

Plane Crashes, Parachutes, and Title VII of the Civil Rights Act of 1964

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I. INTRODUCTION

Roy Ward was, unbeknownst to himself, headed for disaster.¹ He sat in his cubicle, unaware that others in his office found him difficult to work with. Roy was not a conventionally attractive person. Though no specific physical characteristic was to blame, Roy's appearance had the effect of making others uncomfortable. Six months into his job, Roy suffered a personal disaster comparable to a plane crash. He was fired without a stated cause.

Roy had no knowledge that this event would occur. It caught him totally by surprise. Roy's work had been exemplary. Arlene Bolte, Roy's supervisor, had even confirmed the quality of Roy's work in his termination meeting. Several weeks after his termination, Roy spoke to a former coworker who revealed the real reason for Roy's termination: Roy's appearance had made some of his coworkers uncomfortable. Roy sought legal assistance to recover damages for his prejudicial termination, but he had no reasonable cause of action to pursue. In other words, Roy had no parachute.

Roy's situation is hypothetical, but most Americans are subject to the same dangers of dismissal.² The current system of American employment law has developed gaps in protection that unwitting Americans can fall through.³ Fundamental shifts in employment law are needed to correct this issue.

This Note proposes that Title VII of the Civil Rights Act of 1964 should be broadly extended to all Americans regardless of their status

1. Roy Ward is a hypothetical person in a hypothetical situation. No one was harmed in the making of this Note.

2. Around 70 percent of Americans are operating as "at-will" employees. Greg Mgrditchian, Note, *Employment & Social Media Privacy: Employer Justifications for Access to "Private" Material*, 41 RUTGERS COMPUT. & TECH. L.J. 108, 124 (2015).

3. See generally Lindsay B. Jackson, Note, *A Lesson from Germany on How the United States Could Reform its Laws on Dismissal*, 4 GEO. J.L. & PUB. POL'Y 522, 523 (2006) (discussing the difficulty of administering American employment law because of the complexities it contains over different jurisdictions).

in a protected class. This Note also proposes that an expansion of Title VII should be accompanied by an adoption of either a full “just-cause”⁴ standard of employment, or a rebuttable presumption of “just-cause.”⁵ Part II of this Note will detail the troubled process that led to the adoption of the “at-will” standard and the state of current employment law in the United States. Part III will demonstrate that the “at-will” employment standard fails to live up to the promise of a flexible workplace, fails to adequately protect American workers, and fails to address all forms of work-related prejudice. Part IV of this Note will detail why an expansion of Title VII would better protect American workers, better address all forms of prejudice in the workplace, and fulfill the needs of American employers. A proper system of employment termination must acknowledge that an employee does not have the same level of bargaining power as an employer, but an employer must maintain some level of flexibility in their operation of their business.

II. “AT-WILL” EMPLOYMENT AND THE CURRENT SYSTEM

The plane that carried Roy to his own personal disaster has been crashing repeatedly since the *Lochner* era of the Supreme Court.⁶ As far back as the 1800s,⁷ American courts struggled to balance the protection of American workers with the needs of a flexible economy and

4. Also called “good cause” or “for cause,” just-cause simply refers to a requirement showing that a termination was carried out for a legally valid reason. This definition is “not susceptible of precise definition.” N.C. Dep’t of Env’t & Nat. Res. v. Carroll, 599 S.E.2d 888, 900 (N.C. 2004).

5. 42 U.S.C. § 2000e (2018) (known colloquially as Title VII, it now resides in Title XLII).

6. The *Lochner* era is a controversial era characterized by an especially powerful standard of judicial review, or by judicial activism depending on who is consulted. See generally 1 LEX K. LARSON & KIM H. HAGAN, LARSON ON EMPLOYMENT DISCRIMINATION § 2.05 (2d ed. 2021) (citing *Lochner v. New York*, 198 U.S. 45, 52 (1905)).

7. The standard before the *Lochner* era was based on British common law, which presumed a contract of one year unless otherwise stated and provided for robust relief if terminated early. *Blackstone’s Commentaries on the Laws of England, Book the First: Chapter the Fourteenth: Of Master and Servant*, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR. (2008), https://avalon.law.yale.edu/18th_century/blackstone_bk1ch14.asp (“[T]he law construes it to be a hiring for a year . . .”).

American employers.⁸ The states developed their own approaches to workers' rights in termination. Three primary schemes emerged as states grappled with termination disputes. Some states adopted the previous British standard, which called for a year's presumed employment contract and penalties for early termination of that contract.⁹ Others developed a statutory notice requirement that would give an employee time to find new work in the event of an unforeseen termination while collecting pay.¹⁰ The final group adopted the emerging "at-will" standard for the flexibility it offered each contracting party to walk away at any time without penalty.¹¹

A. The Formation of "At-Will" Employment Standards

The Lochner Court, steeped in the growing capitalist trend which erupted from the turn of the twentieth century, adopted the third approach. The Lochner Court agreed that the mutual ability of the parties to walk away from an employment agreement and the importance of the freedom of contract principal were adequate motivators to deny any federal laws regulating employment.¹² The adoption of the "at-will" standard is one of the longest surviving artifacts of the Lochner Court and has been widely criticized by modern legal scholars.¹³ Among the most severe criticisms is that the Court had partially relied

8. See Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELY J. EMP. & LAB. L. 111–15 (2006).

9. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 59 (Mass. 1870) (requiring a default 1-year contract unless otherwise stated).

10. *Franklin Mining Co. v. Harris*, 24 Mich. 115, 116 (Mich. 1871) (requiring adequate notice).

11. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 520 (Tenn. 1884) (adopting the "at-will" standard).

12. *McCullough Iron Co. v. Carpenter*, 11 A. 176 (Md. 1887); see also *Adair v. United States*, 208 U.S. 161 (1907) (invalidating a statute which banned "yellow-dog" contracts). Yellow-dog contracts are employment contracts which require employees to avoid union activity under threat of termination. They are illegal in modern employment practice because they impair the ability of an employee to contract with their employer effectively. *Id.*

13. The Lochner era is a rare point of agreement between liberal and conservative legal minds. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 44–45 (1990); BARBARA J. FLAG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 75 (1998) (each identifying the Lochner era as a troubling judicial advocacy).

on a poorly researched treatise,¹⁴ which had incorrectly interpreted several cases.¹⁵ Each of the cases in question, some American and some Scottish, did not agree with the treatise’s proposal of an “at-will” standard.¹⁶ Regardless of this grave error, “at-will” employment gradually became the standard across all fifty states due to the power it gave employers and the perceived flexibility it gave the American worker.

Because the freedom to contract was the principal support of the “at-will” standard, the first protections from “at-will” termination were created in individually bargained-for contracts.¹⁷ Individuals retained the freedom to contract for increased or decreased job protection.¹⁸ The freedom of contract principle still applies to modern employment contracts and allows a prospective employee to contract with an employer to secure more comprehensive protection.¹⁹

The natural next step was collective bargain agreements. Unions were already common during the Lochner Court, especially among trades.²⁰ Unions enabled the common workers of one trade or

14. The idea of “at-will” employment is primarily credited to Horace Gray Wood who, in an 1877 treatise, cited six cases (none of which agreed with his proposition) in which American or Scottish courts transferred the burden of proving contract duration to the employee rather than its historical place with the employer. Wood is a notable American legal scholar whose real identity remains somewhat of a mystery. The name “Horace G. Wood” never occurred in obituaries or other publications of the time, or in the record of the New York State Bar Association. Penny Lozon Crook, *Employment at Will: The “American Rule” and its Application in Alaska*, ALASKA. L. REV. 1985, at 25 nn. 9, 11.

15. HORACE GREY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (J.D. Parsons, Jr. ed., 2d ed. 1886).

16. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 762 (1994) (identifying that Wood’s reasoning did not comply with the cases his treatise cited).

17. *Coppage v. Kansas*, 236 U.S. 1, 21 (1915).

18. See generally Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000*, 32 BERKELEY J. EMP. & LAB. L. 215, 234–35 (discussing a work requirement that required waiver of “just-cause” protection, which indicates that the protection served as a readily bargained item).

19. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 265–66 (1994) (ruling on a contract which included “just-cause” protections for the plaintiff).

