At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law

J. Wilson Parker*

Table of Contents

I. Introduction: The Marginalization of Employment Law 349

II. Two Unlikely Solutions to the Conundrum of Employment-at-Will: The Implied Covenant of Good Faith and Legislative Reform 359

A. The Implied Covenant of Good Faith in the Employment-at-Will Setting 359
   1. Understanding the "Amorphous" Implied Covenant 360
   2. The Inherent Definitional Problem of the Implied Covenant 362
   3. The Problems of Application of the Implied Covenant 363

B. Legislative Reform of Employment-at-Will: Wrongful Discharge Legislation—The Deus Ex Machina of Employment Law 370
   1. An Overview 370
      a. Montana adopts "good cause" 371
      b. Montana's highest court equates "good cause" with "bad faith" 373
      a. META: An overview 376
      b. META: The legislation is illusory without judicial participation 378

* Professor of Law, Wake Forest University School of Law. B.A. 1974, Yale University; J.D. 1977, Duke University. The author wishes to thank Wake Forest Law School students Laura Kidwell, Tamura Coffey, and Marc Eppley for their diligent research, creative contributions, and unending enthusiasm for this project; Alan Palmiter and Ron Wright for their helpful critiques; and Deborah Leonard Parker for her support and patience.
III. A Proposed Analysis for the Judicial Reform of Employment-at-Will: A Return to Basic Contract and Tort Principles

A. Expanding Contract Protection for the At-Will Employee
   1. The Current Status of Implied-in-Fact Employment Contracts
   2. Expanding the Application of the Implied-in-Fact Contract Exception to the At-Will Doctrine

B. Expanding the Tort of Abusive Discharge for the At-Will Employee
   1. Current Judicial Approaches to Determining Sources of Public Policy that Justify Tort Liability in the Abusive Discharge Setting
      a. Public policy is found in a statute pertinent to the employment relationship that specifically prohibits discharge
      b. Public policy is found in a statutory right pertinent to the employment relationship
      c. Public policy is found when the employer orders the employee to violate a criminal or civil statute of general application
      d. Public policy is found in a criminal or civil statute or constitutional provision of general application
      e. Public policy is found in the courts' inherent authority, independent of a specific statutory or constitutional basis

IV. Conclusion
I. INTRODUCTION: THE MARGINALIZATION OF EMPLOYMENT LAW

[The Wizard of Oz]: "Just to amuse myself, and keep the good people busy, I ordered them to build this City, and my palace; and they did it all willingly and well. Then I thought, as their country was so green and beautiful, I would call it the Emerald City, and to make the name fit better I put green spectacles on all the people, so that everything they saw was green."

"But isn't everything here green?" asked Dorothy.

"No more so than in any other city," replied Oz; "but when you wear green spectacles, why of course everything you see looks green to you. The Emerald City was built a great many years ago, for I was a young man when the balloon brought me here, and I am a very old man now. But my people have worn green glasses on their eyes so long that most of them think it really is an Emerald City . . . ."

While academics may make the point more elegantly, the Wizard summarizes the relationship between attitudes and experience as well as anyone. The unknown bias, whether it affects instruments used in the construction of a building or attitudes that influence the development of the law, is problematic since assumptions which are unacknowledged and unaccounted for have a tremendous potential for skewing results.

Employment law is one area of the common law that has suffered in its development due to the influence of unacknowledged assumptions. For example, chaos has followed the development of employment-at-will, a concept which has dominated the past one hundred years of employment law. This concept, properly understood, holds that an employment relationship for an indefinite period will be presumed to be terminable at the will of the employer. As with most legal presumptions, this

---

2. For an insightful discussion of the effect of such subjectivity on legal decision-making and how literature can at least make one sensitive to its existence, see John Denvir, William Shakespeare and the Jurisprudence of Comedy, 39 Stan. L. Rev. 825 (1987). Professor Denvir points out that "[l]iterature can . . . show us the illusory quality of what we accept as reality." Id. at 839. Unawareness of this subjectivity can make legal decision-making particularly suspect:

This potential pluralism of interpretations is concealed by positivist jurisprudence's claim to objectivity, which presumes the contingent as natural. Literature also undermines legal theory's pretentions to science by overtly appealing to the emotions as well as the intellect. Any study of human relations, law included, that divorces itself from our emotional responses is a sham.

Id.
3. For a discussion of how the assumptions and unacknowledged biases of a society implicitly determine that society's version of reality, see generally Walter Truett Anderson, Reality Isn't What It Used to Be (1990).

---
presumption is supposed to be rebuttable by the party against whom it operates. However, many courts have transformed the concept from a presumption into a substantive rule of law.

Commentators and courts in the 1970s and 1980s scrutinized the concept of employment-at-will, exploring the origins of the rule, exposing the injustices perpetrated under the rule, and making various calls for reform. Courts in virtually every jurisdiction have addressed the issue of

(ending the traditional view that an employee-at-will can be fired for a good reason, a bad reason, or no reason at all). The controversy concerns what "bad" reasons will be tolerated by the law.

5. See generally Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence Manual ¶ 5 (1987) (stressing that presumptions are rules of procedural, rather than substantive, law). "The appropriate burden on the opponent [against whom the presumption operates] is to produce enough evidence so that a reasonable juror could be convinced that the contrary of the presumed fact is true." Id. at ¶ 5-5. The authors use the example of the common law presumption of negligence when there is proof that an article was delivered to a bailee in good condition and was returned in a damaged condition. Only when the bailee has failed to introduce sufficient evidence to permit a reasonable juror to find no negligence will the jury be told that the question of good condition prior to bailment is dispositive. Otherwise, the jury is to apply the "more likely than not" standard to the question of the bailee’s negligence. Id. at ¶ 5-6. Further, "[t]he word presumption should not be mentioned to the jury." Id.

6. This transformation has not only stunted the application of modern contract principles in employment-related disputes, see, e.g., Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (refusing to enforce a promise of "good cause" for dismissal in company manual), it has also produced bizarre and unfortunate results in cases where employers have overtly offended fundamental public policy but have been insulated from tort damages by courts’ viewing this “rule” as a carte blanche for employer misconduct. E.g., Comerford v. International Harvester Co., 178 So. 894, 895 (Ala. 1938) (holding that employment-at-will rule precludes a tort cause of action when plaintiff was fired because his wife rebuffed his supervisor’s sexual advances); see also Reich v. Holiday Inn, 454 So. 2d 982 (Ala. 1984) (relying on Comerford and finding no cause of action when employee was fired for following official corporate instructions by refusing to be a party to criminal activities). For a broader discussion of these issues, see infra part IIIA-B.


