I. The Rise and Fall of Employment at Will

A. Overview
   1. Immutable Rules
      a. Cannot be changed by either party
   2. Default Rules
      a. Applicable rules unless the parties agree to other terms

B. Historical Foundations of Employment at Will
   1. Statute of Labourers (1349)
      a. Reacting to plague
      b. Everyone has to work at pre-plague wages for the duration of their contracts if they were under 60, not merchants, and not land-owners
      c. Law applies based on status in society
      d. Anti-competitive attitude towards markets
   2. Statute of Artificers
      a. Also imposed duties on employers—could not fire before the term of the contract without just cause
   3. Blackstone Commentaries (1765)
      a. Presumption that hiring is for one year—created symmetry—have to stay during thick and thin
   4. Wood’s Rule
      a. Presumption that Employment at will
         1.) Sees labor as a mobile and fungible commodity
         2.) Ignores intention of the parties
      b. X$/year still at will
      c. Permanent or lifetime contracts held to be of indefinite duration and at will
      d. Full performance was a condition precedent to getting wages
         1.) Rejecting quantum meruit claim by employee leaving before term is up
   5. Skagerberg v Blandin Paper Co
      a. Plaintiff turned down a position with the university based on assurances that he would have permanent job. He sued after being terminated after two years.
      b. An offer of permanent employment is of an indefinite term and is thus at will.
         1.) Only exception to at will is when employee “purchases” permanent employment in exchange for valuable consideration—i.e. not suing, selling business to competitor.
            a) In other areas of contracts don’t need separate consideration or—one promise can usually be consideration for multiple promises.
            b) mutuality of obligation—both parties must be bound, antiquated part of contracts law
   6. Main v. Skaggs Community Hospital
a. Plaintiff’s contract was for an indefinite time but stated that either party could only terminate for just cause and with 60 days notice.
b. Held: In MO, a contract for an indefinite amount of time is still at will. Language about just cause does not make this change.
   1.) Court troubles by notion of perpetual obligation—want clear evidence of intent to contract out of at-will. MO still very traditional.

C. Contract Erosions of Employment at Will
   1. Express Modification
      a. Chiodo v. Genderal Waterworks Corp.
         1.) Plaintiff sold his telephone company to the defendant and was hired for a ten-year period as manager. He was terminated after three years.
         2.) Held: The contract has an implied provision that the employee may be fired only for a willful and substantial failure to adher to the usual standards of service.
            a) Difference between just cause under definite term and indefinite contracts?
               i. Definite—require bad conduct on part of employee—failure to render honest faithful, loyal service.
               ii. Indefinite term—just cause could be a business failure
            b) Important to determine whether standard of just cause is an objective or subjective one
      b. Hetes v Schefman & Miller Law Office
         1.) Hetes agreed to work as a receptionist and was assured that she would be retained if she did a good job.
         2.) Held: The oral promise to retain an employee “if she did a good job” can be the equivalent of a just-cause provision in a contract even though the employment contract is of an indefinite term.
            a) Far end of liberal spectrum—even MI has since pulled back.
            b) Generalities usually not enough
         3.) Probationary period is usually held to be still be consistent with at will employment.
      c. Ohanian v. Avis Rent a Car Systems, Inc.
         1.) Ohanian was assured that if he transferred east, his future with the company was secure—he had a job as long as he did not screw up and he could transfer back if he chose.
         2.) Held: An oral contract that defendant would have a job with the company as long as he did not screw up was not barred by the statute of frauds because in NY termination for just cause includes business reasons—termination could take place within a year without a breach.
            a) Court was implying just cause from “unless you screw up”then used NY law to define just cause.
            b) Other states have other ways of defeating statute of frauds
3.) Held: The oral contract is not barred by the parole evidence rule by a later written document because the oral contract may be used as evidence that the written document is not the contract.

2. Reliance and Implied Contracts
   a. **Grouse v. Group Health Plan, Inc.**
      1.) Grouse told defendant after he was offered job that he was turning down his present job. The job offer was later rescinded.
      2.) Held: An employer may be liable to an at-will employee when it rescinds an offer of employment under promissory estoppel when the company could reasonably expect that their offer would induce reliance, and where the employee acted in reliance on the offer.
         a) Could also have used promissory estoppel (§ 90 of restatement of contracts) after he started—dictum that he should have a chance to prove himself.
         b) Damages: difference between old salary and replacement job—not between replacement job and promised job.
   b. **Veno v. Meredith**
      1.) Newspaper editor fired after being told by boss that he wanted to retire together and cosigned editor’s home loan.
      2.) Held: Could not sue for wrongful discharge. The only way an at-will employee can overcome the presumption against being an at-will employee is by showing 1) an express contract or 2) an implied contract or 3) additional consideration or 4) by showing the firing was against public policy or 5) the firing was with intent to harm the employee.
         a) Expressions of hope not enough.
         b) Court seems to using additional consideration for evidentiary purposes and suggest that even without an agreement, additional consideration may be enough to overcome the presumption.
            i. Used as way of showing intent of parties.
         c) Court suggesting that that where termination would result in a great hardship or loss to the other party—reliance then can imply contract for a specific time—Grouse might still have case in PA.
   3.) **Pugh v. See’s Candies, Inc.**
      a) Employee was fired after 32 years with the company with multiple commendations and promotions, employer had practice of not firing without cause.
      b) Held: An employee may attempt to overcome the presumption of at-will employment by showing an implied contract for an indefinite term with dismissal only for cause. The implied contract may be shown by employment practices, longevity of service, or industry practices.
i. Rejecting the separate consideration rule—one promise can support multiple others.

ii. Employee bears the burden—don’t want to interfere too much with manager’s discretion.

iii. Difference between good faith and just cause—some states like Alaska need to show that reason actually existed, other states like CA—employer’s good faith belief sufficient.

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<td>Good faith</td>
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<td>Just Cause</td>
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Employee burden    Employer burden

iv. Life Cycle Contracts Theory—most risk of arbitrary discharge at end of cycle—investments not even over time.
   (a) Is this still an accurate model?
      (1) Grouse—at beginning, vulnerable so court uses promissory estoppel
      (2) Veno—in middle—got chance to start, no help
      (3) Pugh—at end, use implied contract

3. Employment Manuals
      1.) Woolley given manual that stated company would not dismiss except for cause and that company would follow outlined procedures.
      2.) Held: Where an employer issues a manual, that without disclaimer, provides for certain benefits, the judiciary should construe such provisions in accordance with the reasonable expectations of employees even where the employment is for an indefinite term and would otherwise be at will.
         a) Different from an individual permanent contract—group contract common to all.
            i. Offer in exchange for continued work—unilateral contract. Presume reliance—effective from distribution.
            b) Subject to change allowed company to keep it current and competitive—did not defeat promises.
               i. Could have added disclaimer—any problems with indefiniteness employer’s own making.
         c) Majority View but some courts require actual reliance.
   b. Reid v. Sears, Roebuck and Co.
      1.) Employee manuals listed possible grounds for dismissal. Employment applications had disclaimer that all employment was at will.
      2.) Held: Disclaimer was not altered by employment manual—language was intended to be illustrative and not inclusive.
c. **Johnson v. McDonnell Douglas Corp.**
   1.) Employee was discharged after receiving a notice of probation that the company would consider extenuating circumstances.
   2.) Held: Handbook is not a contract and statements and procedures outlined in the manual do not create an exception to the presumption that indefinite employment is at will.
      a) Decision to modify at will must be stated with greater clarity.

d. Changes to manuals—some courts have held a change after many years requires at least notice and possibly consent.

