EMPLOYMENT AT WILL

Skagerberg (illustrative of employment at-will at its height)
- At-will is the default rule
- Permanent (indefinite term) employment simply means “at-will”
  - There can be an exception to this such as additional consideration

NOTES

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Main v. Skaggs SR (MO) → permanent employment means at-will (this is all MO recognizes)
- Ct is concerned with the idea that employer might create an open-ended obligation that might last forever – so ct here doesn’t want to allow at-will default to be changed even by K
- If it is an indefinite period of time, it is an at-will employment. If you stipulate a definite period of time, then the employer needs just cause

EXPRESS CONTRACTS
- The presumption of employment at will can be seen as the cts’ attempt to fill the gap: unless the parties state otherwise, the employer can discharge for good, bad or no reason at all.

Chiodo → fixed term = just cause
- In a fixed term, just cause should be based on a willful and substantial breach.
- In an indefinite term, you are hired to work, but if there is a lack of funds, that may be a just cause
- There is a difference in a justifiable cause in a fixed term K and an indefinite term K. In a fixed term, I think just cause should be based on a willful and substantial breach. In an indefinite term, you are hired to work, but if there is lack of funds, that may be a just cause.

Hetes → In this case, presumption is easily overcome, but this is rare
- Ct takes an off-hand comment, you will keep your job if you do good work, to change the K (Mich)
- In light of the Main case, MO ct would have seen this as an employment at will because they say that if there is an indefinite period it is at-will employment
- This is the total opposite end of the spectrum from Skagerberg. The 2 are at extreme ends, and today, the cts are somewhere in the middle.

Ohanian → this was a lifetime oral K, stat of frauds doesn’t apply bc can be fired w/i a year.
- Ct says that Stat of Frauds only bars Ks that are incapable of being completed in one year, but here the ct says that this is a just cause K, therefore the employer would have been able to terminate employee within one year, and thus falls outside the stat of frauds. There is a problem with putting just cause in the K bc an employer will look lazy if he asks for it.

IMPLIED CONTRACTS

Grouse – an employment K which is terminable at will can give rise to an action for damages if anticipatorily repudiated (promissory estoppel)
- This was an indefinite term K; therefore, it is presumed to be at-will
- The ct says promissory estoppel
  - There was a promise that could be reasonably expected to induce some sort of action
  - Actual reliance
- P turned down a job offer because he relied on an oral promise.
- the doctrine of **promissory estoppel** entitles Grause to recover

**promissory estoppel** – implies a K in law where none exists in fact → a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Promissory estoppel may exist even after the job has begun → So the day before P starts a job, they can’t fire him, and even if he works for one day at an at-will employment, there can be promissory estoppel.
- P turned down a job by relying on the oral promise. It is reasonable for P to quit his job on reliance of an at-will employment
- Promisory estoppel creates an implied in fact K.

**Veno**
- the most elementary way that the parties can overcome the at-will presumption is by express K
- at-will may also be overcome by implied K
- at-will may also be overcome where the employee gives the employer sufficient consideration in addition to the services for which he was hired.
- To contract away the at-will presumption, much clarity is required. Absent this clarity, the relationship is at-will and a discharge is not reviewable in a judicial forum
- When sufficient additional consideration is present, an employee should not be subject to discharge without just cause for a reasonable time. The length of time during which it would be unreasonable to terminate, without just cause, an employee who has given additional consideration should be commensurate with the hardship the employee has endured or the benefit he has bestowed.
- Employee can challenge at-will if there was an expressed or implied K.

**Pugh – implied in Fact good cause Ks for long-tenured employees.**
- the presumption that an employment K is intended to be terminable at will is subject to contrary evidence. This may take the form of an agreement, express or implied, that the relationship will continue for some fixed period of time.
- **Independent consideration** – serves an evidentiary function: it is more probable that the parties intended a continuing relationship, with limitations upon the employer’s dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment beyond the usual rendition of service.
- In determining whether there exists an implied-in-fact promise for some form of continued employment, cts have considered other factors in addition to independent consideration.
  - Personnel policies or practices of the employer
  - Employee's longevity of service
  - Actions or communications by the employer reflecting assurances of continued employment
  - Practices of the industry in which the employee is engaged.
- Agreement may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and the surrounding circumstances.
- Employee has to prove that the employer doesn’t have a good reason at the subjective (good-faith) end to the employer having to prove just cause at the objective (just cause) end
EMPLOYMENT MANUALS

Woolley

Issue – Can certain terms in a company’s employment manual contractually bind the company? Did Def retain the right to fire with or without cause or can P only be terminated for cause? Should the legal effect of the dissemination of a personnel policy manual by a co with a substantial number of employees be determined solely and strictly by traditional K doctrine?

Absent a clear and prominent disclaimer, an implied promise contained in an employment Manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will. – RULE

- Ct will not allow a co offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable (but the P got the manual after he already started working – not really inducement to take the job)
- Job security provisions contained in a personnel policy manual widely distributed among a large workforce are supported by consideration and may therefore be enforced as a binding commitment of the employer
- The manual is an offer that seeks the formation of a unilateral K – the employees’ bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue \( \Rightarrow \) continued action in exchange for the employer’s promise
  o But for the employer’s policy manual, the employee would have quit.

Reid

- A K to discharge only for cause may not be based on a mere subjective expectancy
- There was disclaimer saying that employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Co or the employee.
- The list of conduct that may result in termination was not all encompassing
- Def included a provision of at-will employment in the application form
  o Toussaint held that employers can avoid misunderstanding over the term of employment by requiring prospective employees to acknowledge that they serve at the will or pleasure of the co.

Johnson v. McDonnell Douglas \( \Rightarrow \) an at-will employee cannot interpret the distribution of a handbook as a modification of the at-will status

- Under MO employment at will doc, an employer can discharge for cause or without cause
- For an at will employee to state a claim for wrongful discharge he must plead the essential elements of a valid K and a discharge in violation thereof

- The elements of a valid K are offer, acceptance, and bargained for consideration.
  o None of these elements are present
- D’s unilateral act of publishing its handbook was not a contractual offer to its employees.
- An employer’s offer to modify the at will status of his employees must be stated with greater definiteness and clarity than is found here.
- Since D made no offer to its employees, no power of acceptance was created in the P

REVIEW of how to overcome at-will

- Express Ks – written and oral
- Personnel Manuals – unilateral Ks
- Implied Ks – History, length of service, practice, etc
- Promissory Estoppel
- Implied in Law K – substantial detriment benefit (this is a variation of promissory estoppel)

Wrongful discharge due to pub pol doesn’t fall in here because you can be at-will and still bring a WD tort charge. → exception to at-will

The difference is between K (duties rising out of the parties) and TORT (duties arising out of law).

**WRONGFUL DISCHARGE/PUBLIC POLICY**

**Typology of Wrongful Discharge Cases – fact pattern**
- 1) Refusing to commit unlawful acts
- 2) Exercising a statutory right
- 3) Fulfilling a public obligation
- 4) Whistleblowing

Many cases don’t fit neatly as exceptions to the at-will rule – look at Kirk

Public pol concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s
- Criminal codes
- constitution and
- statutes and, when they are silent,
- in its judicial decisions.

Public Policy, defined by effects
- effect on third parity
  - leaves the question of how direct must the 3rd party effect be (Bala)
- Whether parties could K (Foley)
  - Foley test is circular

This is not about K, it’s a duty imposed by law because it effects the public, so we’re not concerned with the party’s intent → if the employer meant it to be at-will or not.

**Nees v. Hocks**
- She is fired for missing work for jury duty. There is no way she can sue on K bc she’s at will, so she sues on tort.
- The source of the duty the employer violated in firing her was a duty implied by law to allow her to serve jury duty.
- Third party effects are prominent, bc having citizens serve in juries is a big policies.