20. See 1 LABOR CONSPIRACY CASES, 1806–1842 59 (John R. Commons & Eugene Gilmore eds., 1910),

profession to join and bargain as a group under the proposition that doing so would give them more leverage.²¹ Among the most historic of union demands was a requirement for “just-cause” termination.²² Some unions successfully bargained with the employer, but others have failed spectacularly.²³

B. The Birth of the Public Policy Exception and the Good-Faith Exception

The true complexities of “at-will” employment law began as the states recognized that employers could subvert state policy and essentially punish employees for following the law.²⁴ “At-will” employment remained the rule, without exception, until 1959.²⁵ That year, in *Petermann v. International Brotherhood of Teamsters*, a California court of appeals examined the case of an employee who had been terminated

<https://archive.org/details/adocumentaryhis05gilmgoog/page/n19/mode/1up> (detailing an 1806 labor strike case, *Commonwealth v. Pullis*, between the Federal Society of Journeymen Cordwainers and the city of Philadelphia, which resulted in a determination that labor unions were illegal).

21. *Hawaiian Airlines*, 512 U.S. at 249 (describing the nature of the contract as a collective bargaining agreement).

22. Union websites regularly acknowledge the importance of “just-cause” protection in their literature. The University Professional and Technical Employees, the Communications Workers of America, and the Professional Health Care Union of New Jersey have all published information about the importance of “just-cause” protection and why it is a critical part of collective bargaining agreements. See *Your Rights in the Workplace: Discipline, Termination and Just Cause*, UPTE, <https://www.upte.org/stewards/discipline.html#:~:text=An%20extremely%20important%20right%20guaranteed,capricious%2C%20arbitrary%20or%20discriminatory%20reasons> (last visited Jan. 3, 2022); Maureen Kairus, *Just Cause for Discipline*, UUP/CWA, https://cwa1109.org/sites/default/files/just_cause_for_discipline_1.pdf (last visited Jan. 3, 2022); *Weingarten Rights and “Just Cause” for Disciplines*, HPAE, <https://www.hpae.org/resources/weingarten-rights-just-cause-disciplines/> (last visited Jan. 3, 2022).

23. This was essentially what happened when Ronald Reagan fired all striking members of the Professional Air Traffic Controllers Organization in 1981 for what was determined to be an illegal strike.

24. See Clark W. Sabey, Note, *Scalpels and Meat Cleavers: Carving a Public Policy Limitation to the At-Will Employment Doctrine*, 1993 UTAH L. REV. 597, 601–03.

25. See *Petermann v. Int’l. Brotherhood of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (creating the first policy exemption).

for refusing to perjure himself on the stand.²⁶ The court held in favor of the plaintiff, reasoning that there was a greater utility in protecting those that followed the law than there was in allowing total freedom of contract.²⁷

Other states began to create their own public policy exemption schemes as they encountered issues like *Petermann*.²⁸ Statutory exceptions were created to protect employees who become whistleblowers or refused to violate public policy.²⁹ Further protections were allocated to defend employees against reciprocal termination for state required action.³⁰ On one occasion, a public policy exception was used to award damages to an employee who had been fired for reporting for jury duty as required by law.³¹ The court decreed that specific firing as “such a socially undesirable motive that the employer must respond in damages for any injury done.”³² Similar rules developed in the common law of some states.³³

26. *Id.* at 26. Attempts to force violations of the law are among the clearest cases where public policy overrides the “at-will” standard. Less clear instances usually involve whistleblowers who are discovered but are not required by law to reveal information. *See Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 490 (Mont. 1989) (determining that though the plaintiff was not being compelled to break the law, the plaintiff’s status as a whistleblower was enough to exempt them from “at-will” termination).

27. *Petermann*, 344 P.2d at 28.

28. *See Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 559–60 (Iowa 1988) (barring termination that clearly violates public policy); *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (holding plaintiff has a claim when termination is in violation of Arkansas public policy); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (creating a public policy exception to “at-will” termination); *Peterson v. Browning*, 832 P.2d 1280, 1282–83 (Utah 1992) (allowing a cause of action for violations of the plain text of public policy in termination).

29. Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 2001 MONTHLY LAB. REV. 3, 11 n.3 (discussing the adoption of certain federal employment protections, like protections for whistle-blowers, into state statutes).

30. *Id.*

31. *See Nees v. Hocks*, 536 P.2d 512, 514–16 (Or. 1975) (en banc) (recognizing the importance of jury duty over the “at-will” standard); *see also Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1144–45 (N.H. 1981) (recognizing public policy as more important than the ability to terminate employees).

32. *Nees*, 536 P.2d at 515.

33. J. Michael McGuinness, *The Meaning of Just Cause in North Carolina Public Employment Law: Carroll and Its Progeny Provide for a Heightened*

Another common protection that developed in many states was a presumed expectation of good faith and fair dealing. One such case involving this presumed exception, *Cleary v. American Airlines, Inc.*, involved a plaintiff who had been fired in violation of the employer's own regulations.³⁴ The court held in favor of the plaintiff because the defendant had created specific procedures meant to adjudicate disputes which were denied to the plaintiff.³⁵ The denial of these rightfully-expected procedures was a violation of the implied covenant of good faith and fair dealing and was, thus, improper.³⁶

Even as protections for some American workers expanded via state exceptions, the federal government saw fit to establish full “just-cause”³⁷ protections for federal employees.³⁸ The federal government created the Merit Systems Protection Board in 1979 to investigate and adjudicate alleged abuse of government employees by government agencies.³⁹ The Board also enforces termination requirements, which

Multifactor Standard for State Employee Disciplinary Cases, 33 CAMPBELL L. REV. 341, 342–43 (2010).

34. See *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722, 724 (Cal. Ct. App. 1980).

35. *Id.* at 729.

36. *Id.*; see also *Dare v. Mont. Petroleum Mktg. Co.*, 687 P.2d 1015, 1020 (Mont. 1984) (expressing an expectation of good faith and fair dealing in employment contracts).

37. Though it only applies to a percentage of American employees, protections for public sector employees still cover around fifteen percent of American workers. Niall McCarthy, *Scandinavia Leads the World in Public Sector Employment*, FORBES (July 21, 2017, 9:23 AM), <https://www.forbes.com/sites/niallmccarthy/2017/07/21/scandinavia-leads-the-world-in-public-sector-employment-info-graphic/?sh=138040818204>. This may not include all public sector employees, however, as roughly sixty-three percent of public sector employees are local government employees that may or may not benefit from a “just-cause” employment standard. This percentage is relatively constant, regardless of national trends. Jonathan Brock, *United States Public Sector Employment*, in STRATEGIC CHOICES IN REFORMING PUBLIC SERVICE EMPLOYMENT 97, 97–98 (Carlo Dell’Arling, Giuseppe Della Rocca, & Berndt Keller eds., 2001).

38. 5 U.S.C. § 2302 (requiring good cause to terminate public-service employees).

39. *About MSPB*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/About/about.htm#:~:text=The%20Merit%20Systems%20Protection%20Board,95%2D454> (last visited Jan. 3, 2022).

are effectively “just-cause” requirements, for non-probationary federal employees.⁴⁰

C. Montana, Federal Protection, and the Birth of Title VII

Montana has also adopted a pseudo “just-cause” system and has extended that protection to most employees in the state.⁴¹ Montana is currently the only state in which a private employee likely has “just-cause” protection.⁴² The Montana system specifically uses the term “good-cause” to avoid non-union terminations from being judged on the same standards as negotiated “just-cause” union agreements.⁴³ Nonetheless, the system is effectively “just-cause”⁴⁴ and employers that act in accordance with a typically union-centric “just-cause” standard of termination meet the requirements of Montana’s vaguer “good-cause” requirement.^{45 46}

Another important element of Montana’s statute is the probation requirement, and the statutory assumption of probation where none is specifically contracted.⁴⁷ This limits “just-cause” protections to

40. *Id.*

41. MONT. CODE ANN. §§ 39-2-901–15 to -915.

42. Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 376, 376–78 (1996).

43. William L. Corbett, *Resolving Employee Discharge Disputes Under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case*, 66 MONT. L. REV. 331, 398–99 (2005).

44. The test that the Montana statute calls for establishes a standard test of reasonableness as judged by a fact finder. Reasonableness was evaluated under a standard of “false, whimsical, arbitrary or capricious,” following *Kestell v. Heritage Health Care Corp.*, 858 P.2d 3, 7 (Mont. 1993). Thus, Montana’s “good-cause” standard is effectively a laxer “just-cause” standard that lessens the burden on the employer.

45. *See* Corbett, *supra* note 43.

46. As an example, a Montana trucking agency might provide written notice of misconduct and allow a curing period for an employee to comply with company policy. This is usually required by “just-cause” standards but not by Montana’s “good-cause” standard, which only requires that a termination be for a specific and allowable reason outlined by the statute. In effect, a Montana employee may have “pseudo union” protection despite having no union membership.