8. See, e.g., Leonard, supra note 7, at 657 (finding that discharges can be predicated on bad or morally wrong reasons under the at-will doctrine); Peter S. Partee, Reversing the Presumption of Employment-at-will, 44 Vand. L. Rev. 689, 707-08 (1991) (finding the at-will doctrine burdens employees with predicting the probability and costs of arbitrary discharge); Venessa F. Kuhlman-Macro, Note, Blowing the Whistle on the Employment-at-will Doctrine, 41 Drake L. Rev. 339, 340 (1992) (finding that at-will doctrine leaves whistleblowers remediless); Note, Protecting Employees-at-Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931, 1937-38 (1983) (finding that lower level employees receive less protection from public policy exception than upper level employees).

9. See, e.g., Leonard, supra note 7, at 642-47; Cheryl S. Massingale, At-Will Employment: Going, Going . . . , 24 U. Rich. L. Rev. 187, 204 (1990); Partee, supra note 8, at 708-11. While abandoning or reversing the at-will presumption may be ideal, this Article assumes that the at-will presumption will remain the majority rule for the foreseeable future. For a discussion of the need for courts to at least ameliorate their application of the at-will doctrine, see supra
the legal rights of employees who work for indefinite terms. In spite of the wealth of scholarship on this topic, courts continue to be fragmented in their approaches and many opinions are virtually incoherent in their application of basic contract and tort principles. Why does this area continue to be so problematic?

The contemporary confusion may stem from historical and ideological opposition to employee rights.\(^\text{10}\) Without question, ideological opposition to employee rights was a significant factor in the development of employment law.\(^\text{11}\) Even proponents of employment-at-will concede that it "was the natural offspring of a capitalist economic order."\(^\text{12}\) Some opponents contend that the evolution of employment law proves that judges are mere "legal surrogates"\(^\text{13}\) through whom the dominant capitalist ideology is "filtered[,] . . . purified . . . [and] sanctified as the outcome of eminently fair procedures, and solidified as part of society’s core common-sense normative beliefs."\(^\text{14}\) This Article, however, eschews purely political explanations in the hope of offering well-meaning,
thoughtful, real-world jurists a feasible way out of the current morass.\textsuperscript{15} The Marxist critique is ultimately paralyzing; if American courts must reject capitalism before addressing the inequities of employment-at-will, the doctrine will remain unjust and incoherent indefinitely.

Contemporary courts are struggling with an incoherent and unjust employment-at-will doctrine because of the marginalization of employment law. "Marginalization" means that, for a long period, lawyers and courts alike have acted as if employment law were something "special," existing outside the bounds of ordinary contract and tort law. While the common law governing commercial exchanges developed more or less apace with industrialization\textsuperscript{16} and consumerism,\textsuperscript{17} employment law remained largely stagnant. Only in the last twenty years has there been a significant amount of common law litigation in employment law. This litigation has been marked by a tentative development of theory and inconsistent outcomes. This Article proposes that judges, academics, and practitioners end this confusion by consciously demarginalizing employment law through the energetic application of adequate legal doctrines already existing in contract and tort.\textsuperscript{18} This solution should be welcomed by mainstream

\textsuperscript{15} The premise is that while legal doctrine is indeterminate and does not dictate decisions, in a given context it does describe a range of possible decisions in contract and tort. The object, then, is to challenge and ameliorate judges' contextual bias. This will allow a "practical" solution for judges, as distinguished from a "pragmatic" one that focuses on a quixotic search for a metaphor to describe and prescribe illusory normative values and epistemological technique. Compare Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 114-24 (1984) (describing how contextual analysis of indeterminate doctrine yields fundamentally contradictory results) with Daniel C.K. Chow, A Pragmatic Model of Law, 67 Wash. L. Rev. 755, 818 (1992) (advocating allegiance to a jurisprudential standard that "consists of normative principles that cohere with as much of the existing web of beliefs as possible").

\textsuperscript{16} Compare Stark v. Parker, 19 Mass. 267, 275-76 (1824) (relying on formalistic contract principles to deny a laborer who left term employment before end of term recovery for performance rendered) with Hayward v. Leonard, 24 Mass. 181, 185 (1828) (noting that the same court allowed a commercial builder to recover for partial performance because to do otherwise would make "a hard case indeed"). For a revealing discussion of these and other cases showing the early marginalization of labor issues, see Holt, supra note 10.

\textsuperscript{17} As consumers became an economic force, courts found it necessary to shed formalism and apply standards of reasonable expectations and merchantability to consumer products liability cases. Compare Cushing v. Rodman, 82 F.2d 864, 870 (D.C. Cir. 1936) (extending the law merchant to acknowledge an implied warranty of wholesomeness to restaurant patrons) and MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (obliterating privity of contract doctrine to allow automobile purchaser to recover in tort from manufacturer) with Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 87-88 (N.Y. 1983) (refusing to recognize common law tort of wrongful discharge in the absence of legislation).

\textsuperscript{18} It is hoped that these waters have not been permanently tainted by Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357 (1983) (calling for a retreat from progressive labor legislation and a return to nineteenth century common law laissez faire judicial minimalism). For a different perspective on the social impact of the judicial minimalism practiced in the nineteenth century and praised by Epstein, see Charles Dickens, Hard Times (Oxford Univ. Press 1955) (1854) (depicting the atrocities that took place when manufacturers where able to operate as
jurists who have been struggling for a coherent approach that does not embrace allegiance to either employers or employees.

The marginalization of employment law begins in law school. Law students arrive to law school far more malleable than they would like to admit. Three years of education impart implicit norms about the legal world. As students acquire a new base of "sophisticated" legal knowledge to replace their "naive" lay view of the world, this "legal knowledge separates what is thinkable from what is unthinkable, what is practical from what is impractical. It identifies what is deemed important and attempts to distinguish it from the trivial." However, in the 1960s, when current judges were probably being introduced to the law, a first year law student could have taken an entire year of courses without encountering a single case involving the employment relationship. Even today, tort casebooks largely ignore employment law. Contracts books have been more responsive to the developments of the last twenty years, but they, too, overwhelmingly use commercial transactions as the paradigm of contract law. Like the Jerzy Kosinski character Chance the gardener, who could deal with the outside world only with reference to what he had seen on television, law students inevitably assimilate the norms of their "legal"