**Murphy v. AHP**
- Ct concludes that recognition in NY state of tort liability for what has become known as abusive or wrongful discharge should await legislative action

**Foley v. Interactive Data Corp** → he gets K damages not Tort damages bc, this was a private matter
- To successfully plead a cause of action under the Tameny theory, P must allege that he was
  - terminated in retaliation for asserting his statutory rights,
  - or for his refusal to perform an illegal act at the request of the employer,
or that his employer directly violated a statute by dismissing him.
- It’s a private matter if it can be contracted around or if it doesn’t affect a third party → if you’re going to find pub pol, you have to find a touchstone for it.

WHISTLEBLOWER
Look at p 158 for different states and what they say about whistleblowing
Johnston v. Del Mar distributing Co. → the protection usually extends to mistaken whistleblowers and efforts to determine the legality of an employer’s action; must have good faith belief.
- There is an exception to the at-will doctrine for the discharge of an employee for the sole reason that the employee refused to perform an illegal act.
- P inquired to the ATF whether or not she was committing an illegal act. Since ignorance of the law is no def to a criminal prosecution, it is reasonable to expect that if an employee has a good faith belief that a required act might be illegal, she will try to find out whether the act is in fact illegal prior to deciding what course of action to take. If an employer is allowed to terminate the employee at this point, the pub pol exception would have little or no effect.

Kirk v. Mercy Hospital Tri-County - MO
- Pub Pol – is that principle of law which holds that no one can lawfully do what which tends to be injurious to the pub or against the pub good.
- Nurse turned to the Nursing Practice Act to find her pub pol
  - 2 things you need to prove for violation of PP tort
    - the discharge violates some well est pub pol
    - there be no stat remedy to protect the P or society.

EXERCISING STAT RIGHT
Hodges v. SC Toof Co. → the statute didn’t limit the remedy to the statutory remedy, so you can have the common law remedy too.
- What is the remedy for this tort? Is it what the statute provides for in a discharge for serving jury duty – reinstatement and reimbursement? Or, should the P be allowed to get compensatory and punitive also?
- P has been employed for 19 years, doing good work, called for jury service. He was then fired.
- Can he get more than just reinstatement and lost wages, can you get tort damages also even when there is a statutory remedy? Yes, you can get more because there was no express limitation in the stat.

WRONGFUL DISCHARGE – ATTORNEYS
Balla → Ill rules of professional conduct
- because of the special relationship between an attorney and client, there is no retaliatory discharge.
- If in-house are granted a right to sue their employers in tort for retaliatory discharge, employers might further limit their communication with them.
- Under the Rules of Prof Conduct, P was required to withdraw from representing def if continued representation would result in a violation of the Rules – Therefore, he would have had to withdraw anyway.
- It would be inappropriate for the employer to bear the economic costs and burdens of their in-house counsel’s adhering to their ethical obligations under the Rules
- If he wasn’t an attorney, he would have a cause of action due to potential FDA violations

General Dynamics Corp v. Superior court → Opposite Balla, in-house do have a right to wrongful discharge
- Attorneys should be accorded a retaliatory discharge remedy in those instances in which mandatory ethical norms in the Rules of Prof conduct collide with illegitimate demands of the employer and the attorney insists on adhering to his or her clear professional duty.
- Balla no good – cts remedy of the in-house att’s duty of withdrawal is illusory because non-lawyer employees don’t have to surrender their jobs rather than go along with unlawful demands
- **RULE** – in determining whether an in-house att has a retaliatory discharge claim, ct must first ask whether the att was discharged for following a mandatory ethical obligation prescribed by professional rule or statute.

**SUMMARY**

Types of cases
- Refusal to perform illegal act
- Performance of public duty
- Exercising statutory right
- Reporting illegal ER activity (whistleblower)

Many cases don’t fit neatly as exceptions to the at-will rule
- look at the *Kirk* case

Public Policy, defined by source
- criminal codes
- statutory or constitutional provision
- statute, constitutional provision, or regulation
- statute, constitutional provision, regulation or judicial decision

How specific does the articulation of pub pol have to be? If very specific, then have the issue of preemption by common law (*Hodges*).

Public Policy, defined by effects
- effect on third party
  - leaves the question of how direct must the 3rd party effect be (*Ballá*)
- whether parties could contract (*Foley*)
  - Foley test is circular.

**IIED**

**Agis v. Ho Jo**
- In order for P to prevail, it must be est that:
  - 1) The actor intended to inflict emotional distress or knew or should have known
  - 2) The conduct was extreme and outrageous
  - 3) The actions of the def were the cause of the P’s distress
  - 4) The emotional distress sustained by the P was severe

**Boedwig v. K-Mart**
- She sued employer and customer
  - For customer, she had to show intent
  - For the employer, she had to show special relationship (power relationship or special knowledge of employee’s vulnerabilities) and recklessness (don’t have to show intent)
- there is a power relationship with the employer – the employer had some sort of authority over her, and this raises the duty for the employer. In addition, the employer knows something about her, and she’s particularly vulnerable
- For both, she has to show that the conduct was extreme

**GOOD FAITH AND FAIR DEALING**

In every K there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the K, which means that in every K there exists an implied covenant of good faith.

In any good faith action, the P can only get K damages.

**Fortune v. National Register Co**
- burden on employee to show that there wasn’t good cause
- Don’t act in a way that will deprive the other party of the benefit of the bargain.
- This is more narrow than Foley

**MURPHY V. AHP**
- this case basically says that recognizing good faith and fair dealing will undue the employment at will, so the ct is against good faith and fair dealing

**Foley v. Interactive Data Corp**
- Difference bw tort and K: K, you’re limited to expectancy, in tort, you can get more.
- P reported that the newly hired supervisor was under investigation ➔ but P was fired for not doing a good job
- P brought a charge of good faith and fair dealing, he says he was fired for doing his job.
- Previously, cts say that good faith is being deprived of the fruits of your labor, but here, him being fired isn’t taking away the benefit of the bargain. So, here the ct expanded the definition of good faith and fair dealing.

**WRONGFUL TERMINATION LAW**

**DUE PROCESS – 14TH AMENDMENT**

The Board of Regents of State Colleges v. David F. Roth
- You have to find an interest that is protected by the due process clause ➔ life, liberty, and property
- There were no violations of liberty – the ability to find another job wasn’t impaired by anything that the employer did
  - Even if he did have a liberty interest, it wouldn’t mean that he got his job back, but that he would have a right to process to have a hearing
- He didn’t have a prop right ➔ there has to be something that sets out his interest other than just his desire to work
  - The sources of prop rights are state laws, K, stat, implied K

Perry v. Sindermann ➔ proof will not reinstate him, but it would give him the right to a hearing.
- There may have been an implied K
- Sindermann must show proof of the legitimacy of his claim in light of the policies and practices of the institution. Proof will not reinstate him, but it would give him the right to a hearing
- He did have a prop interest based on an implied K through the teachers’ tenure policy and the length of time that he worked there even though he wasn’t a tenured employee.

Cleveland Bd of Education v. Loudermill ➔
- A tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story ➔ notice and opportunity to respond, that’s it, need not be elaborate
- The governmental interest in immediate termination does not outweigh the interests of the employee. Affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.
- The nature of the claims was that their termination violated the due process clause of the 14th amendment—they didn’t have the opportunity to be heard.
- The purpose of the due process clause is to protect citizens from the government taking arbitrary actions without hearing of response from citizens
- Private employees don’t have any procedural rights unless they have an agreement with the employer. If you don’t have a prop or liberty interest, you don’t have a due process right
- **Balancing test**—employee wanting to continue to work and be heard v. government’s right to fire and not worry about it.
- **The necessary part of notice and opportunity to be heard**—a chance to hear why he’s fired and to speak with the employer about it; it doesn’t have to be big or any type of administrative burden.

