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TO LABOR IN THE DANCING WORLD: HUMAN RIGHTS AT WORK

*Erin E. Bahn**

I. INTRODUCTION

Dance is a time sensitive activity. For many dancers their whole life, from a very young age, is focused on dance. Many do not get an education because every moment is dedicated to dance. Your art is shaped by the hours of work you spend loving it. The food you eat shapes your body. You never leave your tools of work. It is your body and you take it everywhere. After many years of dance consuming your life and your love, to have this life ended by an employer without “just cause” for termination is cruel. It leaves the artist in an extraordinarily bad situation. Firing a dancer is truly a life-altering crisis. For some dancers suicide seems like the only viable alternative when dance is no longer possible. It is fundamental to a dancer’s life to be able to work and be onstage to express what is their meaning of life.

Dance is a form of labor not unlike other kinds of labor. However, dancers are uniquely vulnerable under their collective bargaining agreements due to the lack of just cause discharge provisions. This note will examine collective bargaining in dance and how dancers, like other workers, must be provided just cause discharge provisions in their contracts. Without these provisions there is no protection against employers arbitrarily firing a worker. Workers need a mechanism of recourse to which they can receive due process through the arbitration and grievance procedure. The life presented to a dancer on the job through his or her dance contract provisions will be examined as a crystallized example of human labor which is performed through the direction of the employer. The choreography of peoples’ jobs may vary, but the human right to just discharge and due process remains constant. Through dance this article will seek to find an equitable balance between the subjective world of employers’ desires and the objective world of human labor and needs.

The most secure work for a dancer is to be a member of a major dance company. The dancers in major dance companies in the United States are represented by the American Guild of Musical Artists (AGMA).

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AGMA is the largest representative of dancers in the United States. The human rights of workers to have safe working conditions, substantive rights to protection against discharge without "just cause" and the procedural rights to challenge unjust termination, will be examined in the dance world using current AGMA collective bargaining agreements of numerous American dance companies.

However, there is a unique contract mechanism within the AGMA contracts which leaves dancers without a substantive right to not be discharged without "just cause" and the procedural right to challenge any discharge through the grievance and arbitration process. Not only do dancers' rights under this contract offend basic notions of industrial democracy, but such contracts are in complete odds with the International Labor Organization, Termination of Employment Convention, 1982.¹ These rights are also protected under the United Nations Universal Declaration on Human Rights, 1978.² This lack of protection against "arbitrary and capricious" termination also effectively destroys any protection the dancer has facing discrimination against union activities, racial discrimination, discrimination against sexual orientation, and protections against sexual harassment. The right to be protected against such discrimination is found within the collective bargaining agreements; however, the right of the employer to terminate employment at will renders such clauses as meaningless. This note will examine the elements of collective bargaining in dance and provide recommendations for equitable changes or reform.

The slight imposition on an employer to justify firing a dancer provides the dancer a fundamental security. "Most collective agreements do, in fact, require 'cause' or 'just cause' for discharge or discipline."³ After the dancer's devotion and investment of energy into a dance company, that dance company owes the dancer some justification for actions to terminate. The dancer is expected to give his or her life to dance. To give the dancer adequate respect, there must be some mechanisms to stop whimsical firing for whatever reasons the employer feels like at the time. When terminating an employee, the employer needs to be able to articulate and justify the reasons for doing it. If there is a dispute about these reasons there needs to be an objective third party who has the authority to evaluate whether the employer has met his burden under the contract to establish "just cause" for these actions. "A significant percentage of cases that reach arbitration in-

¹ See International Labor Organization, Termination of Employment Convention, 1982 convention 158 (1982).

² See Universal Declaration of Human Rights, Dec. 10, 1948.

³ See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 612 (3d. ed. 1978).

volve discharge or disciplinary penalties assessed by management.”⁴ By this demand, there is no utopian expectation of lifetime employment. There will still be disputes over terminations, but these must not be “arbitrary and capricious” terminations cloaked in non-reengagement contract terms.

II. DANCE CONTRACT PROVISIONS

A. *Typical Clauses (but unique to dance contracts)*

Dance contracts have very particular provisions for the life of a dancer which seem unusual to an outsider. Every craft, trade or industry has unique needs involving its work. People who work with steel pipe are concerned with steel-toed boots and construction workers need hard hats. As with any industry, dancers provide needs in their employment in the collective bargaining agreements. Dancers insist on finely detailed definitions of their needs in the conditions of employment. Provisions are included for activities that are considered potentially dangerous for the artist and are commonly listed as “Extraordinary Risk.” This might include, for instance, as listed in Ballet Metropolitan’s contract:

- A. Suspension from a trapeze, wire or like contrivance more than four (4) feet above the stage floor.
- B. Performing on stilts or like devices which place the Artist’s feet more than four (4) feet above the stage floor.
- C. Handling fire or performing near fire which has a flame larger than that of a standard candle.
- D. Directly operating explosive or pyrotechnic devices that have not been deemed safe by a Fire Marshall or licensed Pyro-technician.⁵

Choreography may demand the use of props or real weapons which require special handling. The San Francisco Ballet, for example, has special regulations placed into contracts to protect its dancers. Here are a few such safety provisions from the San Francisco Ballet’s Collective Bargaining Agreement: *AGMA Regulations for Safety with Swords or Knives* states that:

During a performance on which a coordinated movement of weapons occurs, there shall be a fight review of any such scenes prior to the performance of said scenes during the ballet. This fight review shall be scheduled and supervised

⁴ See *id.* at 610.

⁵ See Basic Agreement between American Guild of Musical Artists and Ballet Metropolitan, Inc.- July 1, 1999-June 30, 2002, para. 16(j), at 9.

by the expert or his designee at fifteen (15) minutes to curtain.⁶

Firearm Safety states that:

The EMPLOYER shall designate an Armorer who shall be thoroughly familiar with the proper use and maintenance of the firearms required in the production. The Armorer will instruct all ARTISTS in the proper and safe use of the firearms. This shall be a prerequisite prior to the issuance of any firearm to any ARTIST for any rehearsal or performance. No one may overrule the Armorer's judgement in this regard.⁷

Fire Safety states that:

No ARTIST who feels unsafe carrying a live flame shall be required to do so. This right shall not be invoked unreasonably.⁸

The ground that a dancer dances upon is a source of great drama as well. The floor can cause terrible injuries to joints and tendons if it does not give when the dancer lands on it. Special clauses are added to insure that dancers are not forced to dance on unhealthy floors. The San Francisco Ballet Collective Bargaining *Health Safety* provision for example states that:

No ARTIST shall be required to dance on a floor of concrete, marble or any similar material or on any surface laid directly over such floor, which does not provide the appropriate airspace between such floor and the dance surfaces to provide for adequate spring. Adequate spring shall be defined as visible flex throughout the surface when pressure from jumping is applied.⁹

Similarly, San Francisco Ballet *Health Safety* A. General-13 states that:

⁶ See San Francisco Ballet Association- Final Draft Basic Agreement July 1999-June 30, 2003: *AGMA Regulations for Safety with Swords or Knives*: See also Exhibit 2(7), at 60.

⁷ See *id.* at Exhibit 3(1), at 61.

⁸ See *id.* at Ex. 4 (4), at 62

⁹ Basic Agreement on San Francisco Ballet Association, Final Draft, July 1999-June 30, 2003, Ex. 5(A)(13), at 64.