47. MONT. CODE ANN. § 39-2-904(1)(b), (2) (2021).

employees who are more likely to be long-term employees.⁴⁸ Furthermore, a wrongful discharge claim for lack of “good-cause” in Montana is unavailable to any party that has a valid discrimination claim on a Title VII basis or has “just-cause” protection under a collective bargaining agreement.⁴⁹ This has the effect of reducing the potential for frivolous lawsuits by parties that are already protected.⁵⁰

The United States Congress realized, as these changes were taking place, that discrimination in the workplace was a common problem for minority communities.⁵¹ Thus, Congress passed the Civil Rights Act of 1964 (CRA) in response.⁵² Part of the CRA created the Equal Employment Opportunity Commission (EEOC),⁵³ which was meant to support plaintiffs in protected classes who were seeking relief from prejudice in the workplace.⁵⁴ Title VII of the CRA outlines those who may access this relief.⁵⁵

The original CRA provided recourse to victims of prejudice based on gender or race.⁵⁶ The Age Discrimination in Employment Act of 1967 (ADEA) extended that same protection to victims of age discrimination, though only for those that were forty and older.⁵⁷ The Americans with Disabilities Act (ADA) added protection to those who

48. Corbett, *supra* note 43, at 335.

49. Corbett, *supra* note 43, at 345.

50. See generally Bradley T. Ewing, Charles M. North, & Beck A. Taylor, *The Employment Effects of a “Good Cause” Discharge Standard in Montana*, 59 *INDUS. LAB. REL. REV.* 17 (2005) (determining that Montana’s “good-cause” statute benefited Montana employment numbers). There is no specialized court or agency to manage these claims. They remain isolated enough to handle in the court system. *Id.*

51. 110 *CONG. REC.* 7203 (1964) (statement of Sen. Joseph Clark).

52. *Id.* at 7203–05 (discussing the inequality inherent in the American employment system of the time, and the need for reform).

53. 42 *U.S.C.* § 2000e-4.

54. The expressed purpose of the EEOC is to “prevent and remedy discrimination in America’s workplaces and advance equal employment opportunity for all.” Memorandum from Janet Dhillon, Chair, EEOC, to all EEOC employees (Apr. 1, 2021), <https://web.archive.org/web/20210119220214/https://www.eeoc.gov/eo-policy-statement>.

55. 42 *U.S.C.* § 2000e-2.

56. 40 *U.S.C.* § 122(a); see also 42 *U.S.C.* § 2000d.

57. 29 *U.S.C.* § 621 (responding to “rising productivity and affluence,” and concerns that “older workers find themselves disadvantaged in their efforts to retain employment . . .”).

were “substantially limited”⁵⁸ in such a way that prevented them from performing at least one critical physical or mental task.⁵⁹

Recent expansions of Title VII have come from the Supreme Court,⁶⁰ as demonstrated by the Court’s holding in *Bostock v. Clayton County*.⁶¹ The Court used a logical extension of Title VII prohibitions of discrimination on the basis of sex to extend Title VII to members of the LGTBQ+ community.⁶² The *Bostock* plaintiff argued—and the Court agreed in a 6-3 decision—that terminating the employment of a man who was in a relationship with another man was sex discrimination.⁶³ This decision was deeply criticized by some American citizens and indeed some members of the Court because the text of Title VII does not identify sexual orientation or identity as protected class categories.⁶⁴

Nonetheless, it is no longer legal to discriminate on the basis of sexual orientation or identity in the United States.⁶⁵ The Supreme Court recognized the importance of this decision and the pragmatic effects that a lack of protection for the LGTBQ+ community caused.⁶⁶ Other, smaller expansions have been carried out by the Court as well, but these expansions mostly recognize additional rights to already defined parties or enable different forms of recovery.⁶⁷ Realistically,

58. This is a difficult burden to prove and would be unnecessary if a “just-cause” standard were adopted. Congress has already altered this burden once. *See* 42 U.S.C. § 12101(a)(7).

59. 42 U.S.C. §§ 12101–03.

60. Though, as members of the Supreme Court have indicated, an expansion would best be performed by Congress. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1822–24 (2020) (Kavanaugh, J., dissenting) (arguing that an expansion of Title VII to members of the LGTBQ+ community should be a congressional act).

61. *Id.* at 1754 (majority opinion) (expanding the scope of an existing class rather than creating a new class).

62. *Id.* at 1754.

63. *Id.* at 1742 (“[B]ecause to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”).

64. *Id.* at 1822–24 (Kavanaugh, J., dissenting).

65. *Id.* at 1742.

66. *Id.*

67. *Cf.* *King v. Palmer*, No. 84-5750, 1986 WL 68523, at *1 (D.C. Cir. Feb. 18, 1986) (recognizing that a decision to refuse a rehearing of the specific issue in that case *en banc* “may represent a significant expansion of Title VII coverage”).

Bostock's applicability outside of the LGBTQ+ community is minor, and will not allow for other expansions of *Bostock's* scope to occur.⁶⁸

D. Modern Cases of “At-will” Termination

Modern cases of “at-will” termination are not rare.⁶⁹ Such recent cases usually involve activity that almost, but not quite, rises to discrimination under a protected class and are thus unsupported by the EEOC.⁷⁰ Cases rise to courts of appeals across the country for issues that range from termination based on general appearance to specific traits, like muscularity.

In *Yanowitz v. L'Oréal*, the plaintiff was a regional sales manager employed by L'Oréal USA, Inc.⁷¹ Yanowitz was directed by a male supervisor to terminate an employee who was not “hot” enough to hold the position.⁷² Yanowitz refused and suffered intense scrutiny and “increasingly hostile adverse treatment” as a result.⁷³ A California statute banning termination based on protected classes also banned the firing of employees who refused to terminate employees in a protected class,⁷⁴ so Yanowitz argued that firing the employee would have been illegal.⁷⁵ The court agreed, but rather than declaring a firing based on appearance improper, they ruled that the case dealt with sex

68. This is especially true given the conservative nature of the court, which begins the 2021 session. Any new expansion of Title VII will need to originate in the legislature for the foreseeable future. Such expansions will face significant legal challenges and a hostile court that could again favor deregulation of federal labor law.

69. See generally *Economic News Release: Job Openings and Labor Turnover Summary*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/jolts.nr0.htm> (last updated Dec. 8, 2021) (noting that 1.8 million Americans were fired in 2020).

70. See generally *Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2020 (2021)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020> (showing that the EEOC has accepted and filed 67,448 charges in fiscal year 2020).

71. *Yanowitz v. L'Oréal USA, Inc.*, 116 P.3d 1123, 1127 (Cal. 2005) (deciding the issue on the matter of sex discrimination because no appearance discrimination law exists).

72. *Id.* at 1127–28.

73. *Id.* at 1125.

74. CAL. GOV. CODE §§ 12940 (h)–(j).

75. *Yanowitz*, 116 P.3d at 1144–46. (Chin, J., dissenting).

discrimination.⁷⁶ This ruling was beneficial for Yanowitz but detrimental to any future cases which were based primarily on appearance.

Makeup, or the lack thereof, was the primary issue of *Jespersen v. Harrah's Operating Co.*⁷⁷ Jespersen, a bartender at a Harrah's casino, refused to wear makeup which was required by the Harrah's "Personal Best" self-grooming program.⁷⁸ Jespersen argued that the requirement to wear make-up was discriminatory on the basis of sex, because no similar requirement existed for men.⁷⁹ In fact, the program explicitly banned the use of make-up by men. The court found in favor of Harrah's, citing previous cases which dealt with appearance-based rules.⁸⁰ The court reasoned that the "Personal Best" program had separate standards for men and women, but these standards were more or less equal and thus valid unless shown to be unreasonable.⁸¹

Weight⁸² has been at the heart of many discrimination claims, especially claims by airline employees.⁸³ In *Tudyman v. United Airlines*, a bodybuilder was terminated from his flight attendant position with United Airlines after his weight was found to be in excess of the limit for men of his height, a standard established by the company.⁸⁴ This limit was intended to prevent flight attendants from having a poor personal appearance, and the plaintiff was terminated for being only fifteen pounds over the limit.⁸⁵ The court determined that the plaintiff's

76. *Id.* at 1143–44.

77. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (finding that requiring makeup on female employees was not discriminatory because the expectation was roughly equivalent to expectations placed on male employees).

78. *Id.* at 1107.