Is notice and opp to respond always necessary? Public employer doesn’t have to have a pre termination hearing if they have a big enough interest or there is a prompt post termination rule

**CONSTITUTIONAL LIMITS – FIRST AMENDMENT (regarding gov’t as EE)**

**Pickering v. Board of Education**
- absent proof of false statements knowingly or recklessly made by P, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for dismissal from public employment. Since no such showing has been made in this case regarding appellant’s letter, his dismissal for writing it cannot be upheld.
- **Pickering Balance Test**—Cts task is to seek a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

**Connick v. Meyers**
- The ct uses the Pickering Balance test, but before applying the test, they look to see if she was speaking on a matter of public concern. If she wasn’t, then she could be fired at will.
- **Connick and Pickering Test**
  - Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities;
  - Whether the speech impairs the employee’s ability to carry out his own responsibilities;
  - Whether the speech interferes with essential and close working relationships;
  - Whether the manner, time, and place in which the speech occurs interferes with business operations

**Rankin v. McPherson**
- The determination whether a public employer has properly discharged an employee for engaging in speech requires a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
- While the statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office.
- Look at the manner, the time and the place that the statement was made.

**Rutan v. Rep Party**
- promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of pub employees.
- The prior cases that the ct relies upon state that government officials cannot engage in the patronage practice – it’s violative of the first amendment. We don’t want to corrupt the democratic practice.

**CONSTITUTIONAL LIMITS – EMPLOYEE PRIVACY (public ERs)**

**O’Conner v. Ortega**
- **Balancing Test**
  - The governmental interest in justifying work-related intrusions by public employers is the efficient and proper operation of the workplace.
  - Employee has a privacy interest but the employee may avoid exposing personal belongings at work by simply leaving them at home.
- **Holding** – public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. The inception and the scope of the intrusion must be reasonable.
  - The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.
  - A search to secure state prop is valid as long as petitioners had a reasonable belief that there was government prop in Ortega’s office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification.

**PRIVACY RIGHTS OF PRIVATE SECTOR EMPLOYEES**

**Rulon-Miller v. IBM** – co memo guaranteeing right of privacy, dating the competition. Dating practices isn’t anyone’s business.

**K-Mart v. Trotti**
- The element of highly offensive intrusion is a fundamental part of the definition of an invasion of privacy.

**Joy Miller v. Motorola**
- Generally, public disclosure means that the matter is made public, by communicating it to the public at large. That isn’t the case here.
- The exception is if the conduct is egregious in that a special relationship exists bw the P and the public to whom the info has been disclosed. The disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people.
- Public disclosure
  - It was made public
  - It was private
  - It was highly offensive to a reasonable person

**RIGHTS OF SPEECH AND ASSOCIATION IN THE PRIVATE SECTOR**

**Novosel v. Nationwide Ins. Co**
- Can a discharge for disagreement with the employer’s legislative agenda or a refusal to lobby the state legislature on the employer’s behalf sufficiently implicate a recognized facet of pub pol?
- **First Step – find a pub pol issue**
- All the first amendment cases that the ct cited are all public employee, but here the P’s are private employees. But, they are not used as precedent, but to say that there is some kind of pub pol issue at hand.
- Second step: After you find a pub pol issue, follow the Connick and Pickering balancing test

**Timekeeping Systems Inc**
- Board has to show that there is
  - Concerted activity – Here it is concerted activity because it concerned mutual aid or protection
    - Group, not individual effort
    - Has to be related to the employment
    - Employer is aware of the concerted nature, and the action was taken in retaliation of the concerted activity.
  - There is a protected activity
    - Even if the speech is unpleasant or offensive, it doesn’t lose its protected character unless it is so extreme that it is disruptive of the workplace.

**PROTECTIONS FOR ACTIVITIES WHILE AWAY FROM THE JOB**

**Brunner v. Al Attar**
- the narrow exception to the judicially created employment at will doctrine is the discharge of an employee for the sole reason that the employee refused to perform an illegal act or the employer’s desire to avoid contributing to or paying benefits under the employee’s pension fund.
- Brunner has failed to allege sufficient facts to place her within these 2 exceptions to the employment at will doctrine
- The ct cannot create another exception.

**PRIVACY RIGHTS AS PUBLIC POLICY**

**Luedtke v. Nabors Alaska Drilling, Inc**
- Wrongful termination
  - Ct first must determine that the Luedtkes were at-will employees
  - Now, is there a pub pol that protects the employees privacy rights?
  - Ct says yes – the Alaska privacy clause doesn’t apply to private employees, but they look to the clause to say that privacy is valued.
    - From all the evidence (common law, statutes, constitution), the Alaska Ct finds privacy right.
- Ravin Balancing Test
  - First find a privacy right: in sources like – common law, statutes, constitutions → here they have a privacy
  - Next, Balance this privacy right against the public rights. There is a sphere of activity in every person’s life that is closed to scrutiny by others, and the boundaries of that sphere are determined by balancing a person’s right to privacy against other pub pol, such as the health, safety, rights, and privileges of others
  - MJ can impair a person; this makes a dangerous working environment especially on a rig
- There are limits on the employer’s right to test
  - Test must be conducted at a time reasonably contemporaneous with the employee’s work time
  - An employee must receive notice

**Luck v. Southern Pacific Transportation**
- She didn’t take the test, so there was no invasion of privacy
- **Foley Test:** Pub Pol means affecting the public – here there is no public interest. This was a private interest
- Luck’s argument was that protecting privacy was a fundamental interest. She wasn’t saying that employees refusing to take a drug test, which had no effect on the public at large, was the fundamental interest, but the Ct was being a bunch of dicks

Jennings v. Minco Technology Labs, Inc → can’t use the common law privacy right in the offense
- Either party may impose modifications to the employment terms as a condition of continued employment
- Any modification requires the assent of both parties → when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues with knowledge of the changes, he has accepted. P’s suit is basically to compel specific performance of her at will K according to its original unmodified terms → this is a contradiction of terms.
- Here, employee had a choice, and P can’t use the common law privacy right in the offense to bring an injunction against the employer.
- You can’t sue when you consent, and if you refuse to take a test, well you don’t have a claim there either because no test, no invasion of privacy.

Summary
- The Latke ct looked to stats and constitution and found pub pol.
- The luck ct would find that it’s all a private interest → No third party effects
- The dissent in Luck claims that the policy at issue is the preservation of personal privacy. Dissent also says that the Foley test can’t be used because this is an inalienable right given in the constitution, and it doesn’t make sense to use the Foley test.

DEFAMATION
To create liability for defamation there must be
1) a false and defamatory statement concerning another
2) an unprivileged publication to a third party
3) fault amounting at least to negligence on the part of the publisher and
4) either, actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. (if the statement is one that will clearly put someone in disrepute, you probably don’t’ have to show special damages it would just be slander per se)

Elbeshbeshy v. Franklin Institute
- Intercorporate communication is considered a publication in this state as opposed to other states like OK in Zinda

Zinda v. Louisiana Pacific Corp – Conditional Privilege of Communication
- A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. If the statements are capable of the nondefamatory as well as a defamatory meaning, then a jury question is presented as to how the statement was understood by its recipients.
- A conditional privilege exists when statements are made on a subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest → The common interest privilege is based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common. Thus, defamatory statements are privileged which are made in furtherance of common prop, business, or professional interest → if it is germane to the employer-employee relationship.
- As for it getting outside the workplace → an employer is entitled to use a method of publication that involves an incidental communication to persons not within the scope of the privilege.
- 5 ways the privilege can be lost
- Once the privilege has been proved, the burden shifts to the P to prove that the privilege was abused.

**Messina v. Krobin Transportation Systems (Fed cts interpret OK)**
- Statements made by one corp employee during the performance of his duties within the hearing of only other corporate employees does not constitute publication
- None of the employees thought less of P after hearing the statements, therefore no slander

**Starr v. Pearle Vision**
- Inter-company communications do not constitute actionable publication
- OK does not recognize a cause of action for compelled self-publication
- There were 2 third party effects, one was to a former employee who was employed at the time of the act (non-tortious). One was just another party (this was defamation)

**Churchey v. Adolph Co**
- **SELF-PUBLICATION** – the element of publication can be est by self-publication if the P proves that it was foreseeable to the def that the P would be under a strong compulsion to publish the defamatory statement.
- A qualified privilege protects an employer’s statements to an employee of the reasons for that employee's termination; such a privilege may be overcome by the P showing of malice on the part of the employer, a showing that the employer knew that the statement was false or acted in reckless disregard as to its veracity.