Pointe-work shall only be required on a non-slick, smooth surface, which does not contain warps or bumps. Should the floor contain any flaws deemed hazardous by AGMA, the EMPLOYER shall designate maintenance work to be done within one week of the report.¹⁰

Ballet Metropolitan's Collective Agreement section 24 paragraph (h) states that:

The Artist shall not be penalized for refusal to rehearse and/or perform on a concrete or carpeted floor even though it may be covered with linoleum.¹¹

There is a special variation in this clause for required performances in Lecture/Demonstration performances that often take place on the very hard floors, which are prohibited, but due to audience convenience and tradition are held on unsuitable floors. This is called a "hard floor variation" and allows for modification of choreography to suit the needs and safety of the artist's body:

Hard Floor Variation- Although the collective bargaining agreement prohibits any ARTIST from rehearsing and/or performing on a concrete or substandard floor, in the event any ARTIST(s) is required to perform in a Lecture/Demonstration, Open Rehearsal or Performance on a substandard floor as determined by a representative of the ARTISTS and a member of the artistic staff, an alternative version of the choreography will be performed to ensure the safety of the ARTIST(s). Such alternative choreography will be less physically demanding and will minimize all jumps and modify pas de deux variations. The format will emphasize character dances or adagio work from any pas de deux excluding jumps, variations and coda(s).¹²

Clothing is also an important issue for dancers. There are rules for artists such as when wearing a costume there is often a provision calling for "No smoking, eating, drinking (other than water) or sitting in costume."¹³ Or everyday work rules for dancers which designate what they can and

¹⁰ See *id.* at Ex. 5(A)(15), at 64.

¹¹ See Basic Agreement between American Guild of Musical Artists and Ballet Metropolitan, Inc., July 1, 1999-June 30, 2002 §24(h), at 17.

¹² See *id.*

¹³ See *supra* note 11, Attach. A, § 11, at 41.

cannot wear, like Ballet Metropolitan's rule 13 which enforces "only tight fitting attire will be allowed during rehearsal periods. Baggy or loose clothing during rehearsal is prohibited, unless authorized by the artistic staff for therapeutic reasons."¹⁴ This kind of rule seems to the outside-eye as quite innocuous and as an obvious must for an artist whose body must be seen by the rehearsal director in order to shape the dancer's movement choices prior to show time. For the dancer, however, these kinds of rules restrict personal choices which often have more to do with personal safety than fashion or the look of the choreography. Rehearsals for dancers are often a grueling process of waiting for long periods of time to dance in a given segment of choreography. During this time the body of a dancer can start to get cold. The dancer must work very hard to maintain a warm body temperature to keep ligaments and muscles ready to exert force and energy while waiting for their cue to dance. Dance needs repetition to achieve a level of understanding in the dancer. Each dancer must patiently wait while other segments are repeated and this can take hours. During this time the drop in body temperature can make the body vulnerable to injury. Sweatpants and sweatshirts can help immensely in maintaining the body heat of a dancer. These articles of clothing are often too baggy for rehearsal directors and are requested to be removed even in cold weather rehearsals. This is part of the discipline of being a dancer. For the art a dancer must expose his or her body to the eyes and to the cold. Unfortunately, this chilled unpleasantness can cause injuries to the most dedicated and selfless dancer all in the name of aesthetic perfection.

As demonstrated by these provisions the dancer's employment conditions are very detailed. AGMA did very well in establishing these conditions for the dancer. The sensitivity and the energy the Union puts into making sure the needs of the dancers are met is wonderful. Destructive conditions which could end a dancer's career are effectively and aggressively addressed. The objective conditions of dancing jobs are clearly defined to maintain a healthy life of a dancer. The extraordinary measures the Union takes increases the longevity of a dancer's career. Unfortunately, as will be seen, the Union has not effectively protected the dancer from an employer arbitrarily ending the dancer's career. Risks of injury are protected against in the work conditions, but the protection of dancers against their employer leaves the collective bargaining agreement with a broken ankle.

¹⁴ See *id.* §13, at 41.

B. Atypical Clauses in the World of Collective Bargaining at Large.

1. Wages:

A centerpiece of a collective bargaining relationship is that the employees negotiate for wages collectively and the negotiated wages are applicable to all individuals under the agreement, though wages may vary based upon the position the person holds and the years of service. Failure to agree on a rate of pay can result in lengthy strikes.

When one examines all the provisions of the National Labor Relations Act one of the mandatory subjects of bargaining is rate of pay. In the National Labor Relations Act 8(d) "With respect to Wages, hours and other conditions of employment" and 9(a) ". . . Rates of pay, wages, hours of employment or other conditions of employment."¹⁵ In contrast, for the dancer pay is determined individually, though under the NLRA it would be an absolute violation for the employer to deal directly with individual employee to set wages different from those set out in the collective bargaining agreement.¹⁶ AGMA only negotiates a minimum wage but the actual wage that an individual receives is individually negotiated between the employer and the dancer. Not only does AGMA waive its right to negotiate individual wage rates but it mandates that each dancer sign an individual agreement and negotiate with the employer as to the rate of pay that individual is going to receive. The space on the Union's form for the individual agreement for individual wage is left blank.¹⁷ Indeed, in order for the dancer to come under the AGMA Collective Bargaining Contract, each dancer must sign an individual artist contract with the employer.¹⁸ In other words, to work for a particular company a dancer must sign an individual artist agreement. Not surprisingly, this kind of pay structure is a divisive element in a dance company.

2. Retention of employment.

Management's rights can seem at times unlimited to a dancer who is simply thankful to have a dancing job. A good example of the sort of power employer's exercise over dancers is articulated in the Pittsburgh Bal-

¹⁵ See National Labor Relations Act §§ 8(d), 9(a), 29 U.S.C. §§ 158(d), 159(a) (1935).

¹⁶ "It shall be an unfair labor practice for an employer. . . (5) to refuse to bargain collectively with the representatives of his employees." See *id.* §8(a)(5).

¹⁷ See American Guild of Musical Artists, Standard Artist's Contract for Employment (Dancers) [hereinafter AGMA].

¹⁸ See *id.*

let Theatre's Basic Agreement with AGMA-paragraph 63 *Management's Rights*:

It is understood, however, that subject only to the express provisions of this Agreement, the Employer retains the full right to maintain, direct and control in its sole discretion each and every aspect of operations of the Company including, but not limited to, establishing reasonable rules to govern the conduct of the Dancers. The Dancers shall be informed of the rules as they are adopted. It is further recognized by AGMA that all artistic decisions remain exclusively with the Employer and are not subject to the grievance arbitration procedures established by this Agreement.¹⁹

Similarly, unlimited rights can be identified with respect to a dancer's continuing employment with a company. The longest term of employment contemplated by the Individual Artist Agreement is for one year (a contract for not less than 40 weeks).²⁰ After the first year, the employer has sole discretion whether or not to re-engage the dancer for another year. If the employer chooses not to retain the dancer this is referred to as "non-reengagement." This can have devastating consequences for the dancer. This is not just out of a job but potentially it can mean the end of a career for a dancer. The reason is simple. A dancer's career life is a short one. When a dancer gets a job in a company every day the dancer receives free dance class as part of employment. These classes are part of the professional upkeep of technique and expressive articulation. Dance classes on the street are expensive and a dancer needs to take class everyday to maintain their art and to be able to compete in auditions for a dance job.

Under the Standard Agreement the Artist comes under the provision "Pay or Play." This is a practice for dancers who are hired on a performance basis, a weekly basis or an Engagement on Guaranteed Basis (where the period covered, exclusive of options is one (1) year).²¹ "Pay or Play" gives management the ability to not allow a dancer to dance though they are still employees under their contract. It is rare to find a "just cause"

¹⁹ See Basic Agreement between Pittsburgh Ballet Theatre, Inc. and American Guild of Musical Artists (AFL-CIO), Oct. 1, 1999-June 30, 2003, at 43.

²⁰ See AGMA, *supra* note 17.