D. Tort Erosions of Employment at Will
   1. **Wrongful Discharge in Violation of Public Policy**
      a. **Nees v. Hocks**
         1.) Was fired for serving jury duty.
         2.) Holding: It is an exception to the at will doctrine that in some instances the employer’s discharge violates public policy and justifies compensation to the employee.
            a) Actions by legislature courts, and people of state indicate that jury duty is highly regarded. Don’t want employers to be able to interfere with employee’s legal obligation to serve.
            b) If employer had only asked for postponement then might be justified.
      b. Three main categories of Wrongful discharge in violation of public policy
         1.) Refusal to perform an illegal act
            a) No public policy in dismissal stemming from following orders to ignore law
         2.) Exercising a statutory right
         3.) Performing a public duty
      c. Duty basically irrelevant of type of employment contract.
      d. Courts reluctant to get involved in anything short of discharge unless amounts to constructive discharge.
      e. Some states more broadly define public policy, others require clear statement in statutes or constitution—some courts even say that federal law is not an indication of state public policy.
         1.) Criminal codes (TX)
         2.) Statutory or constitutional provision (CA)
         3.) Statute, constitution or regulation (MO)
         4.) Statute, constitutional regulation or judicial decision (HA)
      f. **Murphy v. American Home Products**
         1.) Alleged discharge because he disclosed accounting improprieties to top management officials.
         2.) Held: Recognizing public policy exception is best reserved for NY legislature not NY courts.
      g. **Foley v. Interactive Data Corp.**
1.) told his former supervisor that new supervisor was under investigation by former employer for embezzlement—no third party effects, only private interest of employer.

2.) Held: No public policy interest in preventing employer from discharging an employee for telling on fellow employee.
   a) Test: Contract to do reverse—not to tell would not be against public policy.

h. **Kirk v. Mercy Hospital Tri-County.**
   1.) Firing after expressing her concerns that patient was not receiving proper care.
   2.) Held: Public policy exception where an employee is dismissed for refusing to violate law, or where discharge contrary to policy expressed in constitution, statutes, and regulations of the states.
      a) RN’s have clear duty to act in best interest of patients.
      b) If public policy preserved by other remedies then policy sufficiently served.

i. **Hodges v. S.C. Toof & Co.**
   1.) Dismissed in violation of Tenn. Statute for serving jury duty.
   2.) Held: The remedy provided by the legislation is not the exclusive remedy where a common law remedy existed prior to the statute—the statutory remedy is assumed to be cumulative unless the legislature specifies otherwise.
      a) Under Kirk would have been pre-empted by statute.

j. **Johnston v. Delmar Distributing**
   1.) Johnston contacted the ATF when she was instructed to ship firearms labeled fishing gear.
   2.) Held: Public policy requires an exception when refusing to commit illegal acts and this exception extends to employees who in good faith attempt to find out whether or not an act is illegal.
      a) Good faith belief sufficient even if conduct turns out to be legal.
   3.) Many states have statutes specifically protecting Whistleblowers
      a) Some states only protect external whistleblowers, others actually require internal reporting first.
      b) Some states exclusive remedy, others common law action not preempted.

k. **Wrongful Discharge of Attorneys**
   1.) **Balla v. Gambro, Inc.**
      a) In house counsel fired after he advised company to reject shipment of dialysis machines that did not meet FDA regs.
      b) Held: No cause of action for wrongful discharge in violation of public policy because attorney’s ethical obligations are enough of a guard against public policy.

i. Don’t want to limit client from disclosing in attorney
ii. Don’t want employer to bear costs of meeting ethical obligations
iii. Ultimate at will relationship—serve at pleasure of client

2.) General Dynamics Corp. v. Superior Court
   a) Fired as in-house counsel brought claims of implied contract for just-cause dismissal and for wrongful discharge in violation of public policy.
   b) Held: No reason why employer should not be held to bargain if choose to limit the terms of employment for in-house counsel.
   c) Held: There is a claim for wrongful discharge in violation of public policy where the attorney can show that he or she was dismissed for following a mandatory ethical obligation or where the conduct is not required, but the attorney can show that a non-attorney would have a claim and the attorney is permitted to depart from the usual attorney-client privilege rules.
      i. Work is by definition affected with public interest.

2. Intentional Infliction of Emotional Distress also “tort of outrageous conduct”
   a. Don’t need outrageous conduct to have a claim of retaliatory discharge—but can also usually get any emotional damages under wrongful discharge in violation of public policy.
      1.) Waitress was fired after manager announced that employees would be fired in alphabetical order.
      2.) Held: One who by extreme and outrageous conduct causes severe emotional distress may be liable if it is shown that 1) they knew or should have known that the emotional distress was likely to result, 2) that the conduct was beyond the bounds of human decency (a reasonable person would find extreme and outrageous), 3) that the defendant’s conduct caused the distress, and 4) that the distress was severe.
      a) Liable even though at-will employee—not attacking termination but rather the manner of termination
   c. Bodewig v. K-mart
      1.) Was made to be strip-searched in front of customer.
      2.) Held: Because of the special relationship between an employee and employer, the employer can be liable for intentional infliction of emotional distress even if the distress was not intention if it was reckless.
      a) Distress which must be severe not necessarily physical manifestations.

E. Good Faith Limitations on Employment at Will
   1. Fortune v National Cash Register Co.doc
a. Salesman was entitled to bonuses for sales, was fired 3 days after landing a $5 million dollar sale. Stayed on as a consultant.
b. Held: Good faith and fair dealing clause may be implied in contracts at-will, especially where employees are paid on a commission basis.
   1.) Damages were amount of unpaid bonuses.
   2.) Can't terminate to deprive of benefits of the bargain—can still terminate at will, just can't sabotage contract.
   3.) Not saying implied in every employment contract
2. **Murphy v. American Home Products Corp.**
a. alleged that dismissed because disclosed accounting improprieties
b. Held: court will not imply obligation of good faith and fair dealing where it would be inconsistent with the other terms of the contract.
   1.) Limitation of right to discharge at-will must be clear.
   2.) Looking for different damages from Fortune—trying to protect right to continued employment, Fortune just wanted his commissions.
2. **Foley v. Interactive Data Corp.**
a. fired after reported that supervisor was under investigation for embezzlement.
b. Held: Oral contracts do contain an implied obligation of good faith and fair dealing, but damages are limited to those available in contract—no reason to allow punitive damages.
   1.) Protecting promises, not public policy
   2.) Not similar to insurance cases where allow punitive damages—can always get another job
   3.) Limiting to contract damages biases the system in favor of upper-income employees
F. The Future of Wrongful Discharge Law
   1. Richard Epstein
      a. At will employment makes most sense as a gap filler because it is predictable, and benefits both parties—worker can quit whenever advantageous, loss of reputation through arbitrary discharges a check on employers.
         1.) Making implicit assumption that the only alternative to at-will employment is a fixed-term contract.
   2. Weiler
      a. All jobs may not be the same—have to protect individual loss. Job security and long-term employment are important to employees. Employers also have interest in long-term relationship and protect through wage structure, benefits, advancement. Employees may not know at outset what they are giving up through at will employment. Employers might be willing to give security—but don't want to bear the burden for just a few workers.
1.) Kim’s Survey—most employees don’t know that they are employed at will—regardless of how permissive their own state laws are.