**Randi W. Muroc Joint Unified School District**
- A school was charged with affirmative misrepresentation when it didn’t tell the new employer what the old employee did wrong, and the employee did it again at the new school

**OUTLINE II**

**Prohibitions Against Discrimination**

**Race and Sex**

**Title VII**
- Departure from at-will employment
- Prohibits discrimination bc of race, color, religion, sex, and national origin.
- Applies to hirings, firings, and promotions
- BFOQ (bona fide occupational qualification) – defense
- 3 basic models exist for proving status discrimination
  - **Disparate treatment** - need intent, focuses on the individual – whether or not the ER intentionally discriminated based on certain categories.
  - **Pattern and practice** – need intent, focuses on a general class
  - **Disparate impact** – focuses on effects – intent is unnecessary; focuses on groups. Lesser standard than Pattern and practice bc you don’t need intent – don’t have to show ER’s state of mind. Looking at practices which screen people out.
- Proving that the Def has adopted a policy which makes the grant of a benefit dependent on a person’s specific group or class (or something like this)

**McDonell Douglas v. Green – DISPARATE TREATMENT**
- Order and allocation of proof in a private, non-class action challenging employment discrimination
  - P has initial burden of proving prima facie case → is this just for racial minorities?
    - He belongs a racial minority
    - He applied and was qualified for a job for which the ER was seeking applicants
    - Despite qualifications he was rejected
    - After rejection, the position remained open and the ER continued to seek applicants from persons of P’s qualifications
  - Est of prima facie case creates a presumption that the ER unlawfully discriminated against the EE
  - Er now has burden to articulate some legitimate, nondiscriminatory reason for the EE’s rejection.
  - P has opportunity to show that proffered excuse is pretext or show that the ER had some direct evidence of discrimination.
    - Evidence to show pretext
      - ER’s treatment of P during his prior term
      - ER’s reaction to P’s civil rights activities
      - ER’s general policy and practice with respect to minority employment

**St. Mary’s Honor Center v. Hicks**
- The finding by the trier of fact that the excuse given by the ER is pretext doesn’t necessarily mean that there is discrimination.
- This case is saying that you have to find direct evidence of disparate treatment
- Showing pretext is not the same as showing intentional discrimination. So, showing pretext permits, but does not require that P win the case.

**Price Waterhouse v. Hopkins**
- Def Burden - Don’t need clear and convincing evidence, Def only needs preponderance of the evidence when showing that it would have made the same decision even if it had not taken the P’s gender into account.
- Brennan maj – the P has the burden of demonstrating a motivating factor on the part of the ER. ER burden is to show that he would have made the same decision regardless of sex, race, whatever by preponderance of the evidence.
- O’Connor (concur) – P has to show direct substantial role (higher threshold), and ER still has to show by preponderance of the evidence that he would have made the same decision regardless.
- Civil Rights Bill of 1991 – basically follows Brennan, but Brennan says that there is no liability, but the CR Act says that there is liability, but it doesn’t grant individual relief, but grants injunctive relief.

**Sum it up…**
**2 models of discrimination**

1) **disparate treatment** – whether or not the ER intentionally discriminated based on certain categories
a. How do you show intent – EE has the burden of showing a prima facie case (this isn’t set, it changes for different situations, but it just needs to show some inference that there is discrimination)
   i. This is a burden shifting scheme 

2) Disparate Impact – looking at practices which screen people out. If a P can show that a neutral business practice has a disparate impact, then the ER has to show that there is a reason for the practice, if he can’t do this, then it will be shot down

SEXUAL HARASSMENT 

Title VII – is about securing opportunities

Ellison v. Brady – reasonable woman
   - sets out the elements of hostile work environment
   - they used the reasonable woman standard
   - 2 forms of sex harassment
     o quid pro quo
     o hostile environment
       • exists when an EE can show
         • that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature 
         • that this conduct was unwelcome, and
         • that the conduct was sufficiently sever or pervasive to alter the conditions of the victim’s employment and create an abusive working environment
   - it is the harasser’s conduct which must be pervasive or severe, not the alteration in the conditions of employment. In evaluating the severity and perversiveness of sexual harassment, we should focus on the perspective of the victim (as opposed to reasonable person)
   - This case says focus on the perspective of the woman,
   - Hostile work environment has both elements of DT and DI
   - This ct says that EEs need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation.
   - Policy
     o A sex blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women
     o This standard classifies conduct as unlawful even when harassers do not realize that their conduct creates a hostile working environment.

Harris v. Forklift Systems – no need for psychological injury to prove hostile work environment
   - The P has to show that she was actually affected and that a reasonable person would be affected (objective and subjective standard)
   - Have to look at all the circumstances.
   - So long as the environment would reasonably be perceived, and is perceived as hostile or abusive, there is no need for it also to be psychologically injurious.

Oncale v. Sundowner Offshore Services – same sex discrimination
   - discrimination consisting of same sex sexual harassment actionable under Title VII
The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The problem is that there are no chicks to compare to.

Equal opportunity harassment isn’t what Title VII is all about. What I’m saying is that if you throw a woman into the mix, and she gets harassed, then the man really has no action because there is no discrimination based on sex. **Do you have any other claims?**

Does conduct have to be sexual in nature to be sexual harassment? What if you just kept calling some chick a dumb bitch?

2 major cases we should know about:

1. **Ellerth** – there was a threat of loss of monetary benefits, but it was never carried out so it was sort of in between QPQ and HWE.
2. **Faragher** – vicarious liability to the ER

Prior to these Sup Ct cases the courts were saying if there was QPQ, then there was vicarious liability. If the supervisor was to blame, then the employer was liable. If there was HWE, then it’s a negligence suit if the employer knew or should have known.

- What the Sup Ct did was, when talking about supervisors
  - First look to see if there was a tangible economic loss or no tangible economic loss. If there was a tangible loss, then it was QPQ, if not the HWE (meaning she has to meet the severe or pervasive standard)
    - For both situations, the ct says vicarious liability would be the rule, but in the case of no tangible loss, the employer would have an affirmative def if the employer could show that it did what it could to prevent sexual harassment by showing that it had a policy and that the employer didn’t take advantage of that policy. If economic loss, then vicarious liability.

**AGE DISCRIMINATION**

- **The life cycle model is what makes the older workers vulnerable.**
- under Title VII, Ps who are successful can get compensatory and punitive damages. Under ADEA, P can only get compensatory
- The difference under ADEA, you can only have opt-in classes, where under Title VII, you can only have opt-out classes.
- **Most courts in ADEA cases use the McDonnell Douglas burden shifting scheme**

O’Connor v. Consolidated Coin Caterers Corp – a person in the protected class replaced by someone in the protected class

- **P has to show prima facie case**
  - He was in the age group protected by ADEA – greater by 40
  - He was discharged or demoted
  - At the time of his discharge or demotion, he was performing his job at a level that met his ER’s legitimate expectations; and
  - Following his discharge or demotion, he was replaced by someone of comparable qualifications outside of the protected class.

- this language does not ban discrimination against EEs bc they are aged 40 or older, but limits the protected class to those who are 40 or older → the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out bc of his age.
- **ADEA looks at discrimination by age and not by class membership** → just have to show that you were replaced by someone substantially younger.
- Sup Ct assumes that the burden shifting scheme set out in McDonnell Douglas is going to apply here even though this is an ADEA case and not a Title VII case.

