional cause of action.[114]

When a jury is instructed to decide a possible exception of the at-will doctrine to the wrongful discharge claim, it determines whether a justifiable reason exists for reversing the employer's decision to terminate the employee. The workers' compensation situation appears distinguishable from the "good cause" termination case of META because, in the former,

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[107] *E.g.*, Mountain Timber v. Washington, 243 U.S. 219 (1917) (upholding the constitutionality of a workers' compensation statute).

[108] James, *supra* note 72, at 655 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937) (holding an administrative finding of unfair labor practice to be proper)).

[109] Golann, *supra* note 64, at 504.

[110] 243 U.S. 219 (1917).

[111] *Id.*

[112] *Id.* at 235.

[113] Golann, *supra* note 64, at 505.

[114] *Id.*

fault is no longer an issue for the jury. All that is necessary is to prove work-related injury and to determine damages. The most important jury question has been sufficiently transformed.

In the META situation, however, a similar jury issue to the earlier wrongful discharge claim still exists: Did the employer have a good cause justification for terminating the employee? Thus, the common-law action of wrongful discharge has not been sufficiently transformed through the new "good cause" right. The "justifiable" termination issue for a wrongful discharge claim still remains. Thus, in its current form, META short-changes the employee's right to a jury determination on the issue of the employer's decision to terminate and instead requires mandatory arbitration with limited review.

The new "good cause" right does not sufficiently transform the common-law right of wrongful discharge. A legislature is subject to certain limits in transforming a common-law right brought before a jury into a new claim disputed and determined under alternative dispute resolution. If a legislature creates a right to be redressed by an action which is analogous to a common-law action, the legislative body "probably may not deprive the parties to the action of a right to jury trial."[115] Thus, the question arises as to what are the constitutional limits to the elasticity allowed a state legislature in transforming the employee's common-law right subject to jury trial into a new "good cause" termination right against the employer subject to binding arbitration.

As was pointed out earlier, the Supreme Court, in *Parsons v. Bedford*,[116] held that if a legislature creates a right to be redressed by an action which is analogous to a common law tort action, "it probably may not deprive the parties to the action of a right to jury trial."[117] The "good cause" standard in META is at least analogous to the existing implied covenant of good faith and fair dealing exception to the at-will doctrine, if not the two other wrongful discharge theories. Section 1(4) of META defines the "good cause" standard as "(i) a reasonable basis related to an individual employee for termination . . . in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise job performance . . . , or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals."[118]

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[115] James, *supra* note 72, at 656 (citing Parsons v. United States, 28 U.S. (3 Pet.) 433, 447 (1830)). For compensatory damages caused by wrongful death, the right to jury trial probably could not be waived.

[116] 28 U.S. (3 Pet.) at 433.

[117] James, *supra* note 72, at 656 (citing *Parsons*, 28 U.S. (3 Pet.) at 447).

[118] M.E.T.A. § 1(4).

Under the good faith and fair dealing exception, a court implies an employer's promise of good faith and fair dealing into the employment contract to rectify bad faith discharge actions on the part of the employer against the worker. A bad discharge is committed when an employer, acting in bad faith, discharges an employee who has established contractual rights of continued employment and who has developed a relationship of trust, reliance, and dependency with the employer. Such bad faith actions include firing a worker for refusing an employer instruction to make false statements to a state legislative committee and for refusing to go on a date with a supervisor.

The "good cause" claim does not change the applicable standard of analysis. Therefore, in those eleven states that have an implied covenant of good faith and fair dealing exception, META's good cause termination standard is analogous to an existing common-law right. In those eleven states, META would violate the employee's right to jury trial.[119]

In addition, the Supreme Court has drawn a distinction between public rights and private rights created by statute and enforced in non-jury settings.[120] *Atlas Roofing Co. v. Occupational Safety & Health Review Comm.*,[121] involved Congress' creating a legal claim by statute against unsafe working conditions in the workplace. Any alleged violations are assigned to administrative agency adjudication.[122] The Court found this action not to be a violation of the employer's Seventh Amendment jury right:[123] It firmly stated:

> *At least in cases in which "public rights" are being litigated*, e.g., cases in which the Government sues in its sovereign capacity to enforce

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[119] The states include Alaska, Arizona, California, Connecticut, Idaho, Massachusetts, Montana, New Hampshire, New Jersey, Nevada, and Utah. *See* Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (2 Dist. 1980); Magnan v. Anaconda Indus., Inc., 479 A.2d 781 (Conn. 1984); Sorensen v. Comm Tek, Inc., 799 P.2d 70 (Idaho 1990); Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982); Prout v. Sears, Roebuck & Co., 772 P.2d 288 (Mont. 1989); D'Angelo v. Gardner, 819 P.2d 206 (Nev. 1991); Albee v. Wofeboro R.R. Co., 489 A.2d 148 (N.H. 1985); McQuitty v. General Dynamics Corp., 499 A.2d 526 (N.J. 1985) (requiring an actual employment contract exist, before an implied convenant of good faith and fair dealing can be found); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

[120] *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm., 430 U.S. 442, 450 n.7 (1977).