²¹ "Pay or Play: The employment of the DANCER hereinafter is non-cancelable, and the compensation is "Pay or Play" both as to performances and rehearsals." See *id.* §§1(b), 2(b), 3(b).

clause in a dance company's contract.²² Even if the dance company does have a "just cause" clause with "Pay or Play," management can effectively remove an artist from rehearsals and performances simply by not using them and paying them compensation for the rest of the contract period. There is question as to whether the concept of "just cause" is alive in the world of the performing arts. In *The Round Dinner Playhouse* the Arbitrator addressed the "just cause" reality by taking "arbitral notice" that any requirement of "just cause" for termination "is virtually unknown in the theatrical world."²³ If an employer does indeed "discharge" an employee and the employee believes it was not for "just cause" the contract has an arbitration provision.²⁴ "A significant percentage of cases that reach arbitration involve discharge or disciplinary penalties assessed by management."²⁵ Due to the short term of the contract itself and the back up of "pay or play," it is rare that the employer is not able to wait out a contract which is at most one year under the Engagement on Guaranteed Employment Basis.²⁶

The dancer has no opportunity to arbitrate wrongful discharge if it is simply the end of the Contract term. This lack of a mechanism through which the dancer may challenge his or her non-renewal renders all the other provisions that provide protection to the dancer of limited effect and fails to hold the management accountable for "arbitrary and capricious" actions. By letting a contract run out, the employer avoids responsibility for firing dancers when in fact these choices may be mere "whim or caprice."²⁷ This freewheeling destructive spirit is why "most collective agreements do, in fact, require "cause" or "just cause" for discharge or discipline."²⁸

The impact of the inclusion of a just cause discharge provision in dance contracts is met by widely varying responses. Many a dancer and most choreographers would view the approach of this clause with opposite reactions, while, ironically, having identical visions of the impact of the

²² See, e.g., "Dismissal for Cause- EMPLOYER retains the right to dismiss the ARTIST for cause," Pacific Northwest Ballet Association/American Guild of Musical Artists Master Agreement, July 1, 1999-June 30, 2002, § I, para. 19, at 10 [hereinafter PNWBA].

²³ See *In The Round Dinner Playhouse, Inc.*, 55 Lab. Arb. (BNA) 118, 128 (1970) (Kamin, Arb.).

²⁴ See, e.g., PNWBA, *supra* note 22, § VIII, para. 53, at 46.

²⁵ See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 610 (3d. ed. 1978).

²⁶ See generally AGMA, *supra* note 17.

²⁷ See *Worthington Corp.*, 24 Lab. Arb. (BNA) 1, 6-7 (1955).

²⁸ ELKOURI & ELKOURI, *supra* note 25, at 612.

clause. They both see the clause as a radical end to the world as it exists today. These dancers would see the world transformed into a nirvana where pure justice reigns and their employment would be protected from subjective termination by the choreographer. These choreographers would view the world as coming to an end, with their artistic vision being held captive to a contract clause that provides lifetime employment for all dancers. Both these dancers and these choreographers would be wrong. The clause does not do as much as they see it as doing. Dancers will be fired. The artistic vision of the choreographer will be protected. All that the clause provides the dancer is the opportunity to challenge the termination through the grievance and arbitration process. All the clause requires of the employer is that it be able to articulate the basis for the termination and that the discharge is reasonably grounded. One such reasonable ground is artistic judgement, and arbitrators will most certainly give great deference to this ground. The world has changed, but not as radically as the dancer hoped or the choreographer feared.

Many a cynical labor lawyer will greet the proposal for the inclusion of a just cause discharge provision with numb disdain. The assertion will be made that, in the final analysis, the clause is meaningless because the arbitrator will simply uphold any discharge of any dancer by any choreographer, as long as, the magic words "artistic vision" are uttered by the choreographer. These individuals are as wrong as those who see the clause as earth shattering. Today, a dancer loses his or her job by simple inaction by the choreographer. The choreographer simply decides not to "reengage" the dancer. No new contract is signed. No explanation is required whatsoever. The choreographer has literally done nothing. The dancer is literally unemployed. End of story. Under the clause, the dancer, once employed, remains employed until one of two things happens, the dancer resigns, or the dancer is discharged. If the dancer is discharged, the choreographer must take the action of discharging the dancer, with full understanding that they may need to explain the basis for this choice in a hearing before an arbitrator. This is a weight. The basis needs to be carefully examined and thought through. Already, the clause has changed the world, maybe not radically, but significantly. The most extreme of the arbitrary and capricious choices of a choreographer may be reigned in. Further, although arbitrators may be inclined to defer to "artistic vision," arbitrators are also able to pierce through this veil and see that the discharge may, in fact, be based upon other impermissible grounds, such as union activism, sexual orientation, race or ethnicity. Although there may be other statutory forums to address such discrimination, none are as immediate or real as arbitration. The clause provides real due process, and this due process can have real significance in the dance world. A just cause discharge provision has the

potential of moving the choreographers from the realm of the arbitrary into the realm of considered actions that more closely resemble justice.

III. SIGNIFICANCE- ANALYSIS

A. *"Just Cause" required with Due Process rights*

The Termination of Employment Convention 158, 1982 was adopted on June 22, 1982 when the International Labor Organization convened in Geneva for its 68th session.²⁹ Although not presently ratified by the United States it is an internationally recognized Convention that gives workers fundamental rights in regard to termination and continuation of work whenever possible. It preserves the workers' humanity in an age when the corporate machinery is accelerating at a dizzying pace. This Convention will perhaps become one of the most central documents for worker's rights as we face the new age of the World Trade Organization. We are entering an exciting era for labor and the Termination of Employment Convention, 1982 will insure a new generation of dancers will have shoes. It is clear that the Convention covers the kind of work that dancers do and also it recognizes the faulty aspects that are present in their fragile collective bargaining contracts. "Article 2: 1. This Convention applies to all branches of economic activity and to all employed persons."³⁰ From examining the Standard Artist's Contract for Employment for dancers and numerous boilerplate provisions in the AGMA collective bargaining agreements one can see that these contracts are not adequate under the International Labor Organization, Termination of Employment Convention, 1982.³¹

Typically termed contracts set a term for a specific job of limited time length. Article 2 section 3 of the Termination of Employment Convention provides: "Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention."³² If a worker is an architect, they can get a limited contract to create a house. Once the house is built, the contract is complete and the architect has done his job. If there is a Theater production that has a limited tour or a limited number of shows then a limited time contract makes sense. When the specific number

²⁹ Convention Concerning Termination of Employment at the Initiative of the Employer, June 22, 1982 (visited Nov. 29, 2000) <<http://ilolex.ilo.ch:1567/scripts/convde.pl?query=c158&query0=158&submit=Display>>.

³⁰ See *id.* at art. 2 §§ 1-3.

³¹ *Id.*

³² See *id.* at art. 2 § 3.

of shows has been performed the job is finished and the job ceases to exist. The limited time of the dancer's contract relates to nothing objective within the dance company. It serves no purpose other than to provide the employer with the opportunity to freely terminate anyone and everyone's employment once a year, every year.

Article 4 of the Termination of Employment Convention states: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."³³ This requires that there shall be reason to discharge an employee. This provision, in addition to the protection provided by Article 2 section 3, gives dancers recognition of rights in the workplace when the Contract seeks to give a sterility to discharge through the objective year count down to the Employer's whim.³⁴ This Convention continues step by step to help protect a worker at each dangerous challenge along the way. Once a violation is asserted, through this internationally recognized convention, there must be mechanisms in place to create a stage on which the involved parties can engage in dialogue regarding management termination decisions.³⁵ Article 7 addresses the need for worker due process to challenge unjust termination. Article 7 states: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."³⁶ This substantive right to "due process" is exercised through the procedural right to challenge in the Convention Division C. Procedure of Appeal Against Termination. Article 8(1) under Division C. states: "1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."³⁷ The power of this "impartial body" referred to in Article 8 is articulated in Article 9(1). The role this "body" will undertake is to listen to the employer's reasons for terminating an individual and determine whether or not this was a justified action.³⁸ In order to facilitate a hearing by an "impartial body," Article 9(2) states options for how to prove wrongful termination. The burden of proving whether the termination was justified

³³ See *id.* at art. 4.