Holley v. Sanyo – here there is no replacement (combined Ps position with someone else’s)
- reduction of force problem
- This presents a problem for the McDonnell framework bc there is no replacement. Since this showing is no longer available, then you need more evidence like circumstantial or statistical (showing preference for younger EEs) that raises the inference of discrimination or else everyone would be able to meet the criteria.
- HYPO: Let’s say that a person is fired, and the position is eliminated. A couple of months later, the position is opened again, and the ER hires a younger worker
  - There is an argument that the duty is over to the older EE
  - Maybe the way to mediate it is to say that the EE proved the prima facie case, and just put the burden on the ER to prove that the termination wasn’t based on age.
  - So now, if the ER says that it was for economic reasons, well maybe we look to see how long the ER waited. If it is a short time, the P can say that it’s pretext.

Hazen Paper v. Biggins – fired bc his pension was about to vest
- Age and pension aren’t the same, and you can’t treat them as so. The purposes of the ADEA is to protect people from stereotypes. What the ER did was wrong, but that wrongfulness doesn’t affect the central goal of the ADEA.
- There is no disparate treatment under the ADEA when the factor motivating the ER is some feature other than the EE’s age.
- The ER may violate ERISA, but it doesn’t violate ADEA.

DISABILITY DISCRIMINAITON
- One of the key issues in an ADA case is, is this person a person with a disability?
ADA – under ADA ER cannot single out a particular disability and provide less favorable conditions.
Sutton and Hinton v. UAL
- the decision turns on whether the disability should be determined with reference to corrective measures
- 3 prongs to disability
  o physical or mental impairment that substantially limits a major life activity – seeing ➔ but doesn’t limit MLA if corrected
  o having a record of such impairment
  o being regarded as having such an impairment
    ▪ P has to show that they can’t perform a broad class of jobs, but they can.
    ▪ Ct says that you’re substantially limited in the MLA of working if one is precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skills, but perhaps not his or her unique talents are available, one is not precluded from a substantial class of jobs.
    ▪ The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
- Bottom line, ct says you have to look at the P with corrective measures bc the plain language of the stat doesn’t speak of mitigating steps either way.
- Prima facie ➔
  o these women have to show that they have a disability,
then they have to show that they could perform the essential fxs with or without reasonable accommodations.

- Then, there has to be discrimination

- But, the ER can have a def of showing that the decision was job related, or there was a qualification standard to protect the health and safety of others.

**Vande Zande v State of Wis Dep of Admin – reasonable accommodation**

- What is reasonable accommodation?
- The cost can’t be unreasonably disproportionate to the accommodation
- There is a duty of reasonable accommodation placed on the ER
- Cost is a factor
- Reasonable accommodation - When ER does what is necessary to enable the disabled worker to work in reasonable comfort
- ER has an affirmative def by proving undue hardship → nature and cost of the accommodation and financial resources of the facility

**MANDATORY ARBITRATION**

**Gilmer v. Interstate/Johnson**

- Can and ADEA claim be subject to compulsory arbitration? YES
- Statutory claims are arbitrable. P isn’t giving up his right, he is just going to bring his claim in front of an arbitrator
- This case sent a clear signal to ERs that they had a favorable disposition to arbitration.

**Circuit City v. Adams**

- Is there an exception to the FAA for employment Ks. The only exception is for transformational workers.
- Benefits of arbitration
  - Avoid costs
  - Party doesn’t give up rights just different forums
  - Quicker judgments – more economical
  - The arbitrator has a knowledge of the specific “shop” and can determine how his award will affect the shop
  - Lower cost may increase access to EEs with grievances
- Dissent – Employment should be exempt from FAA
  - ERs are likely to know how the system works. Arbitrators may want to be favorable to ERs who are going to bring them business
  - Unequal bargaining power
  - No precedential value
  - Discovery rules are non-existent
- The problem isn’t with arbitration it’s with mandatory arbitration.

**Bales article**

- financial and human costs led them to find an alternative
- EE can still contact EEOC if they have problems
- Policy rationale
  - Repeat players – unequal bargaining power
  - Arbitration is more efficient
  - Ct has rules of discovery – no compulsory disclosure; strict conformity to the rules of evidence isn’t followed in arbitration
Arbitration is private so it isn’t adding to the written body of law

**UNEMPLOYMENT INSURANCE**

- to provide temp partial wage replacement to experienced workers who lost their jobs through no fault of their own
- We don’t want a system to encourage people to lose their jobs
- Burden is on the ER to show that it was some bad shit that the EE did for him not to get the benefits

**Knox v. Unemployment Compensation Board of Review**
- claimant cannot attach such conditions to his acceptance of work as to render himself unavailable for suitable work → **must be ready and willing to work to get UE benefits**

**Continental Research Corp v. Labor and Industrial Relations Commissions**
- **If an EE gets fired for direct disobedience he isn’t eligible for UE.** However, this case he just went beyond what he was requested to do and didn’t really disobey.

**Wimberly v. Labor – MO – pregnancy case**
- Pregnancy case – ER granted leave without guarantee for reinstatement. When she wanted to come back there was no work so she filed for unemployment
- A MO stat disqualifies claimants who left voluntarily without good cause connected to the work or the ER (pregnancy has nothing to do with work or the ER)
- FUTA says that no person shall be denied compensation solely on the basis of pregnancy or termination of pregnancy
- The ct affirms the MO stat in MO → all that matters is that she left bc of a problem with her work or her ER

**MacGregor v. Unemployment – CA – this ct says that “good cause” can be something personal**
- EE leaves bc she wants to keep her family together (she’s not married)
- This is good cause for a voluntary departure from work
- Ct here says that good cause can be personal, but it must be compelling in nature
  - **Good cause – would motivate an able bodied, reasonable person to give up work and wages**
- Competing policy interests – encourage people to get married, but they want to preserve the parent child relationship

**WILLFUL MISCONDUCT**

**McCourtney**
- Any ind who is discharged for misconduct (conduct evincing a willful or wonton disregard of the ER’s interest or conduct demonstrating a lack of concern by the EE for her job) is disqualified from UE benefits
- P’s absences were excused and were due to circumstances beyond her control; therefore, no misconduct
- The intent of the UE compensation stat is to assist those who are unemployed through no fault of their own
- **If she was in Cal (MacGregor), she would be eligible. In MO, before the new stat, she wouldn’t be able to get UE benefits (Wimberly)**

**Jones v Review Board**
- IF there is a material change in the material terms of the K, and the EE quits, then she is quitting for good cause and would be eligible for UE benefits. But, since she agreed, the terms of the K changed bilaterally.
- If the EE chooses to remain in the employment under the changed conditions, the old conditions are no longer in effect, and her leaving work for her family isn’t for good cause.

**FLSA**
- The purpose is to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary to health and well being
- Designed to protect vulnerable workers from ER abuses such as excessive work hours or low pay
- Est minimum wage
  - **has to do with minimum standards of living; decency**
    - Default rule – you can K for a higher wage. Immutable rule – can’t K for a lower wage
- Requires premium pay for overtime work
- Restricts the ability to employ children

**IMPLEMENTING SUBSTANTIVE OBLIGATIONS**

**Bright v. Houston Northwest Medical Center Survivor**
- Ct says that the on-call time is not working time.
- The test is if he could have done whatever he wanted to with his time; free to use the time for his own purposes

**Marshall v. Sam Dell’s Dodge Corp**
- Minimum wage problem – the base pay without bonuses doesn’t amount to the minimum wage
- Cts look at the pay/hour on a weekly basis
- The reasonable cost of facilities customarily furnished to EEs may be considered part of their wages. However facilities which are primarily for the benefit or convenience of the ER do not qualify as wages.
  - The demo cars were not part of the wages bc it was more for the ER’s benefit than the EE’s
- Car salesmen are exempted form the overtime rules

**Dunlop v. Gray-Goto**
- EE did work overtime and they didn’t get paid. But the ER’s def is that all the fringe benefits given amounted to or exceeded the overtime pay
  - **The right to overtime can’t be waived**
  - **Policy reasons for overtime**
    - Compensating workers for extra work
    - Spread work around
- There are 7 categories of ER payments that are not to be taken into consideration in determining what an EE’s regular rate of pay is
  - 4 of these categories are not to be credited towards overtime pay – fringe benefits fall into these 4 categories.