79. *Id.* at 1107–08. The makeup requirement was not in place until 2000. Jespersen filed this claim in 2001, and the claim was not resolved until 2006.

80. *See Gerdom v. Cont'l Airlines Inc.*, 692 F.2d 602, 610 (9th Cir. 1982) (condemning restrictions placed solely on female employees); *see also Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (condemning restrictions which placed separate and unequal burdens on male and female employees).

81. *Jespersen*, 444 F.3d at 1113.

82. Though in some cases, extreme weight is considered a disability and is therefore covered by the ADA. This usually requires a person's weight to substantially limit that person's ability to perform normal functions. *See* 29 C.F.R. 1630.2(g)(1)(i).

83. *See generally Gerdom*, 692 F.2d at 602; *Frank*, 216 F.3d at 845.

84. *Tudyman v. United Airlines*, 608 F. Supp. 739, 740 (C.D. Cal. 1984).

85. *Id.* at 741.

weight was a matter of voluntary choice, and thus was not grounds for a discrimination claim.⁸⁶

A different plaintiff received the opposite result where the court determined that her weight was not voluntary.⁸⁷ In *EEOC v. Resources For Human Development, Inc.*, the plaintiff was fired from her position as a prevention/intervention specialist in a treatment facility for chemically dependent women and their children because she was believed to be too large to carry out her duties.⁸⁸ At the time of the claim, she weighed five-hundred twenty-seven pounds.⁸⁹ The court agreed that the plaintiff had been fired for her weight but only because the EEOC's guidelines allowed for severe weight to be protected by the ADA.⁹⁰ The court reasoned that the plaintiff's weight had resulted in numerous health issues and that she could have continued to meet the expectation of her position if reasonable accommodations were made to facilitate her health.⁹¹

Mutable characteristics, like hair, tattoos, or piercings have been used to justify termination of employees for decades.⁹² These characteristics are often used as a proxy for race, sex, or sexual orientation.⁹³ Hair was the center of *Vazquez v. Caesar's Paradise Stream Resort*, in which Vazquez was terminated for a cornrow hairstyle which revealed

86. *Id.* at 746.

87. *See* EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688 (E.D. La. 2011).

88. *Id.* at 696 (recalling the circumstances related to the plaintiff's termination).

89. *Id.* at 690.

90. *Id.* at 695–97.

91. *Id.* at 696.

92. Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 422–33 (2006) (discussing the use of these characteristics as a proxy for protected classes).

93. *Id.* at 419, 422–23. Artificial hair color, tattoos, and piercings may sometimes be used as a reason to terminate an employee because it is believed to indicate reprehensible behavior. *Id.* These traits are identified as “rebellious,” and employers will often punish employees for them. *Id.* Often, these employees are members of other protected classes, but are fired for these reasons, rather than reasons of deliberate prejudice. *Id.* This is called trait-discrimination and has not been addressed by Congress. *See id.*

the scalp between rows.⁹⁴ The defendant argued that Vazquez had not been targeted for prejudicial reasons but for violations of a grooming standard imposed by the employer.⁹⁵ The court found in favor of Vazquez because the standard had not been equally enforced and because Vazquez was of Hispanic and African-American descent.⁹⁶ This, the court determined, was ample evidence of racial prejudice.⁹⁷

One employee, the plaintiff in *Van Sickle v. Automatic Data Processing*, suffered repeated harassment at his workplace due to a facial scar he received in an automobile accident.⁹⁸ His supervisors referred to him as “scar face Van Sickle” on several occasions.⁹⁹ The plaintiff was terminated shortly after this treatment began. The court found in favor of the defendant, because the plaintiff’s scar did not “substantially limit” his ability to complete his work and because the plaintiff failed to disprove the defendant’s reason to terminate the employee.¹⁰⁰

III. THE COMPLEXITY OF THE CURRENT SYSTEM AND THOSE IT LEAVES OUT

The American standard of “at-will” employment has significant gaps which American employees often fall into. These gaps take many forms: The freedom of contract is not as valid a tool to employees as it is to employers. Employers face difficulties in administering the current system of “at-will” employment. The burden of proof is placed on the wrong party or is too heavy for the plaintiff to prove. The EEOC is not properly funded and offers inadequate assistance. Discrimination

94. *Vazquez v. Caesar’s Paradise Stream Resort*, No. 3:CV-09-0625, 2013 WL 6244568, at *1–2 (M.D. Pa. Dec. 3, 2013).

95. *Id.* at *6.

96. *Id.* at *5–6.

97. *Id.* at *11–12.

98. *Van Sickle v. Automatic Data Processing*, 952 F. Supp. 1213, 1221 (E.D. Mich. 1997) (determining only a scar that “substantially limits” an employee’s ability to work will fall under the ADA).

99. *Id.* at 1216; see also Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 213–14 (2000) (discussing the difficulty of correcting prejudice one group at a time).

100. *Van Sickle*, 952 F. Supp. at 122–223 (E.D. Mich. 1997) (determining only a scar that “substantially limits” an employee’s ability to work will fall under the ADA).

still results in termination of some employees, just through unprotected means. In short, our current system accomplishes very little at the expense of significant effort.

A. The Inadequacy of Freedom of Contract

The freedom of contract principle is a pivotal column of the “at-will” standard.¹⁰¹ Under the freedom of contract principle, any two parties are free to engage in a contract if that contract does not require a party to violate the law.¹⁰² This means that if an employee wishes to alter a standard employment contract to include additional protections for termination, they are free to do so. If the employer agrees, and the contract does not violate the law, the contract controls the relationship from that point on.¹⁰³ Many Americans benefit from this principal.¹⁰⁴ Many more Americans, however, are unprotected.¹⁰⁵

Modern labor standards have developed an inequality of bargaining power between employers and employees, thus many Americans remain unprotected despite their “freedom” to contract.¹⁰⁶ Many employees, especially young or entry-level employees, simply do not

101. Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 222 (1990) (describing freedom of contract as a buttress of “at-will” employment).

102. See generally Mark Pettit Jr., *Freedom, Freedom of Contract, and the ‘Rise and Fall’*, 79 B.U. L. REV. 263 (1999) (discussing the history of the enforceability of contracts). This is a general rule, and some illegal contracts may still be enforceable. *Id.* at 290–91. This is dependent on state statutes and common law doctrine. See *id.* Still, most illegal contracts are not enforceable, regardless of the knowledge of the parties involved. See *id.*

103. See *Sweet v. Stormont Vail Reg’l Med. Ctr.*, 647 P.2d 1274, 1280 (Kan. 1982) (discussing the process by which an employee may modify a contract).

104. J. H. Verkerke, *Discharge*, in 2 LABOR AND EMPLOYMENT LAW AND ECONOMICS 447, 450 (Kenneth G. Dau-Schmidt, Seth D. Harris, Orly Lobel eds., 2009). Around 15% of American employees are protected by individually bargained contracts with “just-cause” requirements for termination. *Id.*

105. *Id.*

106. Muhl, *supra* note 29, at 4, 8; see also Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, ECON. POL’Y. INST. (Dec. 12, 2018), <https://www.epi.org/publication/what-labor-market-changes-have-generated-inequality-and-wage-suppression-employer-power-is-significant-but-largely-constant-whereas-workers-power-has-been-eroded-by-policy-actions/>.

understand the contract process and are more likely to fail to negotiate for their interests.¹⁰⁷ Even then, employers are not always inclined to accept “just-cause” protection clauses.¹⁰⁸ An inequality in bargaining power weakens the freedom of contract principal, which in turn weakens the benefits of the “at-will” doctrine.¹⁰⁹

B. Employer Burdens and Fears

Employers are not immune from “at-will” woes. Complexities in labor law continue to grow as each state develops its own specific exemptions.¹¹⁰ Forty-three states have adopted public policy exemptions,¹¹¹ forty-two have adopted a presumption of implied contract,¹¹² and twenty have adopted an implied covenant of good faith and fair dealing.¹¹³ As mentioned, Montana, has done away with “at-will” altogether.¹¹⁴ This patchwork of law, which differs from state to state and overlaps federal labor law, creates complexities that interstate businesses must account for.

Businesses have responded by hiring dedicated compliance officers and collecting data related to employee performance, which

107. See David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1632 (2016) (discussing the failure of young consumers to understand contracts, especially online contracts).

108. There is a presumption that an employee can just walk away from a job. Recent events have proven that workers cannot always afford to refuse work opportunities. Melissa Sanchez, “Essential” Factory Workers Are Afraid to Go to Work and Can’t Afford to Stay Home, PROPUBLICA (Mar. 24, 2020, 4:00 AM), <https://www.propublica.org/article/coronavirus-essential-factory-workers-illinois>.