3. Legislative Reform
   a. Model Employment Termination Act
   b. Major issue in all reforms is how to define just cause.
      1.) Model act and several states use “good cause”—need a reasonable basis.
   c. Also have issue who should bear the burden
      1.) Pugh and Model Act put burden on the Employee.
   d. Should arbitraritration be preferred method of resolution?
      1.) Best chance of allowing for reinstatment—but no protection once reinstated
   e. Generally limit damages

G. Constitutional Limits on the Discharge of Public Employees
   1. for public employees constitutional rights apply
   2. Board of Regents v. Roth
      a. Non-tenured professor’s contract was not renewed. He wanted a hearing.
      b. Held: For due process rights to be violated there must be a protected interest at stake—Roth had neither a liberty interest nor an entitlement (property interest) in continued employment.
         1.) Liberty interest implicated where reputation, honor, good name at stake, or if the firing has foreclosed other employment possibilities.
   3. Perry v. Sindermann
      a. Untenured Professor was fired for critizing university but faculty guide had provision that would be retained as long as services statisfactory.
      b. Held: May have a property interest if there is a mutual understanding that supports the claim of entitlement.
      c. Most statues have civil service statutes that provide tenure and very specific procedures for dismissal
   4. Cleveland Board of Education v. Loudermill
      a. Plaintiff was a security guard—state statute said that he could only be dismissed for cause and specified a post-termination hearing.
      b. Held: If a state statute creates an entitlement, the 14th amendment due process guarantees specify the procedures for taking away the entitlement. State statute can not specify less than due process for taking away.
         1.) State creates substantive right, 14th amendment specifies procedure.
         2.) Balance the competing interests at stake government and individual to determine what is required—essential elements are notice and an opportunity to respond—full evidentariary hearing may not be needed.
II. Employee Privacy
A. Constitutional Limits
1. Pickering v. Board of Education of Township High School District
   a. Teacher was fired for writing letter to editor disagreeing with tax increase.
   b. Held: Because his statements were not directed towards a person he was in frequent contact with there was no problem with discipline or harmony and loyalty and confidence were not necessary for his relationship with the board.
      1.) Balancing employer’s interest in suppressing speech against individual’s right to free speech.
      2.) Want a free and open discourse on matters of public concern.
2. Connick v. Meyers
   a. Assistant district attorney was fired after she distributed survey about transfer policy—had one question relating to work on political campaigns.
   b. Held: Questions about transfer policy were not a matter of public concern—no balancing required, but question about work on political campaign was. Determine matter of public concern by looking at content, form, and context of speech.
   c. Held: When speech is on a matter of public concern, balance interests—here impeded employee’s ability to do her work, close working relationship was essential—also look at the time, place and manner of speech—here at office, disrupted work, in context of employment dispute.
3. Rankin v. McPherson
   a. Rankin was overheard remarking to her boyfriend, a fellow employee, about Regan that if they went after him again, she hoped they got him and was fired.
   b. Held: Taken in context, was speech on matter of public concern, pickering balancing test shows that speech did not interfere with the workings of the office or affect others or discredit the office—was a private conversation.
      1.) Threshold matter: speech must be on a matter of public concern.
         a) Brennan’s alternative test from Connick—if the speech implicates the government’s interest as employer, then engage in balancing test, but if no such evidence, then should have the same free speech rights as other citizen.
4. Hatch Act restricts political activity of federal workers
5. Rutan v. Republican Party
   a. Republican governor of IL instituted a system where hiring, promotions, recall, and transfers were done through a patronage system.
b. Held: The state can not condition public employment on party support.
   1.) Can not deny employment in a way that infringes on constitutional rights.
   2.) Can dismiss high-level policy implementers and uneffective employees.

6. O'Connor v. Ortega
   a. Physician of state hospital’s desk was searched while he was on leave about charges of sexual harassment and financial misdeeds.
   b. Held: Fourth amendment implicated only if he had a reasonable expectation of privacy in his desk—look to the intent of the fourth amendment, the uses an individual has for a location, and societal understanding to determine whether or not protected
      1.) work related areas, within employers control—no privacy,
      2.) but some privacy in own office
      3.) expectation of privacy can be reduced by the employer’s practices, procedures, and legitimate regulations—must look at the expectation in the context of the situation
   c. Held: Once the 4th amendment is implicated, the search is reasonable if balancing the individual’s privacy against the employer’s need to control tips for the employer.
      1.) Warrant not realistic in workplace
      2.) If the public interest is satisfied by a lesser standard—probably cause is not always required—it is enough that work related, non-investigatory intrusions are reasonable if 1) they were justified originally and 2) search was reasonably related in scope to the circumstances which justified the search.
   d. Open Q as to what would be the standards is searching for evidence of criminal activity

B. Rights of Speech and Association in the Private Sector
      a. Novsel was dismissed after he refused to lobby the state legislature on his employer’s behalf.
      b. Held: There are areas of private life of an employee into which the employer may not intrude—firing here violates public policy.
         1.) Look to government employee cases to find the source of public policy.
         2.) Use balancing test similar to Pickering to ensure that employer is not taking advantage of employee.
   2. Timekeeping Systems, Inc.
      a. Sent e-mail to all fellow employees urging not to support changes in vacation policy.
      b. Held: NLRA § 7 and 8(a)(1) protects concerted action by the employee—still protected even where conduct is rude or intolerable unless it is so violent or of such a serious nature as to render the employee unfit.
1.) Cause of Action:
   a) Concerted action—but don’t have to be aware that it was concerted
   b) Related to employment—don’t need to be trying to start an union—enough that trying to enlist mutual aid and protection
   c) Protected activity—can’t be in violation of employment contract, or violent—insubordination not enough to remove protection

3. Brunner v. Al Attar
   a. Employee dismissed for volunteering for AIDS organization.
   b. Held: Limited public policy exception in TX only covers where the employee was asked perform an illegal act or where the employer was trying to avoid paying pension benefits.