**COVERAGE**
- **FLSA** gives broad coverage and presents 3 general types of coverage issues
  - Only applies when there is an ER-EE relationship
  - Only applies to certain EEs. An EE is covered only if she is personally engaged in commerce (ind coverage) or if she works for an enterprise that is engage in commerce (enterprise coverage). Ind EEs are covered if they are engaged in interstate or foreign commerce or in the production of goods for commerce
  - Has many exemptions from coverage
Dalheim v. KDFW – exemptions for executive, administrative, or professional positions
- The exemption requires that an EE perform certain duties and be paid a salary → primary duty cannot be ascertained by a clock standard – it is the chief or principle duty.
- The issue is primary duty – what is the main duty that the EE provides to the ER?
- If you’re an executive, you don’t get overtime

THE EMPLOYMENT RELATIONSHIP
Lauritzen – independent contractors
- FLSA doesn’t cover independent contrators
- Migrant workers are EE – EEs are those who as a matter of economic reality are dependent upon the business to which they render service
  o We have to look at Economic reality 6 factors – this is the test under FLSA
    ▪ Nature and degree of ER’s control – if ER had control, then they are EEs
    ▪ EEs opportunity for profit or loss – if ER had all risk of loss, then EEs
    ▪ EEs investment in materials or tools – ER makes all investments, then EE
    ▪ Special skill involved – if no, then EE
    ▪ Degree of permanency and duration – the longer, then the more EE
    ▪ Services integral to EE’s business
  ▪ DO THE FAMILIES DEPEND ON THE ER
    - Whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently independent to lie outside its ambit
- Easterbrook
  o There should be a bright line test → all migrant workers should be EEs
  ▪ He looked at the general purpose of the stat – protect people from low wages and long hours.

Brennan v. Arnheim - Enterprise
- Enterprise means the related activities performed by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units.
- There is a dollar volume limitation to exclude small business
- What constitutes an enterprise?
  o Related activities – same or similar
  o Unified operation
  o Common business purpose
- Those engaged in an enterprise are governed by FLSA
- An EE is entitled to the benefits of the minimum wage and max hours provisions of the Act, if he is employed in an enterprise engaged in commerce or in the production of goods for commerce

ENFORCEMENT
- FLSA charges can be brought by EEs, Sec of Labor or AG
- Enforcement of FLSA is uneven
  o Takes a long time for Sec of State to bring charges
  o EEs are worried about backlash
  o EEs might not have the money to bring a private action.
Bureerong v. Uvawas

- **TEST of Employment**
  - Tested by economic realities rather than technical concepts
  - A ct must consider the **totality of the circumstances** of the relationship.
  - A ct must not focus on selected and isolated control factors and lose sight of the circumstances of the **whole activity**.

- **Are the manufacturers ERs**
  - Look at the purpose of the stat
  - Economic reality (6)
  - Dependency of EE on ER – manufacturers were paying the bills and they knew that they were paying too little
  - Def did in a way maintain control over the work of the EEs
  - From a policy point of view the manufacturers are in the best position to make sure that the EEs are getting paid

**Hot goods – chain of distribution**

- unlawful to produce/sell goods produced in violation of FLSA provisions.

**ERISA**

ERISA isn’t required, but if the ER chooses to offer benefits plans, they have to follow ERISA

**2 types of Employee benefits**

1) **deferred comp** – pensions
   a. 2 varieties of pensions plans
   i. **Defined benefits** – ERs promise EEs a defined benefit (amt of money) at retirement. The amt of the benefit is determined by a formula specified by the plan which, in most plans, uses length of service and final salary as variables.
   ii. **Defined contribution** – Ers promise only to pay a defined amt over time into an account est for each EE. The ER makes no promise about the amt of the EE’s benefit at retirement, which will depend on the investment experience. ER isn’t promising any amt of money at the end of the road.

2) **in-kind benefits** – welfare plans
   - things that EEs would otherwise have to purchase themselves – child care, ins. Etc
   We want to encourage ERs to provide benefits instead of cash bc ERs can negotiate a better deal than EEs can by using economies of scale – like health ins. Some types of benefits can also increase the bond bw the ER and EE

Concerns about non-cash compensation

- Mismanagement of funds if it’s all in cash – ERs might use the cash held for EEs for their own purposes
- Harder for the EEs to make comparisons bw the benefits offered by different ERs
- Under funding
- ER opportunism

Don’t want ERISA to mandate welfare plans bc they want to encourage ERs to provide them.

**GOODS NOTES**
- ERISA does not cover plans maintained solely to comply with WC, UE, or disability insurance
- 2 types
  o pension plans
  o welfare plans
    ▪ any plan, fund or program established by an ER, an EE org, or both for the purpose of providing certain enumerated benefits, through the purchase of ins or otherwise, to participants and their beneficiaries.

Clark v. Lauren Yong Tire – forfeiture clause (preemption of state law)
- ERISA preempts state law with respect to non-comp forfeiture clauses
- The minimum that ERISA required was 10 years then pension plans have to vest
- So, this ER said that it will vest earlier unless you work for a competitor. This cat worked for 9.7 and should have been vested, but he worked for a competitor, so the ER took the benefit away. The guy was pissed about this, but the Ct says it’s fine as long as it meets with ERISA
- ERISA preempts any state law. Sec 514a preempts any and all State laws insofar as they may now or hereafter relate to any EE benefit plan covered by the Act. Exceptions to this provision include state laws that regulate ins, banking, or securities.

PROTECTING EEs FROM FORFEITURE – THE BASICS AND VARIATION
Hummell v. SE Rykoff and Co
- ERISA requires private pension plans to provide that an EE’s right to his or her normal retirement benefits is nonforfeitable upon the attainment of normal retirement age
- 2 plans
  o one for EEs who went to work for competitor – pension vests after 7 years
  o one for those who didn’t go to work for competitor – vested after 5 years
- ERISA places some restrictions on when it will allow ER to forfeit portion of EE’s benefits
  o When an EE reaches retirement age, whatever they earn up to that point is vested
  o If EEs contribute their own money, they get the tax benefits. The benefits that the EE contributed is non-forfeitable
  o When the ER makes the contribution, then it vests
    ▪ A) After 5 years, the ER contribution is 100% vested or
    ▪ B) Permissible for the ER to have graduated vesting programs where the vesting begins after the 3rd year and is fully vested after 7 years
- AS long as ER permits vesting that satisfies one of the 2 schedules, it can forfeit anything above it
- Can a plan be made of a combination of the 2 schedules?
  o The ER can mix the plans as long as you are meeting one of the schedules at every point in time → At every point in time it has to meet schedule A or at every point, it has to meet schedule B
- POLICY – ERISA has minimum standards for vesting bc
  o We want to protect the EEs – don’t want EEs to lose vested benefits bc of unduly restrictive forfeiture provisions
  o But, we don’t want the benefits to vest immediately bc we want to create a type of loyalty of the EE to the ER so that training costs don’t go to waste.