20. A limited but representative survey of tort and contract casebooks from the era is revealing. See Leon Green et al., Cases on the Law of Torts (2d ed. 1971) (lacking wrongful discharge cases); Leon Green et al., Cases on the Law of Torts (1st ed. 1968) (lacking wrongful discharge cases with the exception of a half-column in the index under "Horse and Buggy Traffic"); Charles Gregory & Harry Kalven, Jr., Cases and Materials on Torts (2d ed. 1969) (same); Page Keeton & Robert E. Keeton, Cases and Materials on the Law of Torts (1971) (same); Friedrich Kessler & Grant Gilmore, Contracts Cases and Materials (2d ed. 1970) (containing no at-will employment cases); John E. Murray, Cases and Materials on Contracts (1969) (same); William Prosser & John Wade, Cases and Materials on Torts (5th ed. 1971) (lacking wrongful discharge cases); Harold Shepard & Harry Wellington, Contracts and Contract Remedies (4th ed. 1957) (containing no employment-at-will cases).
training as reference points as they confront “legal” problems in their careers. “As a cultural arbitrary then, professional training in law embodies a set of dispositions and outlooks that creates a practical consciousness which simultaneously directs and restricts behavior.”24 Having survived first year without exposure to the problems of employees in this new legal universe, students are unlikely ever to learn about them unless they seek out the “specialty” of upper division employment law courses.25 Upon entering the legal profession and practicing law, the average practitioner is unlikely to become involved in employment law. If the lawyer later becomes a judge, employment law retains a boutique image; it continues to color the judge’s perception of employment law, just as the Wizard’s green glasses colored Oz. The unacknowledged glasses tell the wearer that employment law is different, that common-law rules are not meant to be applied in this setting. “[L]egal knowledge represents a form of cultural capital... Legal thinking, as with other forms of knowledge, represents a cultural code that is reified within the educational process. The form that this knowledge is given within law school plays a critical role in reproducing legal practice.”26 It is time to take off the green glasses, look at the underlying concerns involved in the employment setting without this skewed perspective that employment law is a boutique area of the law, and apply common-law principles in a straightforward manner.

Modern employment law revolves around the legal rights of nonunion employees who work without term contracts. There have been three basic common law responses to the issues raised by these employees’ discharges: (1) implied-in-fact analysis sounding in contract; (2) public policy analysis sounding in tort; and (3) implied covenant of good faith analysis, which can sound in either contract or tort. The first two approaches are coherent and should be expanded. The third approach has proved problematic and should be abandoned.

First, courts infrequently enforce contract claims by employees who maintain that their indefinite term contracts contain limitations on the employers’ right to discharge. These cases typically involve employee handbooks and oral assurances of job security. A court’s willingness to find implied-in-fact terms in such contracts by examining the parties’ objective behavior is rooted in fundamental contract principles. Implied-in-fact contract cases unfortunately have been marked by confusion. Rather than enforce the objective manifestations of the parties’ intent, as courts routinely do in commercial settings, courts have been diverted by concerns over the impact of enforcing employer promises on the culture of at-will employment.28 These concerns are misplaced; the courts simply have no

25. This tacit specialization also occurs with tax law, but is appropriate in that field given tax law’s entirely statutory origin and application.
27. Perritt, supra note 4, ¶ 1.2, at 4.
28. For a discussion of the unnecessary deference given to the at-will presumption, see
AT-WILL EMPLOYMENT LAW AND THE COMMON LAW

basis for this distortion of traditional contract principles.29

Second, many courts infrequently utilize tort liability to protect at-will employees from truly antisocial employer conduct. In these cases, courts utilize basic tort principles to impose liability when they determine that the abusive or wrongful discharge30 violates public policy. The tort of abusive discharge is readily classified as a prima facie tort.31 Nonetheless, its development has been marked by agonizing judicial searches for “proper” sources of public policy as courts decide whether a given discharge should be rectified. This Article proposes that courts should impose tort liability whenever the reason given for the employee’s discharge would be held to violate public policy if it were a condition in a contract for a specified duration.32 Determining the illegality of conditions in the contract setting is a traditional judicial function; there is no reason not to apply this analytical technique as the method to determine public policy in the employment context.33

Instead of relying on ordinary doctrines of tort and contract, however, some courts have enforced an implied covenant of good faith and fair dealing as an implied-in-law exception to the employment-at-will doctrine.34 This analysis has been used in two widely divergent situations. When a court simply enforces an inherent duty of each party to the contract to restrain from breaching the manifest terms of the contract, its use is unremarkable. Traditional contract law is the essential foundation of this implied covenant exception. Its use is problematic, however, when a court implies a duty of good faith into an at-will contract that operates as a substantive limitation on the employer’s right to discharge the employee. This latter analysis reflects a very activist judicial posture that essentially transforms the at-will contract into a just cause contract. Many courts may fear that such judicial action is an arrogation of power, invading either the parties’ understanding of the contract or the legislature’s authority to dictate economic policy.

Employees cannot rely upon the implied covenant as an independent basis of protection in at-will contracts precisely because its invocation calls for a tremendous act of will on the part of a court. Generally, courts are self-conscious of their power to determine unilaterally, on a case-by-case basis, the propriety of employer conduct. Consequently, courts are unlikely

supra notes 5-6 and accompanying text.

29. See infra part III.A.
31. See Restatement (Second) of Torts § 870 (1982) (discussing the general principle of liability for intended consequences, which has been called a prima facie tort); see also id. at Reporter’s Notes 87-89 (citing cases of wrongful discharge).
32. See infra part III.B.2.
33. It is disingenuous for a court to shrink from declaring the public policy of a state in the absence of legislation when it blithely does so if that policy favors employers. The presumption of employment-at-will and its development into a “rule” is entirely judge-made law.
34. Perritt, supra note 4, § 1.2, at 4.
to invoke the implied covenant in any but the most exceptional cases.

This Article examines the development of these three doctrines in
detail. This development illustrates the costs of employment law’s
"boutique" status. Most courts have taken halting, and often irrational,
steps toward addressing employment discharges because they have not seen
them as garden-variety settings for the straightforward application of
common law principles. Many courts have been reluctant to apply the
more straightforward causes of action of intentional tort or implied-in-fact
contract, looking instead to the more exotic implied covenant of good
faith or declaring their impotence and calling for corrective legislation.
This Article concludes that such reluctance is unjustified.

The heart of judicial trepidation rests with a reluctance to interfere
with business judgment—unquestionably a legitimate concern. However,
this factor is only one of the factors to be considered as courts mediate
employment disputes. Courts should also consider fairness to employees
and the protection of society’s norms from employer overreaching. Courts
should not sacrifice traditional judicial functions at the altar of employer
hegemony.