109. Pratt, *supra* note 101, at 222.

110. Sabey, *supra* note 24, at 600–04.

111. Muhl, *supra* note 29, at 4–5.

112. See *id.* at 7; *Employment At-Will Exceptions by State*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/at-will-employment-exceptions-by-state.aspx> (last visited Jan. 3, 2022).

113. See Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMPAR. LAB. L. & POL’Y J. 313, 346 (2007); Nadjia Limani, Note, *Righting Wrongful Discharge: A Recommendation for the New York Judiciary to Adopt a Public Policy Exception to the Employment-At-Will Doctrine*, 5 CARDOZA PUB. L., POL’Y & ETHICS J. 309 (2006); Muhl, *supra* note 29, at 10.

114. MONT. CODE ANN. § 39-2-904 (2019) (requiring “good-cause” for termination of employees who have completed their probationary period).

defeats the purpose of “at-will” employment altogether.¹¹⁵ The motivating benefit for choosing the “at-will” system is flexibility, especially for employers.¹¹⁶ By allowing an employer to terminate without cause and by placing the burden of proof on the plaintiff, a system of preparation has developed to counter whatever claim a plaintiff may bring.¹¹⁷ An employer must identify all the reasons an employee may choose to challenge their termination and prepare performance reviews, time-sheets, and other miscellaneous employment information to counter any allegations of unlawful termination.¹¹⁸

There is, moreover, a reasonable fear that new protections for employees will translate to a higher burden for employers. After all, if employers must provide a reason for termination, then they must track data that demonstrates the reason for termination. The truth, however, is that most businesses already collect data that satisfies any “just-cause” burden.¹¹⁹ Small businesses, like those that make less than \$500,000 a year and have no involvement with interstate commerce, would likely be exempt from any congressional “just-cause” statute. These businesses are not subject to the Fair Labor Standards Act, which would serve as an effective guide for scope and implementation.¹²⁰ Only companies which could afford some formal record-keeping would need to take any action at all, and it is not unreasonable for an employer of that size to be able to meet that burden.¹²¹

Another common fear of a “just-cause” standard is that employees will be impossible to remove, even for valid reasons.¹²² This concern is already present with public perceptions of union employees and public sector employees who enjoy “just-cause” protection. This understanding of “just-cause” is simply untrue.¹²³ “Just-cause” protection

115. Jackson, *supra* note 3, at 551.

116. Johnston v. William E. Wood & Assocs., 787 S.E.2d 103, 105 (Va. 2016) (recognizing that flexibility is a chief benefit of “at-will” employment standards).

117. See Jackson, *supra* note 3, at 551.

118. See *id.* at 551.

119. See *id.* at 551–53.

120. 29 U.S.C. § 203(s)(1)(A).

121. Jackson, *supra* note 3, at 551.

122. Michael J. Phillips, *Toward a Middle Way in the Polarized Debate over Employment at Will*, 30 AM. BUS. L.J. 441, 452 (1992).

123. Guy Davidov, *In Defence of (Efficiently Administered) “Just Cause” Dismissal Laws*, 23 INT’L J. COMPAR. LAB. L. & INDUS. RELS., 2007, at 1, 14.

only applies to employees who are wrongfully discharged. It makes it harder to remove employees for arbitrary reasons but still allows for unfettered termination for valid reasons. For example, Montana—the only state with something resembling “just-cause” termination standards—has allowed termination for obscene statements to a supervisor, an inability to perform to the level expected by the employer, and for unexplained absences.¹²⁴

C. Where State Protection Fails

Seven states¹²⁵ have either no protection for employees who refuse to violate public policy and are terminated as a result or have such lackluster protection that it is effectively nonexistent.¹²⁶ In these states, a person who acts in a normally protected manner, like reporting violations of national safety standards, may still be fired without recourse.¹²⁷ The potential for harm to employees or others in these states is extreme.¹²⁸ Such were the stakes in *Jellico v. Effingham County*, where the court considered the creation of a robust public policy

124. See *Becker v. Rosebud Operating Servs.*, 191 P.3d 435, 442–43 (Mont. 2008) (affirming in favor of employer where employee was fired for obscenity and profane language); *Putnam v. Cent. Mont. Med. Ctr.*, 460 P.3d 419, 427 (Mont. 2020) (upholding termination of employee for poor performance); *Sullivan v. Cont’l Constr. of Mont., LLC*, 229 P.3d 832, 834 (Mont. 2013) (upholding termination of employee for excessive unexcused absences).

125. Though not one of the seven states is without any protection, Florida’s protection is so lackluster that it is often considered an unprotected state and grouped with the other seven. Only three exemptions to the “at-will” doctrine apply under Florida law, and they deal with explicit violations of the law or government regulation. See generally FLA. STAT. § 448.102 (2021).

126. These states are Alabama, Georgia, Louisiana, Maine, Nebraska, New York, and Rhode Island. They are geographically distinct and politically diverse states, which highlights the universality of the issue at hand. See generally Brad Rogers Carson, Note, *Labor Law: Tate v. Browning-Ferris Industries: Oklahoma Creates a Common Law Action for Employment Discrimination*, 46 OKLA. L REV. 557 (1993).

127. Cf. *Green v. Ralee Engineering Co.*, 960 P.2d 1046 (Cal. 1998) (holding that the termination of an employee for reporting violations of federal safety regulations was wrongful as a matter of public policy).

128. See generally *Gil v. Metal Service Corp.*, 412 So. 2d 706, 708 (La. Ct. App. 1982) (determining that an employee who was terminated because he refused to participate in fraud but did not come forward to act as a whistle blower had no cause of action).

exception defense when an employee was constructively discharged for refusing to certify buildings as safe.¹²⁹ The Georgia Court of Appeals held that any such rule would need to be implemented by the legislature and that the plaintiff's claim was invalid under Georgia law.¹³⁰

Even in states with public policy protections, an employee can still be fired "at-will" for normally protected means if the employer can provide another reasonable basis for termination.¹³¹ Current regulation lays the burden on the plaintiff, who is normally the employee.¹³² The employee, who often has fewer resources,¹³³ must find and develop a legal strategy for recovery that matches the law in their state and he must prove to the jury that he was wrongfully terminated.¹³⁴ The plaintiff has to identify a cause of action triggered by the employer's actions, but the inequality that hampers freedom of contract is present in this litigation.¹³⁵ A single individual is not always able to meet the burden needed to challenge a large company.¹³⁶

D. The Inadequacy of Title VII as It Is Currently Constructed

Similar issues arise for victims of discrimination in the workplace. Though victims of discrimination have more support via the

129. *Jellico v. Effingham Cnty*, 471 S.E.2d 36, 37 (Ga. Ct. App. 1996).

130. *Id.* at 38.

131. *See e.g., Vazquez v. Caesar's Paradise Stream Resort*, No. 3:CV-09-0625, 2013 WL 6244568, at *8–9 (M.D. Pa. Dec. 3, 2013) (outlining the light burden an employer must prove to offset allegations of discrimination in the workplace).

132. Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. "Employment-At-Will" Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 D.C. L.J. INT'L L. & PRAC. 441, 444 (1995).

133. Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 140 (2012) (arguing that "freedom of contract" has evolved into a concept designed to protect powerful interests and that plaintiff are a weaker party in employment contracts).

134. Jackson, *supra* note 3, at 523–24 (advocating for a lesser burden for plaintiffs).

135. Rasnic, *supra* note 132, at 498.

136. *See generally* Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 317 (2013) (detailing a proposal to remedy the vulnerable status of the American employee without adopting a "just-cause" standard).

EEOC,¹³⁷ they are often forced to proceed alone.¹³⁸ When they do, they face the burden of proving that their termination was a violation of the CRA or related congressional act.¹³⁹ Their former employer is not required to prove any evidence except that which is needed to rebut the plaintiff's allegations because the burden of proof resides with the plaintiff alleging discrimination.¹⁴⁰ If the reason is not invalid, like prejudice or a violation of state law, the termination is likely to remain, and the plaintiff is unlikely to recover.¹⁴¹

The best hope of a plaintiff alleging prejudicial treatment in the workplace is the EEOC, who will sometimes intervene and represent the plaintiff.¹⁴² A plaintiff must begin their case by bringing it to the EEOC, and the EEOC will evaluate the likelihood the case will succeed.¹⁴³ If selected, the chance of a settlement or recovery of damages is significantly higher,¹⁴⁴ but most claims are rejected by the EEOC and are instead allowed to proceed on their own.¹⁴⁵

137. Memorandum from Janet Dhillon, *supra* note 54.

138. See Paige Smith, *EEOC Private Employee Bias Charge Backlog Now Lowest in Years*, BLOOMBERG L. (Feb. 10, 2020, 4:42 PM), <https://news.bloomberglaw.com/daily-labor-report/eec-private-employee-bias-charge-backlog-now-lowest-in-years>; Maryam Jameel, *More and More Workplace Discrimination Cases are Being Closed Before They're Even Investigated*, VOX (June 14, 2019, 9:30 AM), <https://www.vox.com/identities/2019/6/14/18663296/congress-eec-workplace-discrimination?bcsi-ac-> (reporting on the current incapability of the EEOC to process all claims).