C. Privacy Rights of Private Sector Employees
   1. Possible Causes of Action:
      a. Invasion of Privacy
         1.) Need intentional intrusion on solitude or seclusion that would be highly offensive to the reasonable person
      b. Public disclosure of private facts tort
         1.) Public disclosure of private facts which are highly offensive
         2.) Some jurisdictions add requirement “not of legitimate concern”
      c. Intentional Infliction of Emotional distress
         1.) Must be extreme or outrageous conduct which is intentional or reckless and causes severe emotional distress
      d. Breach of contract
         1.) Rely on policy statements that company does not have an interest in the employee’s personal life or things
         2.) May have a disclaimer
      e. Wrongful discharge in violation of public policy
         1.) Hard to find a policy

2. Rulon-Miller v. I.BM.
   a. Employee was dismissed for dating an employee of a rival. Argued breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress.
   b. Held: Where the company has a policy statement that it will not violate privacy, should be held to them—had a right to terminate for conflict of interest—for jury to decide if there really was one.
   c. Held: Conduct was extreme and outrageous and the manager’s actions were intended to humiliate and degrade her when he said that he was deciding for her.
   d. Most employee relationship cases against employee.

   a. Employee put her own lock on locker—it was searched without her consent.
b. Held: Invasion of privacy where there is an unjustified intrusion into the seclusion of another to the degree as to cause a reasonable person to feel severely offended, humiliated or outraged.
   1.) With own lock had a reasonable expectation of privacy.

4. Miller v. Motorola, Inc.
   a. Employer disclosed employee’s mastectomy surgery to her co-employees.
   b. Held: Restatement of Torts 652D allows a claim for the public disclosure of private facts providing 1) there was public disclosure 2) of private facts 3) the disclosure would be highly offensive to the reasonable person. The special relationship between the plaintiff and the small group “public” overcomes the usual rule that communication to a small group is not actionable.
   1.) Had expectation that her medical information would be confidential.

D. Privacy Rights as Public Policy
      a. Two brothers were dismissed for refusing to submit to drug testing. They brought claims of violations of state constitutional privacy guarantees, invasion of privacy, breach of implied covenant of good faith and fair dealing, and wrongful discharge in violation of public policy.
      b. Held: There is a public policy protecting the privacy of employees as evidenced by the state constitution, statutes, and common law action for invasion of privacy, however the use of marijuana on the job is not within this protected sphere as long as the employee had notice of the testing and test was conducted at a time reasonably contemporaneous with the employee’s work time.
         1.) After the court finds the policy, the court is employing a balancing test.
      c. Held: No invasion of privacy because the intrusion was not unreasonable

2. Luck v. Southern Pacific Transportation
   a. Was dismissed for refusing to consent to drug test.
   b. Held: No public policy claim because only individual interests are implicated. Under the Foley test, a contract to submit to drug testing would not be void. Drug testing is a controversial matter—no clear articulation of a fundamental privacy right.
      1.) Strong Dissent: Foley test not appropriate here where there is a state constitutional right to privacy—everyone benefits by protecting.

   a. Employee wanted a declaratory judgement that employer’s proposed drug testing program violated the employees rights to privacy.
b. Held: An employer is free to modify the terms of an at-will employment contract at any time, and the employee is free to accept or not. No invasion of privacy because employee consents. Does not fall under TX's limited public policy exception to at-will employment.

E. Defamation

1. Elements
   a. False and defamatory statement
      1.) No explanation might be defamatory in some states
      2.) Libel: written defamation
      3.) Slander: published defamation
   b. Unprivileged publication
      1.) Jurisdictions split over whether self-publication is enough
   c. Fault (negligence usually enough)
   d. Special harm (may not need if slander per se (clearly would put someone in disrepute)

2. Elbeshbeshy v. Franklin Insitute
   a. After employee was terminated a notation was placed in his employment record that he was dismissed for being uncooperative.
   b. Held: This could be defamatory because it could lower the employee’s esteem in the eyes of other employers and the community, and it was published when it was shared with members of the defendant’s personnel department, and there is an issue for the jury over whether the employer acted with malice or abused its privilege to evaluate the job performance of employees.

   a. Employee was dismissed for giving false information about his health on his employment forms—this was published in a list of “comings and goings” in the employer’s newsletter.
   b. Held: Defamations are privileged where the person making the statement and the person to whom it is made share a legitimate common interest. Employers have a legitimate interest in telling employees why other works have been dismissed to suppress rumors. Employees have a legitimate interest in knowing. Publication in a plant newsletter which was distributed in the lunchroom was not excessive even if some employees took the newsletter home.

4. Messina v. Kroblin Transportation Systems
   a. Supervisor accused employee of falsifying inspection reports in front of coworkers.
   b. Held: Publication by one employee within the scope of his duties to only other employees is not publication.
      1.) Corporation is basically just talking to itself.

5. Starr v. Pearle Vision
a. Starr was dismissed for failing to cooperate with an investigation into missing money. This fact was relayed to three of her friends who called looking for her.

b. Held: No recognition of self-publication either under theory that the employer either knew or should have foreseen that the employee would be compelled to reveal the defamation or that the employer either knew or should have foreseen that the employee would be likely to repeat the defamation.

c. Held: Employer vicariously liable for the defamations of its employees

6. Churchey v. Adolph Coors
a. Churchey was discharged for failure to report her medical clearances for work—a matter which Churchey disputes.

b. Held: For jury to decide if the publication was false.

c. Held: Even if the statement was defamatory, publication to supervise was subject to the common interest privilege.

d. Held: Of the two approaches, the best approach for recognizing self-publication is only where the defendant has reason to believe that the subject will be under a strong compulsion to disclose the defamation.
   1.) Don’t want to basis liability on a freely-made decision to disclose.
   2.) Employer should have a qualified privilege to reveal the reasons for termination to the employee unless they acted with malice or acted recklessly.

7. Randi W. Muroc Joint Unified School District
a. School District recommended teacher without disclosing prior sexual misconduct.

b. Held: Employer may be liable for affirmative misrepresentations that present a foreseeable and substantial risk of physical harm to a third person.
III. Prohibitions against Discrimination

A. Individual Disparate Treatment—Race and Sex

1. Two primary models of discrimination
   a. Disparate treatment—most cases
      1.) Prima Facie Case of Discrimination:
         a) Employee must bring enough evidence for the court to make the inference that something else is going on
         b) Employer then has the burden of showing their reason
         c) Employee has the ultimate burden of proving discrimination
   b. Disparate impact

   a. Civil Rights activist employee who had lock-in on employer’s premises alleged discrimination in turning down his application for reemployment.
   b. Held: Plaintiff has the initial burden of showing a prima facie case: that he belongs to protected group, that he applied and was qualified for a job which the employer was seeking applicants, that he was rejected, that after he was rejected the employer continued to seek applicants with similar qualifications. The burden then shifts to the employer to show a legitimate, non-discriminatory reason. The plaintiff then has the opportunity to show that the reason was a pretext.