³⁴ See *id.* at art. 2 § 3.

³⁵ See *id.* at art. 2 § 3

³⁶ See *id.* at art. 7.

³⁷ See *id.* at art. 8.

³⁸ See *id.* at art. 9(1).

does not rest on the worker's shoulders alone. There are two possibilities in the Convention for shifting burdens. The first burden shifts entirely onto the employer the obligation of proving that the termination was justified. The other is a shared burden where both sides will tell an evidentiary story before the eyes of the impartial body.³⁹ Remedies for a worker when their termination has been found unjustified are found in Article 10. Once it has been determined that the termination was unjustified, this impartial body will be able to order the employer pay compensation and other kinds of reasonable relief to the individual who has suffered this injury. If it does not conflict with the national laws and practice of the country to which the employer belongs, the impartial body can also order reinstatement.⁴⁰

B. Without "just cause" all anti-discrimination guarantees become meaningless.

International human rights are lost without the substantive right against "un-just" termination and the procedural right to challenge the ter-

³⁹ See *id.* at art. 9(2)(a), (b). 2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice. See also art. 9(3). (In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.).

⁴⁰ See *id.* at art. 10. If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

mination through a grievance and arbitration process. Once you lose the right to due process and the ability to challenge termination at work, you lose all other human rights such as the right to unionize and the right not to be discriminated against for race, creed, religion and sexual preference. The United Nations, New York, 1978 Universal Declaration of Human Rights grants these rights to every person in Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴¹

Once an employer can fire an employee for any reason, they can discriminate against employees for reasons which are presently protected in the Universal Declaration of Human Rights and these rights become unenforceable. Article 23 of this UN Declaration recognizes that labor itself is a human right. Article 23(1) states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."⁴² If there is no mechanism to defend a worker and challenge an employer, termination can occur because the employer does not agree with the worker's political beliefs or social activism. This is in direct violation of Article 19 of the Universal Declaration of Human Rights which reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."⁴³

There are no "just cause" nor "due process" protections in the dance world. If you don't have a mechanism to challenge a decision, the management has no need to listen because they are not held accountable for their actions. Article 23(1) grants all people the right "to protection against unemployment."⁴⁴ The labor practice in the dance world promotes unemployment of dancers. The termed contracts have the effect of frustrating the International Convention, Termination of Employment Convention, 1982.⁴⁵ These worker artists have a fundamental human right to "due process."

⁴¹ See *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), at art. 2 (1948) (visited Nov. 29, 2000) <<http://www.un.org/overview/rights.html>>.

⁴² See *id.* at art. 23(1).

⁴³ See *id.* at art. 19.

⁴⁴ See *id.* at art. 23.

⁴⁵ See International Labor Organization, *Termination of Employment Convention*, 1982 Convention 158 art. 2, §3 (1982). (Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention).

Not only is there a lack of internal mechanisms for dancers in the realm of “just cause” accountability but there are rules about going to outside sources for support or to voice to the public about mistreatment. Dance companies often have a clause included in the Master Agreement which curtails the freedom dancers have to go to the media about their job concerns. The Publicity clause appears commonly as follows: “*Publicity*: While ARTISTS are under contract all publicity is controlled by the EMPLOYER. ARTISTS shall cooperate by providing publicity information to the EMPLOYER. ARTISTS shall not communicate with the media about work related subject matter without coordinating with the EMPLOYER.”⁴⁶ Whether this rule is in a collective bargaining agreement or not, the dancer who goes outside their dance company to talk about the unjust treatment and whimsical firing of dancers, will possibly ruin his or her chances of getting hired in this small world of dance companies. The employer may be diligently careful to hire “obedient” workers. Workers who won’t betray their boss, no matter how abusive the boss may be, are celebrated as the stoic and sacrificing artist. The moments to dance in ones life have the timing of mercury and the swiftness of an unexpected storm. Divining from bones and muscles the meaning of gravity’s flight, what more can a dancer do to prove themselves worthy of a “just cause” termination. Dancers talk in the dressing rooms, wondering aloud about how they treat dancers in Europe. Most eyewitnesses return with news about how Europe loves the dancer more than the United States does. “The United States stands alone among the world’s major industrialized nations in failing to protect employees from wrongful discharge through federal legislation.”⁴⁷ Perhaps dancers should not take this neglect so personally. It appears as if this approach to labor as a disposable is prevalent not only in the dance studios but also across the Nation. Watch the service employees dance from job to job and you will see a choir rise in this physical story. These sounds will rise or fall depending on how we choose to move through space. Perhaps, braver leaps could be taken if we could establish “just cause” termination standards in this country. Walking now, we approach a resolution to our disputes. Walking an arbitral path, we will see what their rhythms have to say about “unjust” discharge.

⁴⁶ See e.g. Basic Agreement Between American Guild of Musical Artists and Cunningham Dance Foundation, Inc. a/k/a Merce Cunningham Dance Company, July 1, 1999-June 30, 2002, para. 40, at 30.

⁴⁷ See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM.U.L.REV. 849, 890-91 (1994). See also Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988).

IV. THE TENDENCIES OF THE ARBITRATORS

The major form of dispute resolution in the work place is arbitration. "Arbitration has been the preferred method of resolving disputes under collective bargaining agreements between unions and employers for more than fifty years."⁴⁸ Through this private dispute resolution the employers can maintain the private ownership of their decisions and the employee can have an opportunity to stand before a third party to voice a grievance. In the arbitration decisions one can sense the patterns that arbitrators fall into when it comes to arbitrating labor disputes in the subjective realm of the performing arts. Deferring to employers' decisions is commonplace in discharge cases.

The tricks of termed contracts are well known in the world of performing arts. On the television show "Hawaii Five-O" management used termed contracts for the sound mixers and microphone boom operator. In an arbitration involving employees who had been working on the television show "Hawaii Five-O," it was an industry understanding amongst the employees that the job would last through the entire season. "Local 695 insists that although the agreement does not expressly state sound technicians will receive run-of-the-show commitments it nevertheless implicitly recognizes that the tenure of an employee will last more than one week."⁴⁹ The employees were asked to make themselves available for the length of the season and move to an exotic location for filming. The contract they signed, however, was only on a weekly basis.⁵⁰ When two employees were dismissed in the middle of the production season they demanded that their "discharge" was not for "just cause" and in violation of that provision in the contract. "The Company responds by asserting neither industry practice nor the collective bargaining agreement guarantees run-of-the-season employment and the producer of 'Hawaii Five-O' was therefore free to terminate the employment of the two grievants at any time following the completion of one week of employment."⁵¹ The arbitrator was unable to break from the words on the page. The employees were not officially fired and therefore

⁴⁸ See *id.* at 903.

⁴⁹ See *CBS Inc. v. International Sound Technicians Local 695*, 81 Lab. Arb. (BNA) 361, 363 (1983) (Roberts, Arb.).

⁵⁰ See *id.* at 361. The workers had the "contention that contract implicitly recognizes that tenure of employees would last more than one-week period specified in agreement and, pursuant to existing industry practice, they were entitled to "run-of-the-show" employment. Grievants signed start slips that specifically defined their employment as "week-to-week" and they reviewed with considerable care all other entries in their start slips, including their weekly salary."

⁵¹ See *id.*

did not come under the “just cause” provision. Similar to the termed contracts for dancers, these television production employees were simply at the end of their contract term and not given a new one. Without warning or reason, they were not renewed for the week and would not be needed for the rest of the production season. The Employer had no accountability for discharging without “cause.”⁵² There was nothing more to be said because the contract itself silenced the employees whom worked under its tight scheme of unilateral management control. “It was therein held that a just cause test was not applicable because the replacement of a craftsman during a television series is not a discharge.”⁵³ In the world of employment, contracts can contain poison words that define the situation and label the participants who consent to follow the definition. For artists, who lack bargaining power to assert their rights, there are often clashes between the reality and the words on the page.