The above discussion can be represented graphically. Figure 1
represents the number of at-will employees who are discharged each year;
approximately 92.5% are discharged for cause, while perhaps 7.5% suffer
unjust discharges. As Figure 1 demonstrates, the overwhelming majority

35. It is not clear how many actual discharges these percentages represent; some studies
suggest that there are approximately two million discharges per year, of which 150,000 would
be considered unfair under the standards applicable in unionized industries. Model
Termination Act Would Improve Remedies Available To Fired Employees, St. Antoine Says,
Remedies]. These figures are naturally somewhat speculative. Some put the number of unjust
discharges as high as 300,000 per year, Cornelius J. Peck, Unjust Discharges From
Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1, 10 (1979), while others put
the figure at 150,000 to 200,000. Randall Samborn, At-Will Doctrine Under Fire, Nat’l L.J.,
of discharges are not actionable because they represent a necessary exercise of the employer's business judgment.

Unjustly discharged employees should be protected by the law. It would seem likely that most of these workers would be bringing claims in the nature of breach of contract; alleging that the employer had not honored its promises when it terminated the employee. It would also seem that truly antisocial behavior would be involved in only a limited number of the discharges. Only this latter category should prompt tort liability.

Figure 2 shows a diagram of the current treatment of those employees within the actionable discharges shown in Figure 1.

![Figure 2: The current treatment of valid unjust dismissal claims](image)

The labels in Figure 2 represent the following situations:

- **T1)** Unjustly discharged employee wins in tort where court finds employer violated public policy;
- **T2)** Unjustly discharged employee wins in tort where court finds employer breached implied covenant of good faith;
- **T3)** Unjustly discharged employee loses in tort where court does not recognize implied covenant and refuses to delineate public policy;
- **K1)** Unjustly discharged employee loses in contract where court does not recognize implied covenant and refuses to find contract implied-in-fact;
- **K2)** Unjustly discharged employee wins in contract where court recognizes substantive implied covenant of good faith;
- **K3)** Unjustly discharged employee wins in contract where court finds contract implied-in-fact.

Most of these discharges will involve breaches of contract only. Most

---

36. These diagrams are admittedly impressionistic. In talking with a sampling of employment practitioners and professors, all said there was no way to know for certain how often employer conduct occurs that would prompt tort recovery under the analysis offered in this Article, but a consensus seemed to think that 25% of the discharges was a reasonable estimate.
courts have premised contract liability in this setting upon an implied-in-fact analysis; a lesser number have seen such cases to involve the question of whether a contract claim could be brought for the breach of the implied covenant of good faith. The great majority of jurisdictions recognizing tort liability have seen discharge cases to involve violations of public policy. Finally, a few jurisdictions have allowed tort liability for the breach of the implied covenant of good faith.

Figure 3 represents this Article's proposed resolution of these issues. Under the proposed analysis, courts will resort to traditional contract and tort principles instead of the concept of an implied covenant of good faith; thus, unjustly discharged employees will be granted relief. Courts should determine contract liability by looking at the objective manifestations of the parties. Courts should construe terms regarding job security as implied-in-fact if the parties' objective behavior so indicates. The implied covenant should only be available as a contractual claim for the enforcement of manifested terms, not as an independent basis to create contract liability.

Contract claims should be able to be brought regarding nonterm employment contracts in the same manner as they are brought for commercial goods. Courts should replace the implied covenant tort and vigorously enforce a tort which grounds public policy on traditional judicial standards of illegal conduct. Tort liability that is premised on a clear standard will protect employees who are injured by truly antisocial employer conduct, while employers need not fear tort liability premised upon determinations of subjective bad faith.

Part II of this Article will evaluate two proposals which currently enjoy support as solutions to the problems posed by employment-at-will: the

---

37. It should be pointed out that tort liability is expected to be at issue in only about 1.9% of the total number of discharges—hardly a figure that should provoke alarm. This figure is reached by multiplying 25% (projected number of public policy tort cases) by 7.5% (number of actionable discharges) (.25 x 7.5% = 1.875%). 1.875% x 2,000,000 discharges equals 37,500 possible tort cases a year. 37,500 incidents would represent about 3 abusive discharges per state per working day.
implied covenant of good faith and legislation. Both solutions are found wanting. Part III then evaluates courts’ applications of implied-in-fact contract and public policy tort analysis in this area.

The purpose of this Article is to articulate proposals to expand the traditional contract and tort principles into the employment context just as those principles are applied in other settings. "Employment law" should not be quarantined. The same law that governs a consumer purchase or personal injury suit should also apply to one’s livelihood. The confusing distinctions which have arisen over the years may be attributed to an assumption that the implied covenant of good faith and fair dealing adequately protects employees from arbitrary employment decisions. By limiting the application of the amorphous implied covenant and breathing life into public policy and implied-in-fact contracts, courts would be much better equipped to deal with the competing interests of the employee and employer.

II. Two Unlikely Solutions to the Conundrum of Employment-at-Will: The Implied Covenant of Good Faith and Legislative Reform

This Part will focus on two different strategies that are currently being tried in various jurisdictions in response to judicial discomfort with the current confusion in employment law doctrine. Some jurisdictions have attempted to invoke the contract principle of "good faith" as a substantive remedy. One state, Montana, has attempted legislative reform. As discussed below, both of these strategies are unsatisfactory, unnecessary, and could contribute to the further marginalization of employment law.

A. The Implied Covenant of Good Faith in the Employment-at-Will Setting

The use of the implied covenant of good faith is perhaps the most problematic response to improper employee discharges. Interestingly, some of the earliest cases challenging wrongful discharges were brought under this theory, possibly because the attorneys and courts involved thought that traditional tort or contract principles could not apply. Some commentators have advocated the implied covenant analysis as the best solution to the employment law conundrum. On the contrary, this Article advocates that the implied covenant analysis be abandoned.


I. Understanding the "Amorphous" Implied Covenant

The covenant of good faith and fair dealing inherent in all contracts presents the courts with the most nebulous judicial exception to the employment-at-will doctrine. Broadly stated, the covenant of good faith and fair dealing is a duty imposed by law that requires each party to respect the rights of the other to receive the benefits of the contract and to avoid conscious injury to the other party. A breach of the covenant results when the promisor, by his bad faith conduct, jeopardizes or destroys a promisee's opportunity to reap the expected benefit of the bargain.

In the past, courts have applied the covenant to many different types of contractual relationships, especially in commercial and insurance

40. Restatement (Second) of Contracts § 205 (1981) (stating that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

41. Perritt, supra note 4, § 4.11 (stating that the implied covenant idea is broad enough in theory to impose on employers an obligation to dismiss only for good cause as a matter of law and that it is a small step to translate good faith and fair dealing into terminating employment only for legitimate employment related reasons, i.e., good cause); id. at § 4.23 (stating that the implied-in-law covenant of good faith is breached when an employer terminates an employee without a reason rationally related to the employer's business interests); see also Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1836-37 (1980) (arguing for a broad reading of the covenant that could eviscerate the whole at-will doctrine: "By implying a duty to terminate only in good faith, courts can provide a private remedy for wrongful discharge to replace the at will rule.") [hereinafter Duty to Terminate].