3. St. Mary’s Honor Center v. Hicks
   a. Black officer alleged discrimination in firing from job as corrections officers.
   b. Held: Once the prima facie case is proven, there is a presumption of discrimination, but once the employer produces a reason, this presumption drops away, and the employee has the burden of proving that the defendant’s reason was in fact a pretext.
      1.) Producing any evidence shifts the burden back to the plaintiff—whether or not the evidence is ultimately persuasive.
      2.) Presumption is a procedural device—not trying to get at truth?

   a. Female was denied partnership and told to act more feminine, but defendants also cited interpersonal skills problems.
   b. Held: Where gender is a motivating part of an employment decision, the defendant may avoid liability if they show by a preponderance of the evidence that they would have made the same decision regardless.

B. Sexual Harassment

1. Two types
   a. Quid pro quo—tangible effect—must agree or else wages, benefits, etc. affected.
      1.) Employer strictly liable for Title VII harassment except for hostile environment.
a) But after Ellerth and Faragher, now where supervisor/employee have vicarious liability rule in both situations, but it is an affirmative defense that the employer to reasonable care to avoid, and the employee unreasonably failed to take advantage of those measures.

b. Hostile Work Environment
1.) Basic claim: sexual harrassment severe or pervasive to alter the conditions of employment and create an abusive working environment.
   a) Employers only liable if they knew or should have known about the harassment and failed to take immediate and effective steps to remedy the harassment.

2.) Ellison v. Brady
   a) Plaintiff was harassed by fellow employee who was transferred to another office and then transferred back.
   b) Held: For sexual harassment to be actionable under Title VII, it is harrasser’s conduct which must be severe and pervasive not the alteration in the conditions of employment, and this conduct should be evaluated from the perspective of the victim.
      i. An employer is shielded from liability where they take action reasonably calculated to end harassment—but in some cases, the mere presence of the harraser may create a hostile environment.

3.) Harris v. Forklift Systems
   a) Harris was sexually harassed by her supervisor.
   b) Held: There can be Title VII harrasment before the employee’s psychological well-being is seriously affected.
      i. Factors for Hostile Environment:
         (a) Frequency of conduct
         (b) Severity
         (c) Whether it was physically threatening or humiliating or a mere offensive utterance.
         (d) Affect on work performance
         (e) Affect on well-being is also a factor
   ii. Must prove both objectively and subjectively hostile.
   c) Did not address the reasonable woman standard.

4.) Oncale
   a) Male who worked on oil rig harrased by other men.
   b) Held: Title VII allows a claim when the harasser and the harassed are of the same xex—as long as discrimination because of sex.
      i. Court requiring that members of one sex be exposed to disadvantageous conditions.
      ii. No protection from equal opportunity jerks.

2. Remedies
a. Civil Rights Act of 1991—can now get compensatory and punitive damages.

3. Courts have consistently said that Title VII does not apply to sexual orientation.

C. Age Discrimination
   1. Forbidden under the ADEA
      a. Some differences from Title VII
         1.) Can not get compensatory and punitive but can get liquidated if show that willful.
         2.) Always had jury trials
         3.) Class actions—opt-in classes only
      b. Defense if bonafide occupational qualification
   2. O'Connor v. Consolidated Coin Caters
      a. O'Connor was fired at 56.
      b. Held: It is not necessary that the plaintiff show that he was replaced by a younger worker to have a prima facie case of discrimination.
         1.) Court not ruling on whether McDonell-Douglas burden shifting scheme is appropriate for ADEA.
         2.) What really matters is that replaced by someone "substantially younger."
   3. Holley v. Sanyo Manufacturing
      a. Plaintiff's position was combined with that of younger man as part of a reduction in force.
      b. Held: While a reduction in force can be age discrimination, the plaintiff needs to make an additional showing that age was a factor in the lay-offs to get a trial.
         1.) Had his position not been eliminated, but he was still replaced with a younger worker, then different outcome.
         2.) Look at statistics of who was actually laid off.
   4. Hanzen v. Biggins
      a. Plaintiff was fired a few weeks before his benefits would have vested under ERISA. Sued for both ERISA violations and ADEA.
      b. Held: To prove discrimination under the ADEA by showing disparate treatment, the plaintiff needs to prove that the age was a motivating factor. Age and years of service as distinct.
         1.) No age discrimination b/c decision based on economics not age stereotypes.

D. Disability Discrimination
   1. ADA
      a. Prior to ADA, Rehab act applied to federal employees, contractors and recipients of federal funds.
      b. The body of law interpreting the Rehab Act’s definition of "Reasonable accommodation" is relevant.
   2. Sutton v. United Airlines
      a. Twin Sisters with myopia wanted to be airline pilots. With glasses they have perfect vision.
b. Held: Under the ADA, a disability is a physical or mental impairment that affects a major life activity which is determined without mitigating measures.
   1.) Can also be disabled by being regarded as having a physical or mental impairment that affects a major life activity—major life activity of working, plaintiff must show unable to work in a broad class of jobs.
   a) Would have had to show that the employer thought that they had a disability that impaired them from working in a major life activity.

c. Even if a person shows as a threshold matter that they are disabled, they still have to show that they are qualified, and even then the employer can raise the defense of a legitimate job related reason or a direct threat to health and safety.

   a. Van Zande’s quadrapelgia was accommodated by her employer, but she was not allowed to work from home, had to use sick leave when she was at home, and had to use a different sink.
   b. Held: A reasonable accommodation is not the same as the maximum accommodation possible—it takes into account cost. Even then the employer can still raise the defense of undue hardship which can show that even if reasonable, the cost for this particular employer was unreasonable.
   1.) An employer that goes beyond what is required should not be penalized.
IV. Mandatory Arbitration
   A. Gilmer v. Interstate Johnson Lane Corp.
      1. Gilmer’s security registration application (to be a stock broker) contained a mandatory arbitration clause.
      2. Held: Age Discrimination claims under the ADEA can be subjected to compulsory arbitration. Federal Arbitration Act makes arbitration agreements enforceable and parties should be held to their bargain unless the statute exempts.
   B. Collective Bargaining Agreements
      1. union arbitration contracts do not affect the ability to pursue statutory claims in court.
   C. Benefits of Arbitration:
      1. more claims may be heard, quicker—instead of just a few employees getting large awards, awards are more equitably distributed to among a large number of aggrieved employees.
   D. Circuit City v. Adams
      1. Signed arbitration agreement in employment application.
      2. Held: The FAA does not apply to employment contracts “involving commerce” but this exemption only applies to the contracts of transportation workers and preempts any state laws which read differently.
V. Unemployment Insurance

A. History and Background
1. Federal act used taxing power as part of social security program to give an incentive to states to create their own programs using federal minimum guidelines.
   a. Financed by experience-rated tax that charges higher tax those employers who generate the most cost to the system.
      1.) Reserve ration: (33 states) each employer has account, contributions credited and benefits deducted.
      2.) Benefit ratio: (17 states) taxes charged proportional to benefits and taxable wages without looking at contributions.
2. 1970’s amendments extended coverage to state and local government employees.
3. Types of Unemployment
   a. Frictional unemployment: takes time to find a new job
   b. Structural unemployment: no job in area for skills
   c. Wait unemployment: may be waiting for a recal.
4. Effectiveness
   a. Entitlement—not like other welfare programs
   b. Most recipients prime-age white males
   c. Only 1/3 of unemployed get benefits

B. Work Search Requirement
1. all states require recipients to actively look for a job.
2. Knox v. Unemployment Compensation Board of Review
   a. Knox told a prospective employer that he would go back to his former employer if recalled.
   b. Held: Knox violated the work search requirements—discouraging an employer shows a lack of good faith—must be unconditionally available to work.
      1.) Employees search more in states with stricter work search rules.