Those who achieve high levels of technical skill and artistic mastery of art can, with determination and skill, create and obtain work. Some jobs are so successful that people are able to hold onto them for a number of years. Still, in the most steady of employment there are still problems with the tricky contract terms which get lost in time and painfully rediscovered when at some future unknown date the “word” is used against the employee seeking remedy for unjust discharge. In one particularly frustrating arbitration “[g]rievant had earned the first position on the Extras — Saxophone ranking as the result of an audition, and had maintained such position for nearly two years.”⁵⁴ In this arbitration, the practice of the management to name particular musicians, like the grievant, “Extras” in their contract despite their stabile presence in the orchestra, was an industry standard. Though the saxophonist was fired without cause, the union had failed to change this practice through its contract negotiations. He had been there for two years and achieved the prestigious position of first seat saxophone. Because the contract used the word “Extra” to describe his position, there was no “just cause” protection for dismissal. His presence and achievement

⁵² See *id.*

⁵³ See *id.* at 364. The experience of the two grievants was common to the practice in this industry. They were asked if they could make themselves available for the full production season and both men responded in the affirmative. The inquiry put to them was not, however, a guarantee of employment for the entire season. The producer had to be assured of their ability to serve but an inquiry regarding potential availability does not constitute a guarantee of employment for a term greater than that provided by the collective bargaining agreement

⁵⁴ See *Columbus Symphony Orchestra v. Musicians Local 103*, 92 Lab. Arb. (BNA) 1203, 1206 (1989) (Fullmer, Arb.).

within the Symphony were easily disregarded by management when they chose to fire him "arbitrarily."

When a union fails to secure a "just cause" provision through collective bargaining, they have essentially hobbled their members, as well as, any third party arbitrator, from being able to effectively combat unjustified terminations. In an arbitration involving the American Federation of Television and Radio Artists, the arbitrator was looking around desperately for someone to help. "Since the AFTRA Agreement contains no just cause provision, there are no identifiable individuals to whom backpay can be awarded for Golden West's contract violations."⁵⁵ These situations are unfortunate when the union itself is unable to negotiate a contract containing a "just cause" provision. These situations would be remedied if our country accepted the International Labor Organization's standard of a broad all encompassing labor standard of "just cause" for termination.

There are those who argue that the performing arts are of a subjective nature and therefore cannot be touched by legal regulation. Law deals with many subjective aspects of life. No one would stipulate that marriage is an objective union. We have laws which secure the benefactors to its stability and honor. When and if there is a break in this union, the law addresses the issues and weighs the equity stemming from the redrafting of this human contract. Every kind of work invites the intimacy of human interpretation. We all have likes, dislikes and reasons for being where we are at particular moments in the day. Work is a reason for being somewhere, but it is not an end in and of itself. Human beings make choices within mechanisms of production. "The evaluation of talent in the performing arts is highly subjective in any event; better it be done by those who are intimately involved in the process themselves, the common acceptance has it, so long as good faith is the prism for the evaluation."⁵⁶ Good faith is the standard of decency that is missing when unreasonable terminations are made on a whim. Being fired is a risk for all workers, whether they dance or not. If the employer chooses to fire a person at least let that occupational "death" be for good reason.⁵⁷ If an employee is fired let there be a reason articulated by the employer for it.

A Dallas news anchorwoman was fired without warning due to something management referred to as "unsuitability." Though, according to

⁵⁵ See *Golden West Broadcasters v. American Federation of Television & Radio Artists*, 93 Lab. Arb. (BNA) 691, 698 (1989) (Jones, Arb.).

⁵⁶ See *id.*

⁵⁷ See *Universal Frozen Foods v. Teamsters, Local 839*, 100 Lab. Arb. (BNA) 24, 26 (1992) (Lacy, Arb.); *University of Pennsylvania v. International Union of Operating Engineers, Local 835*, 99 Lab. Arb. (BNA) 353, 360 (1992) (DiLauro, Arb.).

the union grievance the News Director violated the “just cause discharge” provision in the collective bargaining agreement, the arbitrator found that he could defer to the judgement of management.⁵⁸ The arbitrator was given plenty of evidence that the news anchorwoman was “competent” and had not been a bad employee. Yet the arbitrator stated:

Nothing prevents the Company from striving for excellence; all business and competitive considerations support that objective. Seeking and achieving that objective of excellence rests upon the News Director’s best judgment as to employees’ abilities; the Collective Bargaining Agreement reserves that judgment exclusively to the management of the station.⁵⁹

When one enters the world of performance one steps into a magic world where the fickle ways of “artistic vision” are used to excuse the topsy-turvy decisions of management. “The success or failure of television news depends not only on the objective measures of a reporter’s skills, but also on that indefinable extra dimension that all witnesses agreed was a judgment call.”⁶⁰ This “indefinable extra dimension” is the pro-management twilight zone which arbitrators believe in when it comes to the performing arts. This anchorwoman was an award-winning journalist and was well respected in the field. This kind of firing has a way of shaking the entire work staff, which might be part of management’s tactic in doing such an arbitrary firing. The company photographer who worked closely with the news team, which this woman was a part of, said that when this reporter was fired “I was surprised. Everyone was surprised. I mean, I just was surprised because it was like a bolt out of the blue. I didn’t—I didn’t think she had done anything wrong.”⁶¹ In another broadcasting case where the arbitrator upheld the discharge of a reporter for “unsuitability,” the station management was unhappy with the broadcaster because the grievant’s voice was too “mild and mellow” and the management want a “brisk-type” of delivery.⁶² The arbitrator believed he should not “substitute his judgment for that of management,” and felt this was especially needed due to the “special nature of the broadcasting industry and the subjective evaluations

⁵⁸ See *KDFW-TV v. American Federation of Television and Radio Artists*, 94 Lab. Arb. (BNA) 806 (1990) (Allen, Arb.).

⁵⁹ See *id.* at 811.

⁶⁰ See *id.*

⁶¹ See *id.* at 813

⁶² See *Taft Broadcasting Company v. American Federation of Television and Radio Artists*, 64 Lab. Arb. (BNA) 211, 216 (1974) (Goetz, Arb.).

of listener taste involved in such a determination.” If the audience does not see you on the television or the stage, how are they supposed to evaluate if they like you or not? In the Dallas case the arbitrator states that “entertainers only survive if they can attract audiences.”⁶³ Of course how can an entertainer attract audiences if they are fired even when they are getting good ratings for the television show or are part of a show that is selling tickets. If an artist is taken away from the audience’s eyes, and the employee is not a well-known star, the audience may not know what they are missing. The audience does not know what is going on backstage, they come to be entertained and inspired.

Another example of an “unsuitability” discharge is an arbitration concerning Storer Broadcasting Company.⁶⁴ A news anchorman was discharged because of age and claims from the management that ratings were suffering. The AFTRA union tried to help the news anchorman retain his job in some other capacity. The employer was not willing to find another job for this employee. The news director simply maintained that the news anchor was “unsuitable” for his job. The arbitrator found this subjective standard part of a business decision involving ratings and consulting reports and, just like in the Dallas case, did not want to get involved in the subjective judgements of a news director. The news director wanted to attract advertisers with a new “young” look. This employee did not fit that new business image and was fired. Though it was not “just cause” the arbitrator said that the contract included firing for other reasons. It was determined that the decision was at least based on a reasonable business decision and made in good faith seeking profit for the station.