[121] 430 U.S. 442 (1977).

[122] *Id.*

[123] *Id.* at 450.

> public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[124]

The Court explicitly noted in a footnote that the enforcement of the Occupational Safety and Health Administration regulations does not involve purely "private rights"[125] like the one found in META. It stated, that in cases which involve only "private rights" created by Congress, it is acceptable to have "factfinding by an administrative agency, without intervention by a jury, *only* as an adjunct to an Article III court created"[126] by Congress. Thus, for Congress to create a private right for a "good cause" standard for wrongful discharge that is enforceable without a jury as factfinder, it would need to create a state or federal agency to enforce the right and not only rely on an arbitrator's decision on the matter.

META does suggest that an existing state agency administer the program by adopting rules regulating selection and qualification of arbitrators.[127] But it does not require a "new" or existing state agency to actually make the arbitration decisions. It does offer this alternative approach in Appendix A of the Model Act.[128] But from a federal law perspective, META, in its primary form, would appear to be in violation of the *Atlas Roofing* requirement that an agency act as a factfinding "adjunct to an Article III court."[129] Therefore, META, in its primary form, appears to violate at least the Seventh Amendment's right to jury trial. As was noted earlier, the Seventh Amendment is not applicable to the states through the Due Process Clause of the Fourteenth Amendment so some states may be able to sidestep this deficiency in META.

Certain Supreme Court cases are distinguishable from the historical test's first prong constitutional problems of META. In *Block v. Hirsh*,[130] the Supreme Court sustained Congress' power to pass a statute applicable to the District of Columbia which temporarily suspended a landlord's legal remedy of ejectment and relegated him to an administrative fact finding forum charged with determining fair rents at which tenants could hold over despite the expiration of their leases. The Court ruled no violation of the

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[124] *Atlas Roofing*, 430 U.S. at 450 (emphasis added).

[125] *Id.* at 450 n.7.

[126] *Id.*

[127] Mandelbaum, *supra* note 7, at 280 (citing draft M.E.T.A. § 5(c) at 25).

[128] M.E.T.A. app. A § 5.

[129] Atlas Roofing Co. v. Occupational Safety & Health Review Comm. 430 U.S. 442, 450 n.7 (1977).

[130] 256 U.S. 135 (1921).

right to jury trial occurred because the ejectment right of the employer was only temporarily suspended and Congress had intended a speedy resolution for landlord-tenant rent disputes.[131] Even if META admirably seeks speedy resolution of employer-employee wrongful discharge disputes, it is not a temporary suspension of an employee's right to bring his claim before a jury. Therefore, the *Block* case is inapplicable to the META situation.

In addition, the Court in *NLRB v. Jones & Laughlin Steel Corp.*[132] addressed the Seventh Amendment jury right question in relation to the creation of the National Labor Relations Act, where a new federal agency, the National Labor Relations Board, would determine unfair labor practices on the part of an employer or union.[133] The Court found no violation of the right to jury trial since under the historical test's first-prong standard an unfair labor practice proceeding "is not a suit at common law or in the nature of such a suit."[134] In *Curtis v. Loether*,[135] the Court further clarified its *Jones & Laughlin* holding when it stated that *Jones & Laughlin* upheld "congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment."[136] *Curtis* rejected the argument that *Jones & Laughlin* held the Seventh Amendment inapplicable to any action based on a statutorily created right even if the action was brought before a tribunal which customarily utilizes a jury as its fact-finding arm.[137] Thus, *Jones & Laughlin* would be inapplicable to META since META, in its primary form, does not permit a state agency to decide the dispute, and wrongful discharge is an extension of the common-law right of breach of contract. Furthermore, as was noted earlier, with the Court's decision in *Atlas Roofing*,[138] a legislature can only subject a new statutory "private" right to an agency which is an adjunct to an Article III court.[139] The NLRB is just such an agency while an arbitrator is not.

With the above precedent in mind, META, in its primary form, violates the first prong of the historical test for two reasons. First, a wrongful discharge claim by an employee against an employer is an extension of the common-law right of breach of contract. Therefore, it

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[131] *Block*, 256 U.S. 135.