These endorsements of the implied covenant exception, although well-meaning, seem overly optimistic for two reasons. First, because it is so vague, even courts that purport to adopt the implied covenant can hardly be held to it on a case by case basis. Second, well-intentioned but conservative courts may look at the seemingly boundless nature of the implied covenant and shrink from adopting it. Courts may be fearful of the charge that they are arrogating legislative authority if they stray too far from traditional common law remedies. Such reluctance is unfortunate because legislative inaction in addressing employment issues is more often the result of legislative gridlock that an endorsement of the status quo.

42. Implied-in-law contracts are not based on the parties' agreements but on the court's conception of what should have been an element of their agreement. Contracts implied by law are not contracts at all, but obligations imposed by law to do justice even though it is clear that no promise was ever made or intended. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 1-12, at 19 (3d ed. 1987); see also Bradkin v. Leverton, 257 N.E.2d 645 (N.Y. 1970) (stating that implied-in-law contracts are obligations which the law creates, in the absence of an agreement).

43. See Brown v. Superior Court, 212 P.2d 878, 881 (Cal. 1949) (stating that in every contract there is an implied covenant of fair dealing that neither party will injure the other); Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 690 (Ill. 1958) (noting that all contracts imply good faith); Shaw v. E.I. DuPont De Nemours & Co., 226 A.2d 903, 906 (Vt. 1967) (stating that an implied covenant of good faith and fair dealing prevails in all contracts); Restatement (Second) of Contracts § 205 (1981) (imposing duty of good faith and fair dealing).

44. See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 234 (1968) (discussing the possible ways in which bad faith may evade the spirit of the deal).

45. For collection of cases, see Charles M. Louderback & Thomas W. Jurika, Standards
Recently, some courts have extended their use of the implied covenant into the employment context as a miracle cure for employment law disputes. They have expanded the covenant's application blindly, however, without regard to the propriety of the theory. Imposed in the employment setting, the implied covenant creates a duty for the employer to deal with the employee in good faith. Specifically, it requires that employers not discharge employees in bad faith or for an unjust cause if the discharge would deprive the employee of the benefits of the agreement. An employer's breach of the covenant of good faith gives rise to a suit for unjust dismissal by the employee. The underlying rationale for imposing the covenant of good faith in the employment context is that it is necessary to prevent the exercise of arbitrary power by employers who are in a superior bargaining position for Limiting the Tort of Bad Faith Breach of Contract, 16 U.S.F. L. Rev. 187, 194-96 & nn. 31-40 (1982). See also Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 369 n.1 (1980) (listing cases that recognize a general obligation of good faith performance).

For Further Discussion of this topic, see infra part IIA3.

50. Fortune, 364 N.E.2d at 1251.
51. Id. at 1257; Hall v. Farmers Ins. Exch., 713 P.2d 1027, 1029-30 (Okla. 1985); Restatement (Second) of Contracts § 205 (1981).
over their employees. Employees are often vulnerable to unjust contracts because they may lack the necessary training and education to qualify for alternative employment.

Some courts have redressed this imbalance by applying the implied covenant to wrongful discharge cases. In fact, two recent commentators, Henry Perritt, Jr. and Cornelius Peck, acknowledge the trend in a minority of jurisdictions to espouse the implied covenant as the remedy to the confusion in wrongful discharge actions. In reality, however, the implied covenant is simply a court's own interpretation of either tort public policy principles or contract principles of fair dealing. Therefore, their reliance on the implied covenant is unnecessary. A more concrete approach would be simply to articulate their findings in terms of the public policy exception or the implied-in-fact exception to the at-will doctrine. The problems inherent in the implied covenant demonstrate its limitations and warrant a more vigilant application of the public policy and fairness principles which ultimately should govern abusive discharge cases.

2. The Inherent Definitional Problem of the Implied Covenant

Most jurisdictions have declined to impose the implied covenant of good faith and fair dealing as a substantive limitation on the employer's right to discharge because of the vast spectrum of troubles the implied covenant presents. First, some jurisdictions have absolutely rejected the duty of good faith because the implied covenant requirement is simply too broad an exception to the at-will doctrine. In Parnar v. Americana Hotels, Inc., the court refused to hold that there was an implied covenant to

---

53. See Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (recognizing that the employer has superior bargaining power and that the employee usually has no choice but to accept the terms that employers offer); see also Lawrence E. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1408-10 (1967).
54. See Epstein, supra note 18, at 1395; Blades, supra note 53, at 1401-13.
56. Cornelius J. Peck, Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge, 66 Wash. L. Rev. 719, 739-43 (1991) (stating that the use of the implied covenant on a case-by-case basis would provide a more fair determination of wrongful discharge cases); see Perritt, supra note 39, at 690, 743 (noting that California, Massachusetts, and Montana are the only states that rely heavily on the implied covenant in wrongful discharge cases, but calling for the expansion of the implied covenant's application).
57. See Brian F. Berger, Note, Defining Public Policy Torts in At-Will Dismissals, 34 Stan. L. Rev. 153, 172 (1981) (arguing against application of the implied covenant in the employment context); see also Perritt, supra note 39, at 690 (stating only California, Massachusetts, and Montana apply the implied covenant in wrongful discharge setting).
58. See Morris v. Coleman Co., 738 P.2d 841, 851 (Kan. 1987) (stating that the duty of good faith and fair dealing is too broad and should not be applicable to at-will contracts); Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221, 224 (S.D. 1988) (Sabers, J., dissenting) (rejecting "transplantation of covenant of good faith and fair dealing into the foreign soil of the employment at-will doctrine").
59. 652 P.2d 625 (Haw. 1982).
only terminate in good faith in all employment contracts. The court reasoned that to do so would "subject each discharge to judicial incursions into the amorphous concept of bad faith." Other courts have refused to adopt the implied covenant not only because of the difficulty of defining "bad faith," but also because the implied covenant could be easily construed to require that employers dismiss only for just cause. Still other courts have summarily rejected, without analysis, the implied covenant of good faith in the employment context, even when there was evidence of an express or implied-in-fact contract.

3. The Problems of Application of the Implied Covenant

The difficulties articulated above clearly show the inherent handicaps of the implied covenant which warrant its judicial abrogation. Moreover, the problems facing the minority of jurisdictions which do recognize the

60. Id. at 629; accord Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987) (refusing to impose a legal duty to terminate at-will employee in bad faith upon employers); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1086 (Wash. 1984); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1985) (quoting Parnar, 652 P.2d at 629).