C. Disqualifications
1. Continental Research Corp. v. Labor and Industrial Relations Commission
   a. Employee was dismissed because he failed to follow orders and got on the roof to clear snow.
   b. Held: To be disqualified from UI an employee’s unemployment insurance must be the result of deliberate violation of rules, disregard of the employer’s interest, or negligence to the degree of showing an intentional and substantial disregard of the employer’s interest or the employees duties and obligations. No direct disobedience here.
2. Wimberly v. Labor and Industrial Relations Commission
a. Plaintiff left her MO job because of pregnancy. MO denies benefits where the plaintiff leaves voluntarily and without good cause attributable to work.
b. Held: There is no affirmative duty to provide benefits for pregnant women—only to treat pregnant women the same as other workers.  
   1.) Family Medical Leave Act now gives workers the right to up to 12 weeks unpaid leave.
   2.) MO now has exception in cases of pregnancy.
3. MaGregor v. Unememployment Insurance Board
   a. MaGregor left her CA job to follow the father of her child to NY to care for his father. CA allows benefits where the employee quits with good cause.
   b. Held: Family obligations are good cause and legal marriage is not always a prequisite where there is additional compelling reasons—like child.
4. McCourtney v. Imprimis Technology
   a. McCourtney was frequently absent because of a sick baby.  
   b. Held: Misconduct is a willful or wanton disregard of standards or intentional disregard of duties and obligations. McCourney’s good faith efforts to secure child care showed a lack of culpability.
5. Jones v. Review Board of Indiana Employment Security Division
   a. Jones left job after employer extended her hours after agreeing to the change the day before.  
   b. Held: Benefits appropriately denied because left her employment without good cause in connection with her work.  
      1.) If she had left when the change was made, then she could have gotten UI.
6. MacGregor, McCourtney and Jones all show that UI was based on male-head of household model.
VI. Fair Labor Standards Act (FLSA)

A. Background and Basic Provisions
   1. Lochner v. New York
      a. New York set maximum hours for bakers.
      b. Held: Such wage/hour regulations interfere with individual economic liberty and are not justified as a legitimate exercise of the police power because the state’s interest is not outweighed by the imposition on individual liberty.
      c. Demise of Lochner: Entered Era of rational basis test—narrower scope of review only when constitutional rights or discrimination is implicated.
   2. State Laws that mandate a higher wage were not preempted
   3. About 88% of workers covered. $5.15 in 1997.
      a. Has not kept pace with inflation
      b. Must pay 1 ½ times for overtime.
   4. Limits child labor.
   5. State and Local Employees covered but limited in ability to get damages

B. Implementing Substantive Obligations
   1. Bright v. Houston Northwest Medical Center
      a. Bright was required to be on-call all the time so that he could arrive at the hospital within 30 minutes.
      b. Held: Bright should not be compensated for overtime spent on call—the critical determination is whether the employee can effectively use time for their own purposes. He was not required to be at the employer.
   2. Marshall v. Sam Dell’s Dodge
      a. Auto dealer paid by commission basis. Some weeks the employees were paid under the minimum wage.
      b. Held: Regardless of the total pay, FLSA requires that each week employees receive an amount equal to the minimum wage times the number of hours a week.
         1.) Bonuses only factor in the weeks they were paid.
         2.) Demo cars do not count because they were primarily for the benefit of the employer.
   3. Dunlop v. Gray Goto
      a. Employer compensated with fringe benefits instead of overtime pay.
      b. Held: Fringe benefits are not the equivalent of overtime pay under FLSA because FLSA did not want overtime compensation to accumulate beyond the pay day.
         1.) Public sector such arrangements are allowable.
   4. Dalheim v. KDFW-TV
      a. TV station did not pay reporters, news producers, directors, and editors minimum wage and overtime pay.
b. Held: FLSA exempts professional employees who occupy bonafide executive, administrative or professional positions.
   1.) For managers the primary duty must consist of management of enterprise.
   2.) Creative professionals primary duty must consist of artistic endeavors of the employees
      a) Distinguish between those whose work is creative in nature and those who just work in a medium capable of creative tasks.
      b) Reporter’s day to day work does not require invention imagination or talent.
   3.) Administrative employees perform office or nonmanual work which is directly related to the employers management or general business operations and involves the exercise of discretion and independent judgement.
      a) Distinction between those like news producers whose primary duty is producing product and those who administer the business affairs of the enterprise.
   c. Must also be paid by salary not by the hour.

C. Employment Relationship

1. Lauritzen v. Secretary of Labor
   a. Farmer who employed migrant farm workers claimed they were independent contractor.
   b. Held: To determine if an employee is an independent contract, the court looks at the economic reality: (1) at the nature and degree of the employer’s control over the manner of the work, (2) employees opportunity for profit or loss, (3) employees investement in materials or equipment, (4) whether a special skill is required (5) permancy of the working relationship and (6) extent to which service rendered is an intregal part of the alleged employer's business. Here, the employer controlled a great deal of the work, the employees could not end up with a loss, the employees had little investment—all was supplied by the employer, no special skill is required to pick pickles, many families return year after year, and pickle picking is a intregal part of the business.
   1.) Different from negligence standard for independent contractor—FLSA is not concerned about a third party, but rather about the relationship itself.

2. Brennan v. Arnheim & Neely
   a. Real Estate management company managed properties for several different building owners and employed personnel for each.
   b. Held: Real Estate company subject to FLSA because it counts as an enterprise under FLSA because it has a common purpose, unified operations, and its activities are related and taken in aggregate, meets the $500,000 dollar volume of gross sales requirement.
1.) Individual owners could not be liable.
2.) Dollar limited designed to protect small, family owned, or start-up businesses that are the least likely to be able to afford the cost of complying.

3. Bureerong v. Uvawas
   a. Immigrants who were held to work sweatshop wanted to sue the clothing manufacturers who contracted with their bosses.
   b. Held: It is possible to find an employment relationship even when there is limited control over certain aspects of the employee’s work. Here, the plaintiffs are really dependent on the manufacturers to pay wages—the prices they set when subcontracting make a fair wage impossible.

4. Hot goods provision
   a. It is unlawful to transport or sell goods where any employee was employed in violation of FLSA to produce.
   b. Justified b/c clients are the ones who promote violations, they benefit from a lower price, they have a unfair competitive advantage, and they are in the best position to ensure that the producers comply.