[132] 301 U.S. 1 (1937).

[133] *Id.*

[134] *Id.* at 48-49.

[135] 415 U.S. 189 (1974).

[136] *Id.* at 194-95.

[137] Jones & Laughlin Steel Corp. v. NLRB, 301 U.S. 1, 1 (1937).

[138] Atlas Roofing Co. v. Occupational Safety & Health Review Comm. 430 U.S. 442 (1977).

[139] *Id.* at 450 n.7.

requires a jury trial. The historical test's "nature of issue" step prevents a legislative body from creating a "new" cause of action without a jury trial that does not sufficiently transform the wrongful discharge claim to such an extent that these claims no longer require a jury. In states that have adopted the good faith and fair dealing exception to the at-will doctrine, META violates the right to trial by jury by failing to sufficiently transform the common-law right.

Second, under federal law, a legislative body cannot create a new "private" statutory right without having the claim adjudicated by a fact-finding agency that is an adjunct of an Article III court. Therefore, under Supreme Court precedent, META's creation of a "private" good cause wrongful termination claim before a state-appointed arbitrator violates the employee's right to jury trial. For Congress to create a private right for a "good cause" standard for wrongful discharge that is enforceable without a jury as factfinder, it would need to create a state or federal agency to enforce the right and not rely only on an arbitrator's decision on the matter. In states that have not adopted the good faith and fair dealing exception or need not follow the Supreme Court precedent requiring a state agency to administer the adjudication of the new right, META appears constitutional otherwise. However, it may still violate the second prong of the historical test which analyzes the remedy sought by the employee-claimant.

2. Analyzing the Nature of the Remedies

Under the second prong of the historical test, the remedy sought is examined by determining whether it is legal or equitable in nature.[140] As the Court noted in *Chauffeurs, Teamsters & Helpers, Local No. 391*,[141] the second prong is more important than the first in deciding a legal action and therefore a constitutionally-required right to a jury trial. Under the second prong of the historical test, if the remedy sought is one which only a court of law in England had the power to institute, then the remedy is a legal one. Otherwise, the damage is equitable.

Under the common-law right of wrongful discharge, if an employee sues an employer based on contract theory, the employee can possibly recover the following damages: compensatory damages like backpay and loss of fringe benefits, reinstatement, and frontpay if reinstatement is infeasible. If an employee bases the wrongful discharge claim on tort theory,[142] the person possibly can recover the following damages:

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[140] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (citing *Tull*, 481 U.S. at 417–18).

[141] *Id.* at 558.

[142] For example, the public policy tort exception to the at-will doctrine is an example of

compensatory damages like backpay and loss of fringe benefits, reinstatement, severance pay if reinstatement is infeasible, pain and suffering, emotional distress damages, and punitive damages.

Under META, when a successful claim is brought, the arbitration award is limited to reinstatement, with or without backpay, and severance pay when reinstatement is infeasible.[143] Also, compensatory and punitive damages are eliminated.[144] Thus, META "preempts and eliminates the public policy tort."[145] On the other hand, the general remedies available for contract-based wrongful discharge have remained in META.

a. Comparing META to Contract-Based Wrongful Discharge

In analyzing the common-law right of wrongful discharge as differentiated from the changes made in META, it should be noted that the remedies available under contract theory for wrongful discharge claims, including the recovery of backpay and loss of fringe benefits and even reinstatement, have not been changed by META. The only major difference is that under META an arbitrator, rather than a jury, decides the award of these damages.

All of the types of remedies available under both META and contract-based wrongful discharge claims are equitable. The Supreme Court has held that the recovery for backpay relief from an employer by an employee based on a Title VII discrimination action under the Civil Rights Act of 1964 is a type of restitution that is equitable.[146] Restitution is used for "restoring the status quo and ordering the return of that which rightfully belongs" to another.[147] A right to jury trial is not required for these types of remedies under Title VII. Thus, by analogy, the recovery of backpay and fringe benefits in a wrongful discharge claim does not require a jury trial for their determination either.

The call for reinstatement is also an equitable remedy. It is a form of an injunction which was only ordered by courts of equity in England. Furthermore, if a monetary award is "incidental to or intertwined with injunctive relief,"[148] it is more likely to be held equitable as well. A "court in equity was empowered to provide monetary awards that were incidental

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a wrongful discharge claim based on tort theory.

[143] M.E.T.A. § 7; *see also* Mandelbaum, *supra* note 7, at 279.

[144] M.E.T.A. § 7.

[145] Tobias, *supra* note 5, at 501.

[146] Curtis v. Loether, 415 U.S. 189, 196-97 (1974).