61. The difficulty of defining good faith diminishes the attractiveness of establishing the covenant of good faith and fair dealing as an exception to the at-will rule. See Perritt, supra note 4, § 4.23 ("[T]here is not possible to offer a definition of the covenant of good faith and fair dealing that makes it an intelligible alternative theory for wrongful dismissal . . . ."); J.C. Pletcher, Comment, Employment-At-Will and Wrongful Discharge in Oklahoma, 23 Tulsa L.J. 495, 500 (1988).

62. See Foley, 765 P.2d at 400 n.39 (implying that virtually any firing could provide the basis for a pleading alleging the discharge was in bad faith under the cited standards).


implied covenant of good faith and fair dealing in the employment context offer insightful reasons for the abandonment of this amorphous theory.

California illustrates one of the most pervasive problems in the area of wrongful discharge; courts have interpreted the three exceptions to the employment-at-will rule to overlap in such a way as to cause tremendous confusion. This overlapping has occurred due to the reluctance of some courts to expand their current public policy and implied-in-fact exceptions. These courts rely upon the implied covenant of good faith as a catch-all to reach improper employer conduct that does not fit neatly into their narrowly interpreted public policy and implied-in-fact exceptions. This refusal to expand traditional common law theories results in identical situations being labeled a breach of the implied covenant by some courts and a breach of an implied-in-fact contract or a violation of public policy by other courts. As a result, employers and employees alike are confused as to how to structure their agreements to achieve their goals.

Two California cases involving employees who were fired after long terms of employment, assurances of security, and a solid work record, exemplify the courts' confusion between the implied covenant and traditional contract remedies. Both employees were allowed recovery—but under different theories. In Cleary v. American Airlines, Inc., the court found a breach of the implied covenant of good faith based on the employee's eighteen years of service and an inferred promise from handbook provisions articulating a "just cause" standard. However, in Pugh v. See's Candies, Inc., the court found a breach of an implied-in-fact contract where an employee of thirty-two years was fired by his employer, whose personnel policies and practices indicated assurance of continued

65. See, e.g., Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983) (holding employment contract contained implied covenant of good faith and fair dealing); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985) (stating implied covenant of good faith does not require a good cause termination); Cleary v. American Airlines, 168 Cal. Rptr. 722, 727-28 (Ct. App. 1980) (noting that fellow employees may not be held accountable for employer's breach of covenant); Magnan v. Anaconda Indus., 479 A.2d 781, 786-87 (Conn. 1984) (recognizing need for something more than simply the absence of good cause for discharge); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256-57 (Mass. 1977) (finding an implied covenant of good faith even though the contract was terminable at will).

66. These jurisdictions have defined the parameters of the covenant in various ways to curtail the absolute right of the employers to discharge at-will employees. Some jurisdictions have imposed the implied covenant only in narrow circumstances, while other jurisdictions have construed the covenant broadly by essentially prohibiting discharges without just cause. These inconsistent applications have led to confusing results.


68. Cleary, 168 Cal. Rptr. at 729.

69. Id.; see also Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.) (finding breach of implied covenant because long term employee was discharged without notice or compliance with customary procedures), cert. denied, 459 U.S. 859 (1982).

70. 171 Cal. Rptr. 917 (Ct. App. 1981).
AT-WILL EMPLOYMENT LAW AND THE COMMON LAW

employment. The Cleary court’s reliance upon the implied covenant for finding a breach of the employer’s handbook provisions was unnecessary. In both cases, the employers’ policies indicated an implied-in-fact promise to refrain from arbitrarily dealing with its employees. Therefore, Cleary easily could be recast as an implied-in-fact case by relying on the same principles as the Pugh case.

Montana courts also floundered and misapplied the implied covenant theory in cases prior to the passage of state legislation dealing with employee discharges. In Gates v. Life of Montana Insurance Co., the Montana Supreme Court stated that the implied covenant was breached by the employer’s failure to follow policies in the personnel handbook. The court found that the handbook policies were not enforceable on a traditional contract theory, but that the handbook bound the employer to the handbook policies as a matter of the “covenant of good faith and fair dealing” since the policies created an expectation of job security. Likewise, in Dare v. Montana Petroleum Marketing Co., the Montana Supreme Court again found a breach of the implied covenant where the employee had relied on objective manifestations of job security by the employer. The court stated that the covenant was not limited to personnel handbook promises, but existed whenever an employer made any assurance of continued employment. In Gates and Dare, the employers’ policies and conduct should have constituted enforceable implied-in-fact promises. The Montana Supreme Court’s reliance on the implied covenant was not necessary to permit recovery for these employees.

Another example of the misguided application of the implied covenant when traditional contract principles are adequate is found in jurisdictions which hold that the covenant is breached when the employer discharges the employee to avoid paying earned commissions or other monetary benefits. These courts are doing no more than giving the concepts of unjust enrichment and quasi-contract a new label. In Fortune v.

71. Id. at 925-27.
72. See e.g., Kerr v. Gibson’s Prods. Co., 733 P.2d 1292, 1294 (Mont. 1987) (stating that employee can invoke the covenant of good faith and fair dealing); Gates v. Life of Montana Ins. Co., 638 P.2d 1063, 1065-67 (Mont. 1982) (holding that representations in the personnel handbook were not enforceable as contract rights but could invoke covenant of good faith and fair dealing).
73. Gates, 638 P.2d at 1067.
74. Id.
75. 687 P.2d 1015, 1020 (Mont. 1984). The employer’s conduct indicated satisfaction with the employee’s performance and the employer had given the employee raises. Id.
76. Id.
77. Montana’s attempt to resolve this confusion via legislation is discussed infra part II.B.
National Cash Register Co., the case most often cited for this proposition, an at-will employee was fired to prevent him from receiving a large commission on a multi-million dollar sale. The Supreme Judicial Court of Massachusetts held that the employer’s actions breached the implied covenant of good faith. Subsequent Massachusetts decisions have limited the imposition of the implied covenant to situations where the employer has acted to deprive the employee of compensation earned by past performance. Other states have followed Massachusetts and have found that when an employer wrongfully withholds compensation from a discharged employee, the implied covenant of good faith is breached.

Again, however, the implied covenant adds nothing to the analysis of these withheld compensation cases. In fact, an implied-in-fact contract analysis can be used to recast withheld compensation cases where courts have granted employees recovery on an implied covenant theory.