The management treats artists as replaceable. Each artist is a unique expression of humanity. Every person is irreplaceable and should be given the decency of, at least, “just cause” when they are fired. The arbitrator states in the Dallas case that the selection process was even known to the reporter who was discharged as being “a host of nonquantifiable intangibles.”⁶⁵ This seems to serve management’s power to fire. When the selection process has no justice, then you are in a state of constant auditioning. In an arbitration of the WFMJ Broadcasting Company, the arbitrator based his decision to defer to management decisions on the subjective nature of broadcasting choices and how “its employees differ from those in a mass production industry where performance may be evaluated in such terms as the number of pieces produced per hour and the quantity of

⁶³ See KDFW-TV, *supra* note 58, at 815.

⁶⁴ See Storer Broadcasting Company (78-2 ARB 8303).

⁶⁵ See KDFW-TV, *supra* note 58, at 815.

material used or wasted in achieving such production.”⁶⁶ Everyday, the management has the opportunity to become “inspired” by something new. Something other than what you can provide. . .no matter how excellent you are in your profession.

In *Cosmos Broadcasting of Louisiana, Inc.*, the arbitrator again deferred to the choices of the employer who had fired the newscaster claiming the need to bring in advertisers. The arbitrator justified his decision by calling advertising the “lifeblood” of a television station. Also, backing away from the personal responsibility of the employer for making this choice to fire this individual, the arbitrator stated that the “nature” of the entire broadcasting industry had “peculiar problems” and that on-air television performers have “no such objective standards” by which they can be judged.⁶⁷ It is true that the world of performing arts is subjective. The conclusion that there can be no justice in this world, however, is wrong. The employees lost in these arbitrations due to the assertion of subjective standards that the arbitrator preferred to leave untouched. It was, none the less, an important opportunity for these employees to be heard by a third party arbitrator and for the employees to hear their employer’s reasons for firing them. Through exploring these arbitration decisions involving unjust dismissal, under a perceived “just cause” provision agreement, we can see a pattern of choices being made by arbitrators in subjective scenarios. It is tragic to think of all of the stories of suffering at the hands of an arbitrary employer that go unwitnessed when there is no “just cause” provision in the collective bargaining agreement.

In this situation, weak is strong. It is a small process that can change the world. The addition of just cause discharge provisions seeks to provide a bit of space and time for employers to think before moving death upon a dancer. This will stop the tyrannical employer from taking arbitrary and capricious actions. An employer should not be able to destroy people by firing them, on account of being in a bad mood one day. If a dancer refuses an employer’s sexual advances without a just cause provision, for instance, this dancer with an absolutely shining path in his or her art can be fired at will. No accountability breeds cruel territorial violation in its silence.

⁶⁶ See *WFMJ Broadcasting Company v. National Association of Broadcast Employees and Technicians*, 52 Lab. Arb. (BNA) 995, 996 (1969) (Hertz, Arb.).

⁶⁷ See *Cosmos Broadcasting of Louisiana v. American Federation of Television and Radio Artists*, 68 Lab. Arb. (BNA) 1332, 1339 (1977) (Taylor, Arb.).

V. THE EUROPEAN VALIDATION OF JUST CAUSE

In the United States we have no comprehensive regime for "just cause" termination. This is very unusual in the world of labor. Across Europe there is a strong appreciation for the need to have this kind of protection in the workplace and their labor laws recognize this fundamental importance. Not only have all of the nations in the European Union signed the International Labor Organization Convention, but also new sections dealing specifically with "just cause" termination have been signed. Europe clearly validates the need for acceptance of a standard of "just cause" termination in employment. It should be noted that all of these statutes have no exclusion of dancers or performing artists from their coverage. The United States has recognized the devastating effect that being fired has on its citizens, but has failed to provide any protection when the employer's reasons for the dismissal are "arbitrary and capricious." If "[d]ischarge is viewed as the 'capital punishment' of the shop," there should be statutory recognition of the need for employee due process when such drastic actions are executed by employers.⁶⁸ Through describing various European statutes, it will become clearer that the United States is falling behind in its labor standards. During this time of globalization of labor and international trade it is essential that the United States recognize the importance of "just cause" termination and step up to join all other industrialized nations in establishing accountability for employer's actions. This will help insure a more stable and productive workforce and help the United States maintain a strong economy that expresses the strength of all its citizens who participate in harvesting the wealth it helps to produce.

In 1938 Sweden took its first major step to establish job security in the Basic Agreement between the SAF (Swedish Employers Confederation) and LO (Swedish Confederation of Trade Unions) of 1938. The Basic Agreement was amended in 1964 to require just cause for dismissal. A new dispute resolution section for arbitration was added to the 1964 amendment.⁶⁹

In Germany, there is a system in which the employer must report the dismissal prior to its execution. The German "model of workers' participation is the German works council which must be consulted by the employer before every dismissal. Failure to do so results in the dismissal

⁶⁸ See *Universal Frozen Foods v. Teamsters Local 839*, 100 Lab. Arb. (BNA) 24, 26 (1992) (Lacy, Arb.); *University of Pennsylvania v. International Union of Operating Engineers Local 835*, 99 Lab. Arb. (BNA) 353, 358 (1992) (DiLauro, Arb.).

⁶⁹ See Bob Hepple, *European Rules on Dismissal Law*, 18 COMP. LAB. L. 204, 210-11 (1997).

being null and void.”⁷⁰ This is the main control mechanism used to protect employees in Germany. This requirement of 102(1) of the Work Constitution Act requires that the employer must consult before “every dismissal, be it an ordinary or extraordinary dismissal, with the sanction that a breach of this duty renders the dismissal null and void.”⁷¹ The strength added through sanction, gives teeth to this already strong legislation requiring employers stand witness to their own acts.

France is a good example of a European country that supports its employees through statutory development in the area of termination. “In France licenciement pour motif économique has been subject to a special regulatory regime dating back to 1975 and is defined according to two essential criteria: the reason for dismissal must not relate to the individual concerned (licenciement pour motif individuel) and the termination must derive from the abolition or alteration of the job or from a refusal to accept a substantive change to the contract of employment.”⁷² Some individuals might ask why the French labor tradition is relevant to the United States. Using the booming economy as a reason to take a hands off approach when it comes to such a “bull market.” The poetry of the strikes in France may ring a nostalgic bell to some Americans, but perhaps the United States has not yet reached the level of the French revolutionary labor spirit. One thing remains true, despite our differing histories, the soil of both countries breeds poets and there are new developments in labor to sing songs about. Some think our songs in America are a little melancholy right now, and these people may be right. But to this I say, no fear for the future that hasn’t happened. As the folks in New Orleans demonstrate, we can dance away from any funeral, except our own. Labor dances on.

France had an early start in addressing abusive firings. “This principle of abus de droit or the employer’s abuse of its right to discharge was finally adopted by statute in 1928.”⁷³ Not only did they have an early start, but also they have run the marathon with strength. The distance they cover involves a court which shows a willingness to bow to labor. This degree of respect from the courts is not known to labor in the United States. “The French courts appear more willing than American courts to find that a dismissal was arbitrary or capricious. . . employers are required to give the

⁷⁰ *Id.* at 211. See also Works Const. Act of 1972, 102(1) BetrVG.

⁷¹ *Id.* at 224. See also Works Const. Act of 1972, 102(1) BetrVG.

⁷² Antoine Lyon-Caen, *European Employment and Industrial Relations Glossary*: France 478 (1993).

⁷³ Madeleine M. Plasencia, *Employment-at-Will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L. 294, 299 (1988). See also 1 RECEUIL DALLOZ 94 (1920).

French court a reason for the dismissal; courts have often found the employer's reason to be mere pretext for unfair dismissal. . . the French courts have extended the doctrine of abuse of right to situations in which the employer failed to follow customary or collectively bargained procedures and rules."⁷⁴ The French may have full disclosure and accountability principles which cover the hearing of grievances, but even they have much work to do. For example, interestingly, the only remedy for an abusive discharge in France is damages, never reinstatement.