D. Enforcement Problems
   1. FLSA can be enforced by employees, Secretary of Labor or the Attorney General.
   2. Either the employees or the Secretary of Labor is entitled to recovery unpaid wages and equal amount of liquidated damages.
      a. No liquidated damages if the employer proves a good faith, reasonable belief that they thought there was no violation.
VII. Employee Retirement Income Security Act (ERISA)

A. Background: Regulation of Pension Plans

1. Types of Benefits
   a. Deferred Compensation
      1.) Long-term benefits such as pensions that are earned now and awarded later
      2.) Some of ERISA’s provisions like vesting, requirements to ensure adequate contributions, and pension insurance only apply to pension plans, other provisions like reporting, fiduciary duties only apply to pension plans
   b. In-kind benefits
      1.) Welfare benefits like health and life insurance that are useable in the short-term and provided in a form other than money

2. Why do employers offer?
   a. Get tax incentives for health benefits
   b. Tax deferral on pension plans
   c. Help attract and retain certain types of employees—goals like hiring mature adults with children—can accomplish through benefits what might otherwise be void as discrimination
   d. Have rules so that employers do not only offer pensions to higher wage earners
      1.) These rules run the risk of having the costs exceed the benefits
      2.) Similar rules also applied to health insurance but were repealed

   a. Employee brought action to recover the $52.54 he contributed to a pension fund. The rules of the fund said the trustees decided all questions “without appeal.”
   b. Held: Unless mismangement (breach of trustee duties) is alleged, a pension is a inchoate gift that an employee has no vested right to.
      1.) “Gratutity Theory of Pensions”
      2.) Dissent: unilateral contract—promise of pension in return for continued work performance.

4. Structure of Pension Plans under ERISA
   a. Defined Contribution Plans—employers promise to pay a defined amount into an account for each employee
      1.) Does not have insure places.
      2.) Many of ERISA’s funding requirements don’t apply.
   b. Defined Benefit Plans
      1.) Employer contributes to a trust fund, and is require to insure the plan and adequately fund it so that the promised level of benefits can be paid out.
   c. ERISA designed to respond to risk of mismanagment of funds, risks of employer opportunism, risk of underfunding, and the difficulties employees have comparing and contrasting benefits.

a. Rycoff’s pension plan stipulated that employees forfeited part of pension if they left to work for a competitor. This was different than the vesting schedule for those who left to work for a noncompetitor.
b. Held: ERISA requires either absolute vesting after 5 years or graduated vesting from 3-7 years (20%, 40%, 60%, 80% 100%). A employer can modify but the modified plan must satisfy all of the requirements for one of the vesting options.
   1.) Court fails to realize that while option A was not satisfied, option B was.
6. Clark v. Lauren Young Tire Center
a. Clark was laid off and then went to work for an competitor. Because he had not yet worked ten years (9 years, 8 months), he lost his benefits.
b. Held: Employer’s action permitted b/c employer does not have to allow benefits to vest at all prior to 10 years—if choose to be more generous, can also have fortfiure requirement.
   1.) Changed by 1986 ammendment to make vesting requirement shorter (see Hummell).
   2.) Have vesting standards to protect employee’s loyalty, but still provide an incentive to be loyal.

B. § 510
1. ERISA § 510 provides:
a. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.
a. Heath was fired right before he would have been eligible for early retirement.
b. Held: § 510 of ERISA applies to both vested and unvested benefits. There is a distinction between the employer’s right to change or abolish the plan and their right to deny benefits to a particular employee.
   1.) Applies also to rights which never vest like Health Benefits
a. The employer closed the Benton Harbor plant instead of the Ashville plant. Benton Harbor employees allege this was to avoid increased pension costs.
b. Held: Where a determining factor in the reduction in force is pension liability, there can be §510 violation, but the employer must be given the opportunity to show that they would have made the same decision in any case, which this employer did.
   1.) Can not allow pension matters to tip scale.

C. Health Benefits
1. Loss of benefits a problem for many workers—new employer may have waiting period, exclusions.
a. COBRA—employees must be allowed to continue at the group rate for up to 18 months after a qualifying event (job loss, reduction in hours, divorce, death, retirement, coming of age) but the employee pays the premiums up to 102%.
b. HIPAA—health plans can not impose preexisting conditions limits beyond 12 months, and that is shortened if the employee had prior coverage.

2. Geissal v. Moore Medical Corp.
a. Geissal was denied COBRA benefits because he was covered under his wife’s plan.
b. Held: COBRA only ceases if the employee “first becomes covered” by another plan during the period—not if the employee was already covered by another plan.
   1.) Timing, not adequacy of coverage is determinative.

a. McGann’s employer changed their plan to limit coverage for AIDS after learning McGann had AIDS.
b. Held: § 510 only applies when the employer acts with discriminatory intent towards a specific employee not when they change the plan.
   1.) Discrimination only illegal if it is motivated by desire to retaliate or to deprive of existing benefit to which he may become entitled (no entitlement to certain level of HC
   2.) Desire to save $ not illegal.
c. Shows the fundamental tension between ERISA’s reluctance to impose a minimum level of benefits, while still preventing individual discrimination.

4. Sprague v. General Motors
a. GM’s literature said that GM would pay HC for life for retirees. Some but not all plan summaries reserved the right to change. Retirees alleged that new copays were a breach of K, breach of fiduciary duty, equitable estoppel.
b. Held: Because welfare plans are not subject to vesting requirements, the intent to vest rights must be clear. Here there is no ambiguity in the fact that although they promised lifetime HC,
GM also reserved the right to change. Equitabulate estoppel does not apply when the terms of a plan are unambiguous. The fiduciary duty held by a plan administrator applies in administering the plan but not in amending or terminating a plan. No oral modification when have clear contracts with early retirees.

c. Where there is a conflict, many courts have indicated that the summary plan description should control.

d. Conflict in circuits about whether or not reliance is required before there is a violation of disclosure provisions.

D. ERISA Preemption

1. ERISA § 514(a) provides for broad preemption “supercedes any and all state laws insofar as they may now or hereafter relate to any employee benefit plan”
   a. But the savings clause of § 514 (b)(2)(A) allows state laws which regulate insurance, banking, or securities.
   b. But the deemer clause of § 514 (b)(2)(B) says that self-insured employers are not insurance companies.

2. Metropolitan Life Insurance Co. v. MA
   a. MA law requires that insurers provide a minimum of mental health coverage.
   b. Held: The law is not preempted because it regulates the terms of insurance plans—the substantive of insurance contracts has been a traditional state law domain.
      1.) It falls within regulating “the business of insurance”:
         a) Transfers or spreads risks
         b) Integral part of the relationship between insured and insurer
         c) Limited to entities within the insurance industry

3. “relating to employee benefits plans”—broad but does have some limits—
   a. i.e. okay to require hospitals to collect surcharges on expenses
   b. law requiring one time severance pay okay because not a plan

4. MA v. Morash
   a. MA law requires that employers pay vacation or holiday pay when discharged.
   b. Held: Law not preempted by ERISA because preemption does not extend to regulation for compensation for unused time—states have traditionally regulated wages including vacation pay. Although welfare plan under ERISA can include programs of vacation benefits.