[147] Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946).

[148] Chauffers, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573 (1990) (citing Tull v. U.S., 481 U.S. 412, 424 (1987)).

to or intertwined with injunctive relief."[149] Thus, META, as compared to contract-based wrongful discharge, does not violate the right to trial by jury since the remedies are still the same—equitable in both regards.

b. Comparing META to Tort-Based Wrongful Discharge

As was noted earlier, if an employee bases the wrongful discharge claim on tort theory,[150] the person possibly can recover the following: compensatory damages (like backpay and loss of fringe benefits), reinstatement, severance pay if reinstatement is infeasible, punitive damages, damages for pain and suffering, and emotional distress.

On the other hand, under META, when a successful claim is brought, the arbitration award is limited to reinstatement, with or without backpay, and severance pay when reinstatement is infeasible.[151] Other compensatory and punitive damages are eliminated from the arbitration award.[152]

The fact that META removes the damages claim for reinstatement and possible backpay and severance pay to an arbitrator instead of a jury is constitutionally permissible since they are equitable damages. However, in addition, META eliminates altogether the awards for pain and suffering, emotional distress damages, and punitive damages.

Pain and suffering and emotional distress damages are forms of compensatory damages. Like restitution damages that are ordered to restore the status quo, compensatory damages were administered by the courts of equity in England.[153] Punitive damages, on the other hand, are legal relief.[154]

The *Tull* court asserted that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."[155] Although META strips employees completely of their legal common-law right to pursue punitive damages against the employer when they have been the victim of outrageous and cruel terminations, the Seventh Amendment is not violated since the arbitrator is not enforcing punitive damages. Thus, META's elimination of punitive damages will be rendered constitutional since a court generally gives the legislature discretion to make

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[149] *Tull*, 481 U.S. at 424.

[150] For example, the public policy tort exception to the at will doctrine is an example of a wrongful discharge claim based on tort theory.

[151] M.E.T.A. § 7; *see also* Mandelbaum, *supra* note 7, at 279.

[152] M.E.T.A. § 7.

[153] Tull v. United States, 481 U.S. 412, 422 (1987).

[154] *Id.*

[155] *Id.*

changes in creating a new cause of action and will not interrupt the operation of the political process. Therefore, under the second prong of the historical test, the remedy sought under META is equitable and an arbitrator can constitutionally render decisions of reinstatement, backpay, and severance pay. A jury is not constitutionally required.

Since the second-prong analysis has shown that META does not allow for any legal remedies to be decided without a jury, no further grounds are available for finding that META violates the employee's right to jury trial. Furthermore, because of the fact that the second prong is generally more important than the first in deciding a legal action under the historical test standard,[156] the constitutionality of the second prong analysis may even "trump" the unconstitutionality found in the first prong. The first prong trouble spots include the insufficient transformation of a common-law at-will exception of the implied covenant of good faith and fair dealing into a "good cause" action without the benefit of a jury and the failure of META, in its primary form, to create a state agency to "adjudicate" the newly-developed "private" right of the employee.

Yet, nonetheless, a violation of the right to trial by jury for the above two reasons should still be found. This is so because the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[157] In *Ross*, the Supreme Court found a right to jury trial in a shareholders' derivative suit, a type of suit traditionally brought in courts of equity, because the plaintiffs' case presented legal issues of breach of contract and negligence.[158] The *Ross* decision stands for the proposition that the Seventh Amendment preserves to litigants the right to jury trial not merely in suits which the common law recognized among its old and settled proceedings, but also in suits in which legal rights were to be ascertained and determined.[159] This is in contradistinction to those occasions where equitable rights along with recognized and equitable remedies were administered.[160] Under the "good cause" claim of META, even though this claim did not exist at the common law, the legal right of breach of contract still needs to be determined in this action. Even though an equitable remedy may be the only recourse under the Model Act, a legal right still needs to be adjudicated. At the very least, on the issue of employer liability, a jury trial is constitutionally required.

The second violation of the first prong of the historical test involves the failure of META, in its primary form, to create a state agency to

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[156] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990).

[157] Ross v. Bernard, 396 U.S. 531 (1970).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 533 (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830)).

"adjudicate" the newly-developed "private" right of the employee. This aspect of META likewise should be determinative of its unconstitutionality. Again, under *Ross,* the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[161] META removes from the courts the determination of a legal right of possible breach of contract. The court in *Atlas* [162] stated that in cases which involve only "private rights" created by Congress, it is acceptable to have "factfinding by an administrative agency, without intervention by a jury, *only* as an adjunct to an Article III court created by Congress."[163] Thus, for Congress or even a state, for that matter, to create a private right for a "good cause" standard for wrongful discharge that is enforceable without a jury as factfinder, it would need to create a state or federal agency to enforce the right and not rely only on a arbitrator's decision on the matter.