SEC 510
Contains 2 separate protections
  o prohibits any adverse employment action in retaliation for the exercise of a right to seek benefits (EE files a claim for benefits)
  o prohibits ERs from discriminating against EEs in order to prevent them from attaining rights under ERISA plans.
- An ER that fires an EE in order to block that EE’s vesting in the ER’s pension plan violates sec 510

  - Sec 510 prohibits discrimination intended to interfere with the attainment of any rights under an ERISA plan
    - Also protects participation in ERISA welfare plans, even though welfare plans rarely provide for vested rights
    - Participants are EEs or former EEs who are or may become eligible for benefits under an ERISA plan.
    - Problem with 510 – A major problem is proof of the necessary ER intent. In one sense, every discharge interferes with the EE’s ability to accrue and receive benefits offered by the ER bc fired EEs normally lose all nonvested benefits. 510 is not however a general wrongful discharge stat.
      - Ps must prove more than the fact that their discharge prevented them from receiving future benefits; they must prove that the ER acted with specific intent to interfere with their ERISA rights.
      - The loss of benefits must have been a motivating factor for the ER’s actions, not merely a consequence of them

ERISA DEFINITIONS p91

Heath v. Variety Corp
- ERISA prohibits ER from discharging or disciplining participants or beneficiaries for exercising his right to which he is entitled under provisions of EE benefit plan, or for purpose of interfering with attainment of any right to which participant might become entitled under plan, applies not only to vested, but to unvested benefits, and protects persons who lay claim to or seek to qualify for unvested benefits.
- 510 doesn’t distinguish bw vested and unvested benefits. It forbids adverse action for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. Plan includes both pension and welfare plans.
- P was at-will so ER could fire him, but you can’t discriminate against them for the purpose of depriving them of a benefit.

Nemeth v. Clark Equipment
- In co’s choice to shut down one of 2 plants, it chose the one that one had more pension expenses
- Sec 510 prohibits ER conduct taken against an EE who participates in a pension benefit plan for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.
- In order to prevail on a sec510 claim, Ps must prove that the def made the decision to discharge them from employment with the specific intent to violate ERISA

Shifting Burdens
1) Ps don’t have to prove that this was the sole purpose for the termination → just need proof that the desire to defeat pension eligibility is a determinative factor in the challenged conduct.
   a. More than that the termination of their employment meant a monetary savings to def → a causal link bw pension benefits and an adverse employment action. Ps must prove by a preponderance of the evidence that the def’s desire to avoid pension liability was a determining factor in motivating the challenged conduct.
2) Once P est that the desire to avoid pension liability was a determining factor, the def must prove that it would have reached the same conclusion or engaged in the same conduct in any event in the absence of the impermissible consideration.
a. ERISA doesn’t distinguish bw the termination of one EE and the termination of 100. Either action is illegal if taken with purpose of avoiding pension liability. ERISA distinguishes bw the intent to interfere with vested pension rights and the intent to termination for other, nondiscriminatory reasons.

3) P must then demonstrate that the proffered justification is a mere pretext, or that the discriminatory reason more likely motivated the def’s action
- Whenever an EE is covered by an ER’s pension plan and EE is terminated, their pension rights will be affected. 510 says that it has to be the determinative factor, it can’t merely be the consequence. The defendant then has to prove that the decision would have been made either way
- Don’t really concentrate on the shifting burdens, concentrate on “determining factor”

ERISA covers 2 types of benefits
- Pension – subject to minimum vesting requirements
- Welfare – not required to vest in any way at all

510 refers to any right
- benefit that isn’t able to vest at all (welfare) – Heath says that 510 does apply here
- a right that is about to vest \( \rightarrow \) covered
- rights that have already vested \( \rightarrow \) in Nemeth, what they’re complaining about is the right to accrue – it seems that the policy reason is that older workers should be protected the most, so this is covered.

HEALTH BENEFITS
- one consequence of getting health ins through ER is that when they lose their job, they lose their health benefits
- COBRA is similarly, like UI, a temp response to health coverage after job loss. Required that if ER would take advantage of tax advantages of offering health ins, they have to provide COBRA rights
- Those who are provided coverage thru employment must be allowed to continue coverage for 18 months and ER pays premium
  - Qualified beneficiary – anyone who is covered by the plan
  - Qualifying event – anything that would cause the termination of coverage (reduction in hours)
    - For a spouse a terminating event may be divorce, death, of EE or whatever. For dependants, it is loss of dependency
- After a qualifying even occurs, the qualified beneficiary has to be told and has the right to continue coverage that he may elect after 60 days, but the beneficiary has to pay the premium themselves. The plan must be the same.
  - Terminating event – usually the expiration of time, or the failure to pay benefits, the ER decides not to pay the plan anymore.

PORTABILITY AND ACCONTABILITY ACT
Geissal v. Moore Medical Corp
- ERISA, as amended by COBRA authorizes a qualified beneficiary of an ER’s group health plan to obtain continued coverage under the plan when he might otherwise lose that benefit for certain reasons, such as the termination of employment.
- P’s situation was that he was terminated, and hes ER told him tha the was eligible for COBRA, and he elected it
- Prior to his election, he had another health ins plan thru his wife’s ER, when his ER found out, the ER said that he wasn’t eligible for COBRA
- The ER says that the stat reads that a terminating event for COBRA is if the EE is covered by another plan.
- The ct says that if the EE has coverage from another plan and then elects COBRA, this isn’t a terminating event. The terminating event

**BRIGHT LINE RULE:** If the new coverage is obtained after the EE elects for COBRA, the COBRA is terminated, if the coverage is obtained before the COBRA election, the COBRA is good.

**HEALTH COVERAGE FOR INDIVIDUALS WITH DISABILITIES**

**McGann v. H&H Music**

- the claim is that the change in the terms of the health terms violated 510

**Are there any other claims that can be made?**

- ER changed the plan in retaliation for the P filing for the plan benefits.
  - Ct says that this wasn’t an individual retaliation, the change applies to anyone who has AIDS
- If the ER fired P after he found out the P had AIDS, P may have a 510 claim bc it looks like he was fired bc he filed for claims and bc he will probably file in the future
- If the ER amends the plan in a way that excludes him individually, then this looks like retaliation or a withholding of rights, so P probably has a 510 claim
- To the extent that ERISA is about protecting EEs reasonable reliance on plans made by ERs, ct not consistent with ERISA bc here benefits promised until they bc too costly. EE then had not alternatives (AIDS diagnosis). Seems like ER opportunism we want to prevent. Alternatively, ERISA about encouraging ERs to create welfare plans for EEs one way is by not mandating they provide any particular plan and not locking them in. Even though individual result harsh, ruling benefits EEs generally.
- On one hand ERISA is about regulating plans but on other hand ERISA about not mandating plans for ERs to follow

**An ER has an absolute right to alter the terms of medical coverage available to plan beneficiaries – can’t discriminate against an individual, but can discriminate against a group**

- ER can’t discriminate the individual, but can effectively discriminate an individual by changing a plan.
- P does however have a claim under the ADA – bc ER is giving less favorable treatment to EE

**Sprague v. Gen Motors**

- there are 2 groups of retirees, the regular ones and the early retirees who were induced to leave by a benefits package
- Ps claim that the GM change in the plan is unlawful. They are relying on statements in the summaries that they will get the benefits for life.
- GM says that they reserved the right to amend the plan at anytime.
- ERISA doesn’t require the ER to offer any welfare plans, and if the ER does offer a plan, there is no requirement that it vest, but the ER can choose for it to vest
- Given that health benefits aren’t required to vest, but hey may by agreement
- “Your basic health care coverage will be provided at GM’s expense for your lifetime”
- Ct says that plan summary is binding if it is in conflict with the actual plan.
- Ct says that ERISA doesn’t say that the ER has to disclose that they have the right to change – duty is on the EE to go to the plan and see that GM has the right to amend
514a — except as provided in subsection b of this section, the provision of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any EE benefit plan described in section 4a of this title and not exempt under sec 4b.

- Although the scope of section 514a is very broad, ERISA’s **saving clause**, sec 514b2A, returns significant power to the states by exempting from the scope of the preemption provision any state law that regulates insurance and permitting states to continue their traditional role as primary regulators of the insurance industry.

- The **deemer clause**, section 514b2B, qualifies the saving clause by providing that no EE benefit plan shall be deemed to be an insurance co for purposes of any law of any state purporting to regulate ins companies or ins Ks.

- The combination of these clauses means that any entity engaged in the business of ins, except an ERISA plan, is subject to state ins regulation

**Metropolitan Life Ins Co. v. Mass**

- There is a state stat that says that the ER has to pay for mental health.