139. Rasnic, *supra* note 132, at 444.

140. *Id.*

141. See, e.g., *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961) (“Employment, in the absence of legislation, can be revoked . . .”); *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 725 (1996) (Employers “may indeed terminate at-will relationships, unmodified by any legal constraints, without cause”).

142. *What You Can Expect After You File a Charge*, EEOC, <https://www.eec.gov/what-you-can-expect-after-you-file-charge> (last visited Dec. 28, 2021) (explaining that the EEOC’s 180-day waiting period before an individual may proceed is an attempt to resolve the plaintiff’s charge).

143. *Id.*

144. Press Release, EEOC, *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data* (Apr. 10, 2019), <https://www.eec.gov/newsroom/eec-releases-fiscal-year-2018-enforcement-and-litigation-data> (reporting a 95.7% success rate in its representation of plaintiffs in 2018 when including both verdicts and settlements).

145. This problem has worsened in recent years, as the EEOC reports a severe lack of funding to assist plaintiffs. Jameel, *supra* note 138.

The most concerning gap in American employee protection is a lack of protection for victims of discrimination that occurs outside the typical enumerated classes. Employees may be fired for prejudicial reasons, if the reason is far enough removed from the classes protected in Title VII.¹⁴⁶ Roy, our hypothetical employee and airline passenger, falls into this group. Roy did not negotiate for a protective clause in his employment contract. He was unaware he could do so. Roy was not terminated in a state that provides for a public policy exemption and Roy is not from Montana. Roy is not a member of a protected class, so the EEOC is totally unavailable to him. Roy is in the worst situation an employee can be in, and there is not a parachute in sight.

While many prejudices exist, only some have been addressed by Congressional acts.¹⁴⁷ Admittedly, protections provided by Congressional acts have been limited to the most sweeping and historically relevant types of discrimination.¹⁴⁸ Nonetheless, discrimination remains. Employers fire employees for a variety of reasons which are seemingly unrelated to protected classes.¹⁴⁹

The *Yanowitz* plaintiff, who refused to fire a supervisee who was not “hot” enough, succeeded because she tied her claim to discrimination based on sex and because California’s public policy exception statute protected employees who refused to violate Title VII.¹⁵⁰ If Yanowitz had been in a state with less robust protection, she could have still been fired because her termination itself would not violate Title

146. Yuracko, *supra* note 92, at 422–24.

147. See generally Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 26–27 (2011) (discussing the modern nature of discrimination and how unprotected traits are often used to get around typically protected classes).

148. *Id.* at 28–29; 110 CONG. REC. 7203 (1964) (statement of Sen. Joseph Clark) (identifying discrimination as a problem centered around certain groups, not all people).

149. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL’Y 153, 158 (2007) (arguing that there will never be protection from termination based on appearance alone).

150. *Yanowitz v. L’Oreal USA, Inc.*, 116 P.3d 1123, 1131–32, 1152 (Cal. 2005) (deciding the issue on the matter of sex discrimination because no appearance discrimination law exists).

VII.¹⁵¹ The EEOC was able to win a case for a plaintiff who had been fired for excessive weight, only because they were able to tie the plaintiff's condition to the ADA.¹⁵² The *Vazquez* plaintiff won her termination suit because she was able to tie a violation of an employer's hairstyle grooming policy to race through a disparate impact claim.¹⁵³ This was only possible because the employer had not enforced the policy against non-black and non-Hispanic employees.¹⁵⁴

Plaintiffs who lose these cases do so because public policy exceptions or Title VII does not cover their specific situation.¹⁵⁵ The *Jespersen* plaintiff lost her suit because a grooming standard that applied to women only was judged to be reasonable because men had a different standard with a similar burden.¹⁵⁶ The plaintiff in *Tudyman*, lost his suit because he was fifteen pounds over his employer's weight limit, a condition which resulted from his hobby as a bodybuilder.¹⁵⁷ Though the plaintiff did not violate the spirit of the employer's standards, his weight was a result of intentional and voluntary action which barred a Title VII claim.¹⁵⁸ The *Van Sickle* plaintiff was fired for a particularly unpleasant scar on his face.¹⁵⁹ While some scars allow a plaintiff to allege a Title VII claim through the ADA, the *Van Sickle* plaintiff's scar was not sufficiently debilitating.¹⁶⁰ These "close-calls" are just some of the gaps in Title VII coverage. Other, wider gaps in protection involves things such as entire groups who are not covered by existing law.

151. *Id.* at 1126 (identifying the California statute that allowed the plaintiff to argue for wrongful termination).

152. *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 696 (E.D. La. 2011).

153. *Vazquez v. Caesar's Paradise Stream Resort*, No. 3:CV-09-0625, 2013 WL 6244568, at *1 (M.D. Pa. Dec. 3, 2013).

154. *Id.* at *11–12.

155. *Corbett*, *supra* note 43, at 155.

156. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006).

157. *Tudyman v. United Airlines*, 608 F. Supp. 739, 741 (C.D. Cal. 1984).

158. *Id.* at 746.

159. *Van Sickle v. Automatic Data Processing*, 952 F. Supp. 1213, 1216 (E.D. Mich. 1997); *see also* Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000) (discussing the difficulty of correcting prejudice one group at a time).

160. *Van Sickle*, 952 F. Supp. at 1219.

Employees may be fired for their age, so long as they are under forty.¹⁶¹ The Supreme Court explained this particular nuance of Title VII by examining the motivations of Congress at the time of the ADEA's passing.¹⁶² The Court determined that Congress sought to end harmful practices which hindered employment for the old, like setting age restrictions on applications or firing older employees to hire younger and less compensated replacements. The Court ruled that the ADEA was "structured and manifestly intended to protect the older from arbitrary favor for the younger."¹⁶³ The ADEA was successful in this sense. Age limits are no longer a common part of job applications, and discrimination against elderly workers requires a demonstration of a "bona fide occupational qualification" which would reasonably limit the age of applicants.¹⁶⁴ Unfortunately, this decision failed to recognize a mounting trend of discrimination against the young.¹⁶⁵

Employees may be fired for a personality conflict with a supervisor or based upon factually incorrect information from a third party.¹⁶⁶ Employees may be fired for political views.¹⁶⁷ Under the "at-will" standard, any of these are a valid reason to fire an individual. The

161. *Age Discrimination*, EEOC, <https://www.eeoc.gov/youth/age-discrimination> (last visited Dec. 28, 2021); *see also* *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992) (recognizing that there was no such thing as discrimination against the young, dubbed "reverse age discrimination" by the court, because the ADEA had been intended to protect older workers only).

162. *See* *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 586–91 (2004).

163. *Id.* at 600.

164. *See generally* *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (explaining the effect of a "bona fide occupational qualification exception" on retirement disputes).

165. One state, Maryland, has recognized discrimination against young employees as a problem which requires intervention. Maryland's adopted version of the ADEA specifically omits language which would limit enforcement to one specific group. A recent decision by the Maryland Attorney General's Office used this specific omission as a policy directive and allowed for eighteen-year-old applicants to apply for state government jobs which had previously been limited to applicants at least twenty-one years of age.

166. *See* *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 594 (2008) (recognizing that Title VII is meant to protect only explicit classes).

167. Political views are not protected by federal law but are protected by some state or local laws. An alternate path for political speech is the First Amendment, which may still allow a wronged party to recover. *See generally* *Taylor v. Hoffman*, No. 5:17-CV-148, 2017 WL 5761610 (N.D. W. Va. Nov. 28, 2017).

Supreme Court itself has acknowledged that under “at-will” employment, an employee may be terminated for “good reason, bad reason, or no reason at all.”¹⁶⁸ Each of these examples are inherently unfair, but totally legal in forty-nine of fifty states as only Montana requires something close to “just-cause” for termination.¹⁶⁹ A fundamental shift is needed to protect not just these employees, but all employees in America.