Though France has strong legal mechanisms for labor, this has not been won without a fight. "Pressure from the unions, an increase in sensitivity to the persisting problems of job security and official impetus from the adoption of ILO Recommendation No. 119 led the French government to amend its dismissal statute for the first time. Codified as Title II of the Labor Code, the Law of 1973 requires the utilization of procedural safeguards and provides for judicial review of the employer's decision to terminate an employee."⁷⁵ The problem with the Law of 1973, only addressing indefinite termed contracts, was changed in the Act of 1979 "which regulates contracts of employment of definite duration."⁷⁶ Out of the process of effort that the French workers have exerted through asserting their desire for change, they have created a legal environment which addresses difficult problems with sensitive answers. "The right to work in France is the increasing accumulation of legalities and rules ever more precise, complex and detailed. These legalities embody the positive rights of workers."⁷⁷ Actions which seek to address the workplace may not be able to create a simple world of rules, but at least the standards give working people and their employers a sense of what their responsibilities are to each other.

VI. EUROPEAN "JUST CAUSE" STANDARDS DANCE ON THE GROUND OF THE INTERNATIONAL LABOR ORGANIZATION CONVENTION.

The International Labor Organization Convention contains an expansive and inclusive recommendation on the Termination of Employment that indicates that the International Community has in fact addressed this matter. "The member states of the International Labor Organization (ILO) adopted Recommendation No. 119 on the Termination of Employment at

⁷⁴ *Id.* at 300.

⁷⁵ *Id.* at 302. *See also* C. Civ. art. 73-680 (amending the Labor Code in regard to termination of an indefinite employment contract).

⁷⁶ *Id.* at 303.

⁷⁷ *See id.* at 307.

the 1963 International Labor Conference.”⁷⁸ The member states choose to become signatories to a specific Convention voluntarily. Once ratified the member state accepts the obligation to implement the convention in their state. The employees, within the countries that have signed onto these rights, are protected by an International Standard that covers them without the need for collective bargaining. These standards are established as a right through the convention. Though the workers may still need to express themselves through a strike, even with the Convention, there is at least a stronger national acceptance to the minimum standard.

One can see the principles of the ILO echoed in the European statutory mechanisms we have previously explored. “The Recommendation set forth guidelines requiring that employers advance a valid reason for termination. Under these guidelines, the employer may not base a dismissal on an employee’s union membership or representation on race, color, sex, marital status, religion, political opinion, national or social origin.”⁷⁹ The Recommendation requires the employer to give the employee notice, as well as time off from work during this notice period to seek other employment. If the employer provides the employee with no notice, compensation for this failure must be provided to the employee.⁸⁰ The employer must also provide the employee with “severance pay and a certificate of dismissal.”⁸¹

The European Community has rules that are as follows: “[T]he supervisory machinery of the ILO and of the Council of Europe reviews national laws and practices in the light of the standards set in the instruments, EC directives impose obligations on Member States to implement them by laws, administrative practice or collective agreement.”⁸² Though there still is much work to be done in Europe to create a standard among the member states which will create a smoother flow of labor understanding within the European Community, there is already a much stronger consciousness toward “just cause dismissal” in Europe.⁸³ Europe is so advanced in each

⁷⁸ See *id.* at 300. See also 1982 ILO Conference, ILO Convention No. 158 (ratified).

⁷⁹ See Recommendation No. 119, Part IV at 18. International Labor Conference, Record of 67TH Session, 1982: Report VIII(1) — Termination of Employment at the Initiative of the Employer [Eighth Item on the Agenda] 102-05 (1980) (reprint of the text of the 1963 Recommendation).

⁸⁰ See *id.* at pt. II at 3(d).

⁸¹ See *id.* at pt. II at 8(1). See also Plasencia, *supra* note 76, at 301. See also International Labor Conf. Recommendation No. 119, Part IV at 18, pt. II at 3(d), pt. II at 8(1).

⁸² See Hepple, *supra* note 69, at 219-220.

⁸³ See *id.* at 220.

country's recognition of "just cause" discharge, that they can work together to find a common standard for the European Community. Not unlike musicians coming together to jam, the European Community is fluent in this labor language and now seeks to create harmony.⁸⁴

⁸⁴ See Jack Stieber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L. 229, 230-31 (1980). "A 1976 Report of the European Commission drew attention to the variation in conditions, procedures and legal consequences of dismissal provisions in member states, and put forward proposals to serve as a basis for an EC directive on individual dismissals. The EC Commission Report states that member state laws and standards should be harmonized along the following lines:

1. Dismissal is justified only when "serious grounds" exist. "Serious grounds" is defined in terms of "urgent requirements of the firm," i.e., "when it is impossible or unreasonable, for economic or technical reasons or for reasons connected with the person or behavior of the worker, for the employer to continue the employment relationship."
 - a) Personal grounds shall be deemed to exist only when a worker has, over a long period of time, shown himself to be incapable of carrying out his duties.
 - b) Behavioral grounds for dismissal presuppose a serious breach of a worker's obligations under the individual contract of employment.
 - c) Even when grounds exist, dismissal should be a last resort. When dismissal is unavoidable, employers should take account of a worker's age, length of service, future job prospects and family circumstances.
2. A worker is entitled to written notice and, on request, a written statement of the grounds for dismissal. He should also be advised of his legal remedies.
3. Consultation with worker representatives should precede dismissal.
4. Except in cases of "summary dismissal," minimum notice of thirty days should be given.
5. Summary dismissal should be resorted to only if the worker is guilty of such a severe breach of his obligations under the contract of employment that the employer cannot reasonably be expected to observe a notice period.
6. The legality of every dismissal must, at request of the worker, be examined by an independent body.
7. Protection against dismissal should be provided only to employees with at least six months service in the undertaking."

Implementation of the ILO has inspired legal systems within the member states to expand their recognition of these labor issues. For example, "the French, as signatory to ILO Recommendation No. 119, adopted the ILO standards relating to unjust cause. Since the implementation of the ILO Recommendation in France, the highest court of France, the Cour de Cassation, has undertaken the task of shaping the contours of what is meant by "genuine and serious cause."⁸⁵ When the rules are changed to promote a more equitable playing field, perceptions of the entire game are changed in the mind of the judicial system and society. This perception reaches beyond the concept of unionization, into the realm of pure humanity. There needs to be respect through employer accountability to the treatment of the employee and the investment of time and energy every worker puts into his or her labor. There is no exclusion of performing artists in the ILO. Even in the subjective world of artistic labor, these standards stand strong. Art may allow human beings to transcend the mind's world, but after the curtain falls we all must turn on the lights and live in the workplace. The question is, will this workplace reflect our fundamental rights as human beings, or will it transform the beauty of human life into simply a tool to be used up and thrown away. It is our choice as human beings to seize our time and consider the possibilities in such questions.

VII. EXPANSION OF "JUST CAUSE" PROTECTION IN THE UNITED STATES:
SHALL WE DANCE?

Expansion of this recognition of termination for "just cause" protection in the United States is necessary to create a strong and secure labor force that best expresses the democratic values of due process and self-determination. These values, that this country is proud to celebrate and espouse in its spoken ideals, should be carried out in its actions in the waltz of the everyday. "The United States is the only industrialized nation in the world that does not have national legislation protecting employees from wrongful discharge."⁸⁶ Now the action must follow the words, to demonstrate to the world that we support our workers and seek fundamental justice in the workplace. We need to show that we will support labor justice for each individual, and will help them when the employer has shut the individual out of their livelihood for frivolous reasons. At this stage in our country's development in labor, the courts feel uneasy about addressing

⁸⁵ Plasencia, *supra* note 73, at 315.