- The ER says that the state stat is pre-empted by ERISA

**Mass v. Morash**

- the policy to EEs for unused vacation time doesn’t constitute an EE welfare benefit plan within the meaning of 3(1) of ERISA, and a criminal action to enforce that policy is therefore not foreclosed by 514(a)

- The vacation time is a normal part of compensation (as opposed to other welfare benefits like health insurance which need some contingent occurrence for it to come into effect – injury or sickness)

**Ingersoll-Rand Co v. McClendon**

- Sup Ct held that ERISA preempted an EE’s wrongful discharge claim under Tex common law alleging he was fired to prevent him from becoming vested in his ER’s ERISA pension plan.

- The existence of the pension plan was a critical factor in establishing liability under Texas’ wrongful discharge law. AS a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself.

**Questions on this stuff**

1) An EE is discharged after 15 years of employment in retaliation for serving on jury duty against her ER’s wishes. The EE sues for wrongful discharge and seeks lost wages and the value of her lost fringe benefits
   a. Not covered under ERISA bc her cause of action did not relate to the business of EE benefits.

2) An EE is discharged after 15 years of employment in retaliation for serving on jury duty against her ER’s wishes. The EE sues for wrongful discharge and seeks lost wages and an order requiring that the ER’s pension plan pay her increased pension benefits on reaching retirement age (i.e. that her pension benefits be increased to the level they would have been if she had been allowed to work to retirement age)
   a. EE claims for pension and welfare benefits as remedies in wrongful discharge cases are pre-empted, even though the substantive claim does not relate to the pension and or welfare plans.

3) A state law requires that any pension benefits earned by an EE must vest immediately.
   a. Preempted – ERISA covers vesting periods
4) A state law requires that all ERs who establish benefits plans must file a copy of the Summary Plan Description with the state’s Labor Department, in addition to the federal Dept. of Labor
   a. Preempts – summary plans and administration of the plans are covered
5) A state law requires that all ERs give their EEs Memorial Day off, or else pay them a premium wage of twice their normal rate of pay for work on that day
   a. Not preempted – regular compensation
6) A state law requires that ins cos that offer group health ins for dependent children must provide coverage of those dependents from birth.
   a. No – savings clause
7) A state law requires that any ER that provides medical benefits for its EEs must also provide identical coverage for its EEs’ dependents from birth.
   a. Preempts – deemer clause

**SUMMARY ERISA**
- intended to protect EEs
- REquires things like recording and disclosure of terms, fiduciary requirements, enforcement provisions – applies to pension and welfare plans
- Pension – subjects to minimum vesting requirements
- 514 – Broad pre-emption
- The net effect of ERISA is that the EEs who might have broader remedies are limited to narrow ERISA remedies Some EEs who may have had remedies under state law don’t have remedies under ERISA

**COMPENSATION BARGAIN**

**Goals**
- want to prevent workplace injuries
- want to compensate injured workers

- Want to give ERs incentives to be cool

**Worker’s Comp is strict liability – more efficient**

**Ezzy v. Workers’ Comp Board**
- If the injury arose out of or in the course of here employment, she can get WC
- If the injury occurs out of athletic participation outside of the employment duties, can’t get WC
- There is an exception to the exception – if participating in the sport is a reasonable expectancy of the employment, then it is compensable
- Know if it’s a reasonable expectation of employment by:
  o The subjective belief of the EE
  o Is that belief objectively reasonable?

**Prows**
- 4 part test to see if it’s a substantial deviation from the course of employment – look at the brief
  o Extent and seriousness of the deviation
  o Completeness of the deviation
  o Extent to which horseplay has become a part of the employment
  o Extent to which nature of employment may be expected to include some such horseplay
- The test is whether or not the injury was one arising out of or in the course of employment
Eckis v. Sea World Corp
- The danger of making everything covered by WC, then the ER will be more willing to put the EE at risk. The EE is also bearing all the risk of loss bc most of the time they can only get WC.
  - This was in the course of the employment
    o ER requested
    o The activity is of service to the ER
    o It was during working hours
    o It occurred on the ER’s premises

Torts Suits and Other Legal Actions Against the ER

Millison v. EI du Pont De Nemours and Co – intentional wrong exception to worker’s comp
- You need substantial certainty for the intentional wrong exception to work – this is why it doesn’t work for the Shamu case.
- The Act can’t just be intentional, but the harm has to be intentional also
- This exception has to be narrow or else it would swallow the rule.

Tatrai
- 2 categories for injury arising out of course of employment
  o Relates to those injuries that are sustained while the EE is actually engaged in the furtherance of the business of the ER
  o Injuries occurring on the premises of the ER
- Bc P’s presence in the ER’s premises was not in furtherance of the affairs of her ER and was not required by reason of her employment; WC is not her exclusive remedy

Cole
- When the EE’s claim is based on conduct normally occurring in the workplace, it is within the exclusive jurisdiction of the WC Appeals Board.
- P claims that there is IIED and he suffered mental and physical injury, this is covered by WC bc there is physical injury. But even if there is only mental injury, you still only get WC bc we don’t want any absurd claims.
- There are exceptions to this rule
  o ER steps out of his role
  o Conduct of the ER has a questionable relationship to the employment

Shoemaker
- P can state a cause of action under the Whistleblower – he shouldn’t be limited just bc he had an injury. He can also state a claim for WDPP this is not a legitimate risk of employment – falls outside the comp bargain. However, the claim for IIED falls within the kinds of conduct that is a normal part of the employment relationship and therefore covered by WC.
- There is a conflict with the whistleblower statute and the WC stat – bc the whistleblower is more specific so it applies.

Reese v. Sears
- Reese got WC, and now he wants to come back, but the ER won’t take him
- Reese then claims discrimination for disability; ER says he can’t do this bc he already got WC
- Ct says that he can get discrimination for disability bc the 2 are separate claims.

<table>
<thead>
<tr>
<th>Nature of injury</th>
<th>EZZy, Prows</th>
<th>Eckis Millison, Tatrai</th>
<th>Cole</th>
<th>Shoemaker, Reese</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accident</td>
<td>Accident (for exposure)</td>
<td>Non-physical tort (IIED)</td>
<td>Employment tort (eg whistle-blower stat, WD/PP, discrimination)</td>
<td></td>
</tr>
<tr>
<td>Resulting harm</td>
<td>Physical injury</td>
<td>Physical injury or illness</td>
<td>Emotional and physical</td>
<td>Financial + emotional+ physical</td>
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<tr>
<td>ER fault</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>EE wants</td>
<td>WC</td>
<td>Tort remedies</td>
<td>Tort remedies</td>
<td>Stat and or tort remedies</td>
</tr>
<tr>
<td>ER wants</td>
<td>No WC</td>
<td>WC</td>
<td>WC</td>
<td>WC</td>
</tr>
</tbody>
</table>

- **Ezzy** – in the course of the employment – reasonable expectation of employment
- **Prows** – horsing around didn’t deviate much from the course of the employment
- **Eckis** – P claims that the injury had nothing to do with the employment bc she was a secretary, and she wasn’t supposed to ride whales. ER says that this was all part of employment
- **Millison** – (asbestos) P claims intentional harm and this isn’t contemplated in the course of employment. ER argues that their intention wasn’t to harm, so the physical harm should fall within the exclusivity of the WC
- **Tatrai** – P will say that he wasn’t acting as an EE. There is a dual capacity argument for the ER – one as a hospital and one as an ER
- **Cole** – P argues that IIED happened after termination, so WC exclusivity shouldn’t apply; they also say that it IIED falls within the intentional harm exclusion. ER says that being fired is part of the course of employment, and that it wasn’t their intent to cause the mental distress.
- **Shoemaker** – P claims that whistleblower should apply over the WC exclusivity. ER says that no it shouldn’t.
- **Reese** – P says he should get the discrimination claim bc it’s about the ER’s reaction to the injury not the injury itself. ER says