81. Fortune, 364 N.E.2d at 1258.
83. See Wakefield v. Northern Telecom, 769 F.2d 109, 112 (2d Cir. 1985) (stating New York law permits implied covenant claim for a dismissal motivated by desire to deprive employee of commissions); Mitford v. de Lasala, 666 F.2d 1000, 1000 (Ala. 1983) (holding implied covenant of good faith and fair dealing prevented employer from firing employee to prevent him from receiving his share of the profits); Wagenseller v. Scottsdale Memorial Hosp., 710 F.2d 1025, 1040 (Ariz. 1985) (stating covenant protects employees from discharge motivated by trying to avoid payments already earned but not tenure required to earn pension and retirement benefits); Khanna v. Microdata Corp., 215 Cal. Rptr. 860, 869 (Ct. App. 1985) (finding breach of covenant of good faith for the firing of Khanna in retaliation for bringing a lawsuit against his employer regarding a sales commission contract since the firing was an intentional act to frustrate Khanna’s enjoyment of his contract rights); Hendrick v. Acadiana Profile, 484 So. 2d 242, 243 (La. Ct. App. 1986) (finding sales representative entitled to commissions for issues which had been scheduled to be published prior to her resignation because equitable considerations and the requirement of good faith in contracts preclude unjust enrichment of employer who had benefited from her work performance).
84. See, e.g., Maddaloni v. Western Mass. Bus Lines, 438 N.E.2d 351, 356 (Mass. 1982) (holding that employee discharged in bad faith was entitled to commissions reasonably expected to be paid during employment, but lost wages and fringe benefits unrelated to past services were not recoverable); Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21, 29 (Mass. 1981), aff’d, 461 N.E.2d 796 (Mass. 1984) (finding that employee was not entitled to normal contract damages, but could recover identifiable, reasonably anticipated future compensation based on
could view the right to withheld compensation as a contractual benefit which is independent of continuing employment. In other words, the right to withheld compensation survives termination of the employment relationship. Traditional contract principles such as quasi-contract and substantial performance and other restitutinary principles should be applied to allow the employee to recover his withheld compensation and to prevent the unjust enrichment of the overreaching employer. These traditional contract principles can adequately protect the employee, making the application of the implied covenant unnecessary.

Perhaps the most obvious group of implied covenant cases which can be recast and better understood are those in jurisdictions which have found that a public policy violation constitutes a breach of the implied covenant. For example, New Hampshire and Wisconsin courts lead the jurisdictions which require a finding that the employer violated public policy as an inextricably intertwined element of a breach of the implied covenant of good faith. These jurisdictions have essentially merged the good faith covenant and the wrongful discharge tort. New Hampshire courts require a finding that, first, the employer contravened an important public policy and, also, that it acted in bad faith before finding a breach of the covenant of good faith. Likewise, in Brockmeyer v. Dun & Bradstreet, obligation of good faith and fair dealing).

85. See, e.g., Wakefield, 769 F.2d at 112-13 (stating that an unfettered right to avoid payment of earned commissions is counterproductive to the purpose of the contract); Hejmadi v. AMFAC, 249 Cal. Rptr. 5, 19 (Ct. App. 1988) (stating that previously earned sales commissions were a contractual right independent of continuing employment and that, if an at-will employee is dismissed to deprive him of commissions, a cause of action would lie against the employer); see also 1A Arthur L. Corbin, Corbin on Contracts § 192 (1963) (parenthetical); Elizabeth T. Tsai, Annotation, Promise by Employer to Pay Bonus as Creating Valid and Enforceable Contract, 43 A.L.R.3d 503, 507-08 (1972) (stating that a promise to pay compensation conditioned on continuing employment creates a valid and enforceable contract).

86. See Perritt, supra note 4, § 4.23 (interpreting the implied covenant to be breached only when the employer has acted to deprive the employee of compensation earned by past performance makes the covenant redundant of quasi-contract doctrines).

87. See 3A Corbin, supra note 85, § 700 (explaining substantial performance).

88. In addition, at least one court has found a violation of public policy in this type of fact scenario. See Savodnik v. Korvette’s, Inc., 488 F. Supp. 822, 826 (E.D.N.Y. 1980) (discharging an employee to prevent his pension from vesting was a violation of public policy).


91. See Cloutier, 436 A.2d at 1143-44.
Iowa L. Rev., 368

81 IOWA LAW REVIEW [1995]

Inc., the Wisconsin Supreme Court held that the covenant of good faith is limited to discharges "contrary to a fundamental and well-defined public policy as evidenced by existing law." A handful of other jurisdictions have also applied the covenant of good faith when a violation of public policy is shown. Such confusion of legal principles is unnecessary; these cases should be recast as public policy tort cases, and the employee should receive the attendant tort damages, not just contract damages. The application of the implied covenant is completely unnecessary when public policy is violated.

These cases exemplify the unproductive overlapping which can be remedied by the abandonment of the implied covenant in the employment context. The public policy acknowledged by these courts is enough to rectify the disputes between employers and employees. Attempting to massage an already incomprehensible implied covenant doctrine to fit a particular set of facts not only wastes resources, but also generates costly litigation. The interests would be much better served under the directive of well-defined public policy.

Finally, a few courts have applied the implied covenant of good faith effectively to require an employer to prove just cause for dismissal. These courts have expanded the good faith exception so as virtually to eclipse the at-will rule, causing confusion and uncertainty in the employment relationship.

92. 335 N.W.2d 834 (Wis. 1983).
93. Id. at 840.
94. See Leuedtke v. Nabors Alaska Drilling, 768 P.2d 1123, 1130 (Alaska 1989) (holding that violation of public policy exception may rise to the level of a breach of the implied covenant); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985) (holding that a nurse dismissed for refusing to "moon" could recover on implied covenant theory because public policy was violated); Sterling Drug, 743 S.W.2d at 385 (recognizing implied covenant for employee dismissed for reporting employer violations of federal contracting standards); Magnan v. Anaconda Indus., 479 A.2d 781, 791 n.25 (Conn. 1984) (suggesting that a cause of action for breach of the implied covenant is identical to a public policy tort cause of action); Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227 (S.D. 1988) (explaining that public policy exception sounds in contract since it is "predicated on the breach of an implied proviso that an employer will not discharge an employee for refusing to perform a criminal or unlawful act").
95. See Perritt, supra note 4, § 4.23 (citing courts indicating that the covenant is breached only when jeopardy to public policy is shown reduce the covenant to another name for the public policy tort).
96. The evolution to this extreme position within some jurisdictions can be traced from somewhat less drastic judicial decisions. Some jurisdictions have implied the covenant of good faith in employment contracts when the employer has violated an express agreement to discharge only for cause. See, e.g., Webster v. Allstate Ins. Co., 689 F. Supp. 689, 692 (W.D. Ky. 1986) (holding that Kentucky courts will not find an implied covenant of good faith and fair dealing without an express contract); Lopez v. Bulova Watch Co., 582 F. Supp. 755, 767 (D. R.I. 1984) (deciding that employee failed to state cause of action for putative breach of an implied covenant in absence of explicit terms in contract); Baldwin v. Sisters of Providence in Washington, 769 P.2d 298, 304 (Wash. 1989) ("[A] standard which checks the subjective good faith of the employer with an objective reasonable belief standard strikes a balance between..."
One of the first cases to suggest that no real limits to the scope of the implied covenant of good faith exist was *Mange v. Beebe Rubber Co.*\(^\text{97}\) In *Mange*, the court found that the employer's conduct, discharging an employee for refusing to date her supervisor, breached the covenant of good faith.\(^\text{98}\)