⁸⁶ See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 923 (1994). See also Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988).

even public policy in the work place for blatant violations. "Even if there appears to be some basis for a claim of wrongful discharge in violation of public policy, there is no guarantee that the court will recognize the public policy at issue."⁸⁷

We have seen how the collective bargaining agreements of dancers, musicians and other performing artists magically transform into employment-at-will contracts with the flick of the employer's wand of strange dissatisfaction. The worker is not at home in the fragile world of employment-at-will. There is no safety for them, no matter how dedicated they are. The rules are imposed unilaterally and the employees acquiesce to their daily strain.⁸⁸

There are those who declare that because the economy is booming, the worker has no business disrupting the flow of capital. This vision of humanity lives in the safety of abstraction. It separates the numbers from their source and the conditions under which that source of capital is living. "Extending a minimum amount of protection against arbitrary and capricious discharge to the vast majority of U.S. workers will not disadvantage U.S. employers in the international market because the United States would be joining the vast majority of industrialized nations that already have incorporated ILO unjust dismissal standards into their national legislation."⁸⁹ This world is a productive and creative one. The market is full of individuals. These individuals will shape the market's identity through the actions they take through time and space.

One might ask, if there is presently so little success in the world of arbitration for performing art employees who have "just discharge" provisions and still are discharged without cause, what difference would it make to have "just cause" provisions in the work contracts for dancers. It is true that these employees are "losing" arbitrations, even with the "just cause" provisions, but the fight to get "just cause" provisions in dance contracts transcends winning or losing. It is a small win of words whose very presence in a contract will deter some of the most heinous and destructive behavior of employers who exercise tyrannical cruelty upon their employees

⁸⁷ See Sprang, *supra* note 86, at 887.

⁸⁸ See James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435, 443 (1997). "Thus, employment at will, as many have noted, assumes, without an inquiry into the parties' intentions, the employer's power to make rules, interpret them unilaterally, and, most critically, discipline and discharge arbitrarily. Moreover, the modern easing of doctrines of consideration and mutuality did not necessarily apply to the employment relation."

⁸⁹ See Plasencia, *supra* note 73, at 318 (footnote omitted).

in the name of "artistic vision." The point is that in this dance world of desolation without "just cause" for termination, the ability to assert due process rights and demand accountability from the employer in the contracts for dancers is a fundamental part of existence in a true labor world. "Just cause" is as fundamental to a labor contract, as air is to breathe. The cynic may say that this is not worth fighting for because the dancer will still lose. But would that all life comes to death, stop us from dreaming? The struggle for a just workplace in dance is a difficult one. In this world, where dance workers find no protection for their investment of time through their labor, to achieve a "just cause" termination provision would make all the difference in the world. The key is to open up the doors of the workplace and let light shine upon the employer's dark decisions that befall the dancer.

VIII. CONCLUSION AND RECOMMENDATION

Although, many of these problems have been taken care of in Europe through statutes, in the United States we have not chosen to take such legislative steps. It does not appear likely that such legislation will be adopted in the near future. In the United States issues relating to the protection of just discharge are dealt with in collective bargaining agreements negotiated between employers and employees. In examining the current collective bargaining agreements negotiated on behalf of dancers by AGMA, there are various modifications that arguably could provide "just cause" discharge protection for dancers. In the following, one direction will be set forth that such contract modifications could take.

As discussed above, under the collectively negotiated master agreement, each individual dancer must as a condition of employment enter into an individual agreement with the employer. If the employer chooses not to execute this individual agreement, this dancer's employment is terminated. There are two aspects of the individual agreement: (1.) Rate of pay (2.) After the first year you are not an employee unless the employer signs an individual employment agreement. Instead of saying the decision of the employer to not re-engage must be for "just cause" and subject to the grievance and arbitration process, it makes more sense to sever any linkage between the individual agreement and continued employment. The individual agreement should have nothing to do with continued employment, only the individual wages to be negotiated above the minimum established in the Master Agreement. In the event that the individual artist and employer are unable to reach agreement on the individual's wage, then a mechanism for the resolution of the dispute can be established, such as a set percent increase over the preceding year or arbitration of wages, such as is done in some professional sports. Having removed any issue relating to re-engagement from the individual artist agreement the dancer is then provided in the

master agreement a real traditional “just cause” discharge provision. If an employer wishes to terminate a dancer’s employment, the dancer has the right to grieve such termination, and if necessary, go to arbitration regarding such termination. The employer will have to justify to the arbitrator that such termination was for “just cause.” If the employer fails in his burden to establish that the termination was for “just cause,” the dancer will be reinstated with back pay. This provides the dancer with the substantive right that any discharge be for “just cause,” and the procedural right to challenge any discharge through the grievance and arbitration process.

Right now, all the employer has to do is simply not sign the individual agreement and you are fired. They call it non-reengagement. Before they refused to sign it, you had a job. After they refused to sign it, you do not have a job. One of the more friendly contracts comes out of the Pacific Northwest Ballet.⁹⁰ Management gives an evaluation of each dancer four weeks before the contract expires and management is supposed to notify the dancer whether or not they will be re-engaged. If management intends to end the employment relationship, the dancer may write a letter to the management telling them why they think they should not be let go. The dancer truly does not have any say about the continuation of their employment because there is no mechanism in place to hold the employer accountable for discharging without “just cause.” The contract term will end and the employer will not sign the individual employment agreement. At evaluation time the dancer is notified that they have four weeks to be a dancer with the company, without any mechanism to challenge the decision. The Termination of Employment Convention, 1982 asserts that the employer must have “just cause” in order to “discharge an employee. The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”⁹¹

This struggle is for accountability. Employers must be held accountable for their actions. No more private suffering for the employee who has been discharged. If someone is going to be fired, at least make the employer stand witness and explain their actions in a dispute resolution forum. This is also a great opportunity, for the employer to be as large as their actions and to seize responsibility for their own lives and their own effect upon the world. There will still be cruel humans. But much cruelty takes place by virtue that outside forces can be blamed and the individual

⁹⁰ See PNWBA, *supra* note 22, at §1(5)(f).

⁹¹ See Convention Concerning Termination of Employment at the Initiative of the Employer, *supra* note 29, at art. 4.

who took such action simply places responsibility in something outside themselves. The choreographer may use "artistic inspiration" as their excuse to destroy another person's life. The arbitrator may defer to such an unknowable mystery as "inspiration." Or perhaps, it is simply finding someone "unsuitable" which tells the arbitrator to turn the other way. Regardless of these losses, without the presence of the provision, the story never gets to be witnessed by the arbitrator. The story is simply over and the dancer is left hanging without a reason for their end. The lack of closure to such an important occupational and life change is probably the wound that never heals. The question is left and there is no opportunity to address the problem. With a "just cause" provision there is one last dance, at least. One final encore before the curtain closes, and with this, the dance can become most meaningful. Every player will choose the role they wish to play, and all of their actions have built that character. It may seem like this last dance is a weak one. So often the dancer will fall in the end. But there is hope that, at times, the arbitrator will be able to pierce the artistic veil to find that the true motivation is not to serve an artistic vision but to serve illegitimate ends. Removal of the union activist or the person with the offending sexual orientation serves no artistic vision. In the performing arts we know that there are no small parts only small actors. So we give the employer an effective speaking role in this drama of life changing choices.

In the dancer's collective bargaining agreement the termination mechanism should be removed from the Individual Artist Agreement. Termination should be handled under a regular collective bargaining agreement "just cause" provision. The only thing that should be determined by the individual agreement is wages. The job continues and if a person is doing their job well they have a right to that job. If the employer wants to discharge an employee they should have "cause" and stand before a third party arbitrator to justify their reasons for discharging an employee. This is a job like any other job. The key is to protect the dancer, just like every worker has a right to be protected, by giving them a voice to be witnessed by the world and not be exploited for their labor in silence.