IV. AN EXPANSION OF TITLE VII AND ADOPTION OF “JUST-CAUSE”

A drastic expansion of Title VII of the CRA to include all Americans,¹⁷⁰ not just those in protected classes, would cure all issues previously identified in this Note.¹⁷¹ Such a shift would be best accomplished by adopting a “just-cause”¹⁷² standard for termination disputes, either in totality or by adopting a rebuttable “just-cause” presumption.¹⁷³

168. *Engquist*, 553 U.S. at 606 (citing *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972)).

169. *See* MONT. CODE ANN. §§ 39-2-901–915 (2019).

170. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–03; Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018).

171. It is the essential function of Title VII of the CRA to rid American workplaces of discrimination. 42 U.S.C. § 2000e; *see also* Memorandum from Janet Dhillon, *supra* note 54.

172. A “just-cause” standard is already developing because of the complex patchwork of state labor laws. This transition is glacial and has robbed the “at-will” standard of flexibility. *See generally* *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980); *see also* *Sterling Drug, Inc. v. Oxford* 743 S.W.2d 380 (Ark. 1988).

173. A rebuttable “just-cause” presumption lowers the initial burden of the plaintiff. With this presumption, a plaintiff would need to show only a *prima facie* case of discrimination. The rebuttable “just-cause” presumption would be better suited in the American system of law and would be an adequate half-measure. *See* Jackson, *supra* note 3, at 553 (comparing burdens present in German law and that of American law, and outlining the benefits of a burden change). Consider how the above would change Arlene’s ability to terminate Roy in our hypothetical example. Arlene could still terminate Roy for creating an uncomfortable work environment for employees under a “just-cause” system of employment termination, but Arlene would need to articulate that cause when Roy is terminated. Under a rebuttable “just-cause” presumption scheme, Arlene would make no disclosure of cause at the time of Roy’s termination but would need to articulate a reasonable cause if Roy managed to present a *prima facie* case.

Other, smaller changes may be needed along the way,¹⁷⁴ but a total shift to an expanded Title VII solves all identified gaps in current American labor law while remaining true to the purpose of the original CRA.¹⁷⁵

A. Congressional Ability to Regulate Employment Standards

There is some inherent pressure when the federal government makes sweeping change to areas of law currently protected by state statute, and some may wonder if the federal government may enact these changes without violating state sovereignty. Put simply, the federal government has significant leeway to dictate labor policy to states. An Act of Congress could expand Title VII beyond its current borders.

The federal government has already enacted laws as sweeping, or more sweeping than a broad expansion of Title VII. Civil Rights legislation has been controlling state labor practices since at least 1963, with the passage of the Equal Pay Act.¹⁷⁶ Congress then passed the CRA in 1964,¹⁷⁷ the ADEA in 1967,¹⁷⁸ and the ADA in 1990.¹⁷⁹ Congress has also controlled labor practices outside of discrimination law with acts like the Fair Labor Standards Act of 1938 which established minimum wage, overtime requirements, and prohibited certain types of

174. Recommended changes include the creation of a specialized employment court, designation of employment judges, or creating a new agency to replace the EEOC. These steps would best be taken after the switch to determine the effect a “just-cause” system would have on current labor litigation norms.

175. The CRA was meant to make the text of the Fourteenth Amendment a reality. It was an act meant to bring equal protection of the laws to all citizens of the United States. It was an important step in that direction, but the specificity of the CRA hinders that aim. Simply put, Americans are not yet totally equal in their protection under the law.

176. See 29 U.S.C. § 206d.

177. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000e).

178. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 830 (codified as 29 U.S.C. § 621).

179. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101–03).

child labor.¹⁸⁰ The Occupational Safety and Health Act of 1970,¹⁸¹ known for the creation of OSHA and the regulations it oversees, was also federal law passed by Congress.¹⁸² Unions were regulated as far back as 1935 with the passage of the National Labor Relations Act, and collective bargaining agreements flourished in the American labor market as a result.¹⁸³ Each of these acts demonstrates the power and necessity for Congress to regulate labor practices in the United States to protect the American employee.

The Supreme Court has done its fair share of the lifting, principally by its decision in *United States v. Carolene Products Co.*, a case in which the United States sued a milk company for violation of the Filled Milk Act.¹⁸⁴ The Court ruled in favor of the United States, determining that there was a presumption of constitutionality in legislative acts.¹⁸⁵ The Supreme Court has also recognized the limitations of the freedom of contract, which underpins “at-will” standards, and the importance of choosing public interest over the concept of freedom of contract.¹⁸⁶ This is perhaps the most vital argument in favor of a “just-cause” standard to underpin an expanded Title VII.

Where the “freedom of contract” is in name only, a presumption must be made to benefit the weaker party to balance the scales toward equality; the freedom of contract principal is at its strongest when the parties are equally yoked.¹⁸⁷ A “just-cause” standard would effectively rebalance the parties in any employment contract negotiation so that

180. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060–70 (codified at 29 U.S.C. §§ 201–19).

181. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as 29 U.S.C. §§ 651–78).

182. See 29 U.S.C. § 651.

183. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as 29 U.S.C. §§ 141–97).

184. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145–148 (1938) (establishing a presumption of constitutionality for congressional acts).

185. *Id.* at 148.

186. See *Liberty Warehouse Co. v. Burley Tobacco Growers’ Coop. Mktg. Ass’n*, 276 U.S. 71, 97 (1928).

187. See generally *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 515–520 (Tenn. 1884), *overruled in part by* *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915) (discussing the freedom to contract in the context of employment).

the employee has power more equal to the employer.¹⁸⁸ Employees would no longer be required to bargain for the protection of a “just-cause” system but would instead benefit from it automatically.¹⁸⁹ That means that what an employee would usually sacrifice for protection could be used to bargain for other interests the employee wants to protect.

B. Benefits to Employers and Employees

Employers would benefit from this shift overall.¹⁹⁰ The primary benefit of “at-will” standards was the flexibility it provided the employer and employee.¹⁹¹ This is no longer the case for many businesses.¹⁹² The varied patchwork of state laws currently in place requires a business to prepare for numerous legal challenges to a termination.¹⁹³

An expansion of Title VII to all Americans and the adoption of either a “just-cause” standard, or a rebuttable presumption of “just-

188. Historic levels of inequality support claims that the freedom of contract between an employer and employee no longer exist. Until equality can be re-asserted, freedom of contract remains in a weak state for American employees. See Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW. RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/> (demonstrating the extent to which economic inequality has worsened in recent years); see also Preston & McCann, *supra* note 133, at 140 (arguing that “freedom of contract” has evolved into a concept designed to protect powerful interests).

189. Under a “just-cause” standard, an employee who has not completed a reasonable probation period is still effectively “at-will.” It is only upon completion of a probation period that an employee gains additional protection. See *supra* notes 46,47 and accompanying text; MONT. CODE ANN. § 39-2-904 (identifying a wide ability to terminate employees during probationary period).

190. Jackson, *supra* note 3, at 526 (describing the burden that an employer typically faces in light of statutory protections that limit employment at-will).

191. *Johnston v. William E. Wood & Assocs.*, 787 S.E.2d 103, 105 (Va. 2016).

192. See Sabey, *supra* note 24, at 613–614.

193. Jackson, *supra* note 3, at 526–36 (detailing the various legal hurdles that employers must prepare for). See generally Mark Feffer, *‘Employment at Will’ Isn’t a Blank Check to Terminate Employees You Don’t Like*, SHRM (Nov. 7, 2017) <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/employment-at-will-isnt-a-blank-check-to-terminate-employees-you-dont-like.aspx> (discussing the reduced flexibility of modern “at-will” termination).

cause” would alter the burden of proof attributed to the employer. When an employee is fired in a true “just-cause” system, the employer usually provides a reason for the employee’s termination.¹⁹⁴ This serves two critical functions. First, the employer is forced to identify a valid reason to dismiss an employee. If an employer fails to identify a valid reason upon termination, then they cannot fire that employee.¹⁹⁵ If a valid reason is given, the employee now knows what specific allegation they need to overcome. This is far more equitable because the employee has fewer resources than the employer.¹⁹⁶

Under a full “just-cause” standard, employers would need to be prepared to justify all terminations of all employees. While this sounds like an increased burden, employers must currently prepare for all possible challenges an employee may bring regarding discrimination.¹⁹⁷ The array of claims available to a plaintiff varies from state to state, and between state and federal systems, which widens the scope of what an employer must prepare for.¹⁹⁸ A former employee who was a member of several protected groups might allege discrimination in several capacities, each possibly requiring a legal defense from the former employer. That same employee might also allege that their termination violated the explicit public policy of their state, or that their contract had been violated when the employer acted in bad faith. Thus, as the

194. *See generally* Enter. Wire Co. v. Enter. Indep. Union, 46 La. 359 (1966) (Daugherty, Arb.) (outlining the standard procedure for a valid “just-cause” termination of union or contract employees).