5. Ingersoll Rand v. McClendon
   a. Employee brought state common law action that he was unlawfully discharged to prevent him from attaining pension which was about to vest.
   b. Held: Preempted because the cause of action relates directly to the pension plan and the cause of action is directly addressed by ERISA § 510.
c. Not all wrongful discharge claims preempted—if substance of claim has nothing to do with pension benefits—most states allow claim (and monetary damages which can include lost benefits) but stop short of allowing injunctive relief that would require an ongoing affirmative action by the employer or plan itself.
VIII. Workers Compensation

A. Background and Basic Coverage

1. Two goals of government health and safety programs
   a. Prevent workplace injuries
   b. Compensation of ill or injured workers

2. Possible approaches:
   a. Labor market—idea that employees will demand a risk premium to work in more dangerous jobs
      1.) May not be enough because of difficulty knowing true risks of job (informational barriers), some risks take time to manifest, some workers are more susceptible, workplace is changing with new technology, lack of bargaining power
   b. Tort suits
      1.) Farwell v. Boston & Worchester Rail Road Corp.
         a) Employee injured on the job by fellow employee.
         b) Held: Employer is not liable—respondent superior only applies to situations where a stranger is injured, employees are regulated by the terms of their employment K. General rule is that unless the K specifies otherwise, the employee assumes the risks of the job including risks that others will injure him.
            i. Court assuming that initial contract takes into consideration these risks in the form of a wage premium.
      2.) Recovery at tort law limited by the fellow servant rule, contributory negligence, and assumption of the risk.
   c. Workers compensation
      1.) State laws
   d. Safety and health laws

3. Early state laws:
   a. New York Central Rail Road v. White
      1.) NY legislature enacted workers compensation system. Employer challenging as unconstitutional.
      2.) Held: The workers compensation laws do not violate the employers right to due process or infringe in the liberty of contract—within the states power to replace one body of law with another and a reasonable excerise of the state's police power.
         a) Not unreasonable trade off: Employer is relieved from common law damages, but has to pay into system, employee is assured compensation but prevented from bringing separate actions.

4. Most state laws cover healthcare/rehab expenses, partial wage replacement (usually around 2/3), death benefits to dependents.

5. Which Injuries are covered?
   a. Most states require:
1.) An injury  
2.) Resulting from accident  
3.) That arose out of employment  
4.) In the course of employment  

b. Ezzy v. Worker’s Compensation Appeals Board  
1.) Law Clerk was recruited to join firm softball team by partner. State statute says that off-duty recreational activities are not covered unless they were a reasonable expectancy of or expressly or impliedly required by employer.  
2.) Held: injury was in the course of the employees employment because the employee had a subjective reasonable expectation that it was required which was objectively reasonable. There was substantial employment involvement in the activity, there was a benefit from the activity to the employer, and there was job-related pressure to participate.  

c. Prows v. Industrial Commission  
1.) Employee was injured in the course of horseplay with other employees when he attempted to slingshot a board and hit himself in the eye.  
2.) Held: Covered under workers compensation because the horseplay was not a substantial deviation from the work, looking at the extent and seriousness of the deviation, the completeness of the deviation, the degree to which horseplay was accepted part of employment, and the nature of the employment.  
3.) Other ways could have addressed.  
   a) “aggressor defense”—no recovery if instigated or participated  
   b) NY role—recovery if regular incident  
   c) Treat instigators and participants the same as nonparticipants because it is the conditions of employment which induce the horseplay.  

B. Exclusivity of Remedies  
1. Eckis v. Sea World  
   a. Eckis wants to sue her employer in tort for injuries resulting from her being asked to wear bikini and pose on Shamu.  
   b. Held: Worker’s comp exclusivity rules bar tort suits because she was in the course and scope of her employment in an activity which furthered and benefited the employer: during normal working hours on employer’s premises, performing activity that employer had requested, employer trained her and provided equipment—workers comp is not limited to where the injury occurs w/in the scope of the employment originally hired for.  
      1.) “quantum of work connection” enough  
2. Millison v. E.I. duPont de Nemours
a. Employees wish to sue employer in tort for exposing them to asbestos and for working with company doctors to hide asbestos diseases from them.

b. Held: Workers Compensation exclusivity rules have an exception for intentional wrongdoing by the employer. Injuries from the concealed danger of asbestos are not recoverable—there must be an intent to injure or knowledge with substantial certainty that injury would result—just knowing risks is not enough especially given the context of modern industrial employment. The aggravation of the injuries by covering them up goes beyond exposure to risks or failure to warn—outside the scope of the workers compensation system, not an ordinary risk of employment.

3. Tatrai v. Presbyterian University Hospital
   a. Employee wishes to sue hospital employer in tort for injuries she suffered when she went to the emergency room while at work.
   b. Held: Employee can recover under the “dual capacity” doctrine—at the time of her injury she was no different from a member of the general public—the hospital was relating to her in a different persona from that of employer.
      1.) In course of employer:
         a) In furtherance of employer’s business, regardless of location
         b) On premises of employer, because of employer’s business whether or not in furtherance of employer’s business at the time (i.e. on break).
      2.) Minority rule—most courts reject the dual capacity doctrine in products liability claims

C. Preemption and Relation to Other Laws
      a. Fireman wants to sue employer for Intentional Infliction of Emotional Distress because he was subject to egregious harassing actions by his supervisor, demoted and later suffered a stroke.
      b. Held: Action precluded by worker’s comp exclusivity rules because workers comp provides the exclusive remedy where a physical injury is alleged. Reckless disregard of the risk of IIED and outrageous conduct are not enough—demotion and termination are a normal part of the employment relationship.
         1.) Court distinguished from situations where only an emotional injury was alleged under IIED b/c there workers comp provides no remedy. Later court got rid of distinction—no compensation in either case.
         2.) Exception: Where the employer is “outside the shoes” of their role as employer:
            a) Not a typical risk of employment or
            b) Did not occur while at work
   2. Defamation claims usually allowed
   3. Shoemaker v. Myers
a. Employee sued alleging wrongful termination in violation of state whistleblower laws after he was terminated for reporting employer misconduct.
b. Held: Worker’s comp exclusivity rules do not bar the claim because it would defeat the whistleblower statute to allow WC to gut it, whistleblower is the more specific statute so it controls, behavior covered by whistleblowing statute not reasonably within the original bargain between employer and employee.
   1.) He had tried to amend complaint to remove physical injury allegations: court says can’t amend once you have made a substantial claim just to avoid WC exclusivity rules without an explanation

a. Employee suing employer under state disability discrimination statute for discrimination relating to a work related injury for which he received workers compensation.
b. Held: Claim not barred by worker’s comp exclusivity rules because disability discrimination laws and workers compensation have different goals and remedy different injuries.
   1.) Stronger claim when alleging race or sex discrimination—harder to argue no conflict here.
   2.) Now ADA preempts as a matter of federal law.