This outcome is necessary for public policy reasons as well. For many workers in today's society, the job has replaced "home, family, church, neighborhood, and community as the primary source of [one's] identity, object of loyalty, and major social unit."[164] For an employee to have his job termination claim subject to the decision of an arbitrator goes against the ultimate goal of making one's community the judge of one's actions in which a person's identity — indeed, his job — is at stake.

The right to jury trial is certainly not absolute. However, in the wrongful discharge setting, an individual is entitled to just recourse and compensation. META shortchanges employees in a current world where the average employee already is in an inequitable bargaining position with the employer. A jury trial may give the employee somewhat of a "home field advantage" against the employer since the jurors are composed largely of workers themselves. However, the right to trial by jury was created for a similar reason: to protect the citizen from unjust governmental dominance in the legal setting and to allow a group of his peers and members of his community to judge him for the merits of his case. An employee deserves the very same against a much more powerful employer. Therefore, for those reasons, the second prong should not trump the first prong of the historical test where the right to jury trial protects against unlawful transformation of a common law right into a new cause of action that utilizes binding arbitration and where a state agency is required to administer the decisions for a newly-created statutory, "private" right. Therefore, in these two

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[161] *Ross*, 396 U.S. 531, 531.

[162] Atlas Roofing Co. v. Occupational Safety & Health Review Comm., 430 U.S. 442 (1977).

[163] *Id.* at 450 n.7.

[164] Gorr, *supra* note 10, at 113.

instances, META violates an employee's constitutional right to jury trial.

IV. CONCLUSION

With the above analysis in mind, META, in its primary form, is a constitutional violation of an employee's right to trial by jury in two respects. First of all, the current wrongful discharge claim by an employee against an employer is an extension of the common law right of breach of contract. META's new "good cause" standard does not change this fact; the claim is still the determination of a legal right of breach of contract.

The first prong of the historical test prevents a legislative body from insufficiently transforming this type of action and having it decided without the benefit of a jury. In at least those states that have an implied covenant of good faith and fair dealing exception to the at-will doctrine, META violates the employee's right to trial by jury since the new claim has been insufficiently transformed in order to be decided through the use of binding arbitration. The legal right of breach of contract and the standard of "good cause" termination in fact are unchanged in reality. META could overcome this constitutional defect by making the arbitration voluntary and giving the employee the choice to reject arbitration and proceed before a jury.

Second, under federal law, a legislative body cannot create a new "private" statutory right without having the claim adjudicated by a fact-finding agency that is an adjunct of an Article III court. Therefore, even without the benefit of violating the second prong of the historical test relating to the nature of the remedy, under Supreme Court precedent, META's creation of a "private" good cause wrongful termination claim before an arbitrator violates the employee's right to jury trial.

META is an admirable start. The at-will doctrine has been criticized because of economic realities, the modern worker's quest for security in the workplace, and the respect for human dignity. The modern age of increasing technology, specialization of skills, and an unstable economy leave a very risky and unpredictable situation for the worker whose livelihood depends entirely on his labor. Furthermore, the current exceptions to the at-will doctrine have not been applied consistently by the courts, have become expensive, and are time-consuming in nature.

META is a welcome offer to the continuing debate of the appropriateness of employment at-will doctrine and its growing exceptions. Unfortunately, in its mission to strike a compromise between employer and employees, the Model Act's quid pro quo has unfairly short-changed the least powerful of the two parties. META, in its primary form, violates the employee's constitutional right to trial by jury by first mandating arbitration under an insufficient transformation of a common law right and second, creating a statutory private right without adjudication from an agency which

is an adjunct of an Article III court.

With regard to the latter, some states may not follow the Supreme Court precedent since they are not bound by it. They are not bound since the Seventh Amendment right to jury trial is not applicable to the states through the Fourteenth Amendment's Due Process Clause. However, states will still have a hard time bypassing their own constitutions, many of which protect the right to jury trial "inviolate" as opposed to mere preservation in the Seventh Amendment.

The right to jury trial is a vitally important feature of the American legal system. As the Supreme Court stated in *Dimick v. Schiedt*,[165] any "curtailment of the right to a jury trial should be scrutinized with the utmost care."[166] For this reason, META must be carefully scrutinized by every state in order to protect one of the most vital values of the American legal system.

Michael S. Franczak

[165] 293 U.S. 474 (1935).

[166] *Id.* at 486.