195. This is not as restrictive as it initially seems. A valid reason under “just-cause” usually is understood to mean any reasonable cause to be established by the facts of the case. The Vermont Supreme Court’s working definition asks if the termination was due to a “substantial shortcoming detrimental to the employer’s interests, . . . which the law and a sound public opinion recognize as good cause for his dismissal.” *In re Brooks*, 382 A.2d 204, 207 (Vt. 1977). Other courts have not recognized a single “just-cause” standard, but instead treat “just-cause” analysis as a fact intensive and flexible. *See* N.C. Dep’t of Env’t & Nat. Res. v. Carroll, 599 S.E.2d 888, 900 (N.C. 2004).

196. *See* Jackson *supra* note 3, at 525–26.

197. *See id.* at 526–31.

198. *See id.* at 526–36 (describing whistleblower protections, common law and contract-based wrongful discharge claims, and other causes of action that limit the employment at-will doctrine).

system currently stands, employers must often prepare for the worst case in a termination dispute.¹⁹⁹

This would not be the case in a proper “just-cause” system. Employers would be required to make the first showing of “just cause” if compelled by a former employee, but an employer would not need to create a defense for every eventuality. Instead, an employer would only need to prove that the reason for termination was indeed just.

Under a rebuttable “just-cause” presumption standard, businesses would be free to fire employees as they currently do. The employee would need to bear the initial burden of establishing a prima facie case only, then the burden would shift to the employer. This maintains what little flexibility remains for American employers under the “at-will” system, while significantly lowering the burden of the employee alleging discrimination. Furthermore, the employer would still only require affirmative proof of “just-cause” if an employee met the prima facie burden.

An expansion of this magnitude would effectively remove all concerns about states without public policy protection for employees. All employers would have the burden of showing that the termination was carried out for valid reasons under a “just-cause” system.²⁰⁰ Alternatively, an employer that terminated an employee would be presumed to have a “just-cause” in a rebuttable presumption system and would need to show justification only if prompted. Neither system would create an increased burden for an employer, because employers already collect and collate data on employee performance so that the employer can avoid liability and track productivity.²⁰¹ Thus, employees in states without public policy protections or an implied contract of good faith and fair dealing, would receive significantly greater protection under the law without harming employers.

Under an expanded Title VII, the EEOC would need to cover many more American employees, but each case should be easier to decide. What was formerly a mess of jurisdictional issues would now be a series of simple questions. Under a full “just-cause” system, the EEOC or similar state agency would need to determine if the

199. *See id.* at 536 (“[T]he mix of state and federal statutes and variety of common law rules are messy and difficult for employers to deal with.”).

200. *See id.* at 552.

201. *See id.* at 551.

employer's stated cause for termination is just. Then, that same agency would need to evaluate if the plaintiff can disprove the employer's stated cause for termination or raise significant doubt as to its validity. If the plaintiff can make such a showing, then the case should be investigated further. If the plaintiff cannot, and his or her termination met the requirement of "just-cause," the employee was fired for a fair reason and the employer's decision is upheld.²⁰²

With a rebuttable presumption of "just-cause," the EEOC or state agency would first examine the plaintiff's allegations to determine if a prima facie case for wrongful termination has been established. If so, the process continues as a standard "just-cause" system from that point until its conclusion.

If the EEOC or state agency did not find sufficient grounds to represent the plaintiff, current rules would apply. After 180 days, or permission from the EEOC, a plaintiff would be free to bring their own claim with the same burdens and procedures.²⁰³ The primary benefit is that the EEOC will oversee a more equitable and predictable process that relies less on traditional protected classes and focusses more on the validity of the termination itself. This should streamline claims of wrongful termination, especially discrimination claims, as each party should know what facts the other will argue and what evidence is required.

C. An End to the (Protected) Class System

The final and most robust benefit of a "just-cause" system is the end of unprotected classes altogether. Under an expanded Title VII, all Americans are protected from any form of discrimination or prejudice in the workplace.²⁰⁴ This eliminates the need for additional protected classes to be created for smaller groups. Congress, and to a lesser degree the courts, have recognized the need to protect additional groups from undue harm in the workplace as society progresses.²⁰⁵ An

202. *See id.* at 553.

203. *What You Can Expect After You File a Charge*, *supra* note 142.

204. *See generally* Niedrich, *supra* note 147, at 85–86 (discussing the importance of overhauling Title VII to remove categorical class protection).

205. Congress has made these extensions clear by updating Title VII 42 U.S.C. § 2000e(h) to include new protected classes as they were added by Congressional acts. Congress even tried to pass an act which would extend protection to the LGBTQ+

expanded Title VII simply acknowledges and affirms the need to protect additional groups and does so in a way which prevents Americans from falling without parachutes.²⁰⁶

To be clear, this solution cannot end prejudice in the workplace. Americans will continue to be fired for reasons that are not valid under a “just-cause” standard.²⁰⁷ A “just-cause” standard is simply a recognition that bad behavior will continue and that more power and protection must be placed in the hands of the employee to safeguard their livelihood and rights. Racism, sexism, agism, ableism, and prejudice against members of the LGBTQ+ community will continue to be issues that we struggle to end in the American workplace. Even now, Americans within explicitly protected classes are fundamentally unprotected by the law.²⁰⁸

community before the Supreme Court ruled on the issue. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1822–24 (2020) (Kavanaugh, J., dissenting).

206. Under the current system, “parachutes” are distributed haphazardly. Freedom of contract allows a contracting party to bring their own parachute, but the airline may refuse them the ability. Unions can organize to demand parachutes, but they may be ejected from the plane instead. Public policy exceptions and presumptions of good faith reward individuals that risk themselves with a parachute, but some states don’t. Most federal employees receive parachutes automatically. Classes protected under Title VII may claim parachutes, but only if they were fired for a reason protected by that class designation. A person could claim a parachute for weight or hairstyle, but only if they could connect their plane crash to a class protected under Title VII. Truly, it is a mish-mash-mess.

207. Americans will also be victimized before obtaining a job, regardless of social progress. A recent case, *EEOC v. Abercrombie & Fitch Stores*, involved a woman of Muslim faith being passed over for a position because she would need to wear a headscarf at work. One might presume, after more than a decade of discussion about the Muslim faith, that employers would understand the need of a member of that faith to adhere to traditional norms. This is clearly not always the case. *Abercrombie & Fitch* argued that they had no way to know of the plaintiff’s need for an accommodation. In the end, the Supreme Court determined that the employer did not require notice that an accommodation would need to be made, only that the protected trait of the injured party be the reason for refusing a position in the first place. *See EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768 (2015).

208. This is especially true of independent contractors, who even under this proposed expansion of Title VII, would not receive additional protections automatically. A drastic conversation must be had about how we can best protect workers in an increasingly gig-driven economy. *See Niedrich, supra* note 147, at 57 n.165 (discussing how the exclusion of independent contractors restricts rights from normally protected classes).

V. CONCLUSION

Upon reexamining Roy's situation in our new system, his chances of recovery are greatly improved. Recall that Roy's employer fired him because his appearance was unsettling, and someone had complained. Under an expanded Title VII and "just-cause" standard, Roy's termination is clearly illegal.²⁰⁹ Roy could now articulate a defense against any specific allegation that accompanied his termination. If his supervisor had cited poor work product in the termination, Roy could provide evidence to show that his work product was up to company standards. If Roy were accused of "not fitting the company's culture," Roy could attempt to show that he had fit in with many of his coworkers.

The law should be written in a way that creates just, equitable, predictable, and expedient results. By shifting the burden of proof to the employer, we give plaintiffs a more just and equitable chance to recover against a larger and more powerful party. We also make the process more predictable because the system is consistent nationwide and more expedient as the guesswork of finding a legal strategy is avoided. The employer makes a specific charge for termination, and the employee must work to disprove that charge. For the sake of Roy and the millions of Americans like him, something must change. Title VII must be expanded, and a new standard of termination must be adopted.

209. Niedrich, *supra* note 147, at 105.