The *Mange* court made the sweeping statement that a termination motivated by bad faith or malice harms the economic system and the public good and constitutes a breach of the employment-at-will contract.\(^\text{99}\) Under this approach, which focuses on the employer's subjective state of mind, any discharged employee could claim bad faith discharge.\(^\text{100}\) The employee's allegation will be actionable since a jury is allowed to determine what constitutes bad faith as an issue of fact.\(^\text{101}\) *Mange* is clearly a case where public policy against sexual coercion should have afforded the employer's interest in making needed personnel decisions and the employee's interest in continued employment.\(^\text{3}\).\(^\text{1}\)

Other jurisdictions have gone further and found a breach of covenant where the employer has failed to follow employer promulgated procedures that have led to reasonable expectations by employees; *Carbone v. Atlantic Richfield Co.*, 528 A.2d 1137, 1142 (Conn. 1987) ("[U]nder appropriate circumstances, the terms of an employment manual may give rise to an express or implied contract between employer and employee."); *see also High v. Sperry Corp.*, 581 F. Supp. 1246, 1248 (S.D. Iowa 1984) (denying motion to dismiss since terms of employment relationship were not before the court and giving plaintiff a chance to prove an employment relationship and other facts that would give rise to a cause of action for breach of an implied covenant of good faith and fair dealing); *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986) (suggesting implied covenant might be available if facts imply a contract for permanent employment); *Sheets v. Knight*, 779 P.2d 1000, 1008 (Or. 1989) (suggesting the covenant might be implied if it reinforced the parties' expectations); *Swanson v. Van Duyn Chocolate Shops*, 579 P.2d 239, 242 (Or. 1978) (intimating same).

97. 316 A.2d 549 (N.H. 1974).
98. Id. at 550.
99. Id. at 551.
100. *See Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 2 (1st Cir. 1977) (citing *Mange* and stating that, under New Hampshire law, "an employee who is discharged by reason of bad faith, malice, or retaliatory motives of his employer has a right of action for breach of contract, notwithstanding the fact that he was an employee at will").
101. Since *Mange*, however, New Hampshire has significantly narrowed this exception by construing *Mange* to apply only to situations where an employee is discharged because he performed an act that public policy encouraged, or refused to do that which public policy would condemn. *See Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980) (stating that *Mange* only applies when an employee is discharged either for performing an act encouraged by public policy, or for refusing to do what public policy would condemn). *But see Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1143-44 (N.H. 1981) (reiterating that the employee must show a violation of public policy before a breach of the implied covenant would be found). The *Cloutier* court said, however, that the public policy need not be statutory and generously proceeded to accept the plaintiff's allegations of tenuous public policy violations, perhaps indicating that the implied covenant claim is not dead in New Hampshire. Id.
adequate remedies in tort. As Monge illustrates, the breadth of the implied covenant is distracting the courts from clearer judicial principles—public policy and traditional contractual fairness—that would more effectively address situations of wrongful discharge.

Courts can avoid the contrived manipulation of the implied covenant in employment cases that raise new issues of public policy and basic fairness. The cure is quite simple. Courts should accept traditional contract and tort principles and expand the public policy tort and implied-in-fact contract exceptions to the employment-at-will doctrine. In addition, courts should relegate the implied covenant to its proper position: The implied duty to act in a fair and equitable manner as to the express or implied terms of the contract, rather than a limited, yet amorphous, remedy in its own right.

B. Legislative Reform of Employment-at-Will: Wrongful Discharge Legislation—The Deus Ex Machina\textsuperscript{102} of Employment Law

1. An Overview

Over the last ten years, wrongful discharge legislation has been hailed as a miracle cure, a great compromise certain to bring consensus to the employment community, and a necessary remedy to the current chaos of at-will employment.\textsuperscript{103} Much like Glenda, the Good Witch of the North who aided Dorothy's return to Kansas, wrongful discharge legislation is seen as the \textit{deus ex machina} of employment law, providing magical relief for frustrated employers and employees by striking a balance between their competing interests.\textsuperscript{104} Not only do supporters of wrongful discharge

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{102} \textit{Deus ex machina} is defined as "a person or thing that appears or is introduced (as into a story) suddenly and unexpectedly and provides an artificial or contrived solution to an apparently insoluble difficulty." Webster's Third New International Dictionary 617 (1981).
  \item \textsuperscript{103} See Janice R. Bellace, A Right of Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. Mich. J.L Ref. 207, 231-47 (1983) (arguing for state legislative action regarding the protection against unjust dismissal, since other solutions currently utilized result in lack of uniformity); Theodore J. St. Antoine, A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower, 67 Neb. L. Rev. 56, 81 (1988) (concluding that the doctrine of at-will employment will be replaced by the theory of just cause dismissal); Jack Streiber & Michael Murray, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U. Mich. J.L Ref. 319, 336-41 (1983) (suggesting the need for a federal statute to provide broader protection against unjust dismissal); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481, 498-501 (1976) (suggesting that legislation has repudiated the freedom to discharge inherent in at-will employment); see also Foley v. Interactive Data Corp., 765 P.2d 373, 397 (Cal. 1988) (suggesting that the court would be guilty of judicial activism if they recognized tort remedies for wrongful terminations); Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983) (refusing to recognize cause of action for abusive discharge, holding that any changes are up to the legislature).
\end{itemize}
\end{footnotesize}
legislation claim that the legislation would provide a better balance of employers' and employees' interests, but they also assert that legislation would provide greater certainty to the job market and produce less litigation to disrupt both occupational and judicial arenas. Yet, legislation cannot solve the deeply rooted and multi-faceted problems surrounding employment-at-will. Indeed, awaiting this deus ex machina only serves to further marginalize this actually quite prosaic sphere of contract and tort law.

In fact, this Article proposes that wrongful discharge legislation has not, and inevitably will not, rise to the exaggerated anticipation of its current supporters. Legislation alone is not the answer. As this Article will demonstrate, courts must become more active in their application of traditional public policy and contract principles in order to correct the imbalances created by wrongful discharge.

2. Montana: The First Statutory “Good Cause” Standard

a. Montana adopts “good cause”

In 1987, Montana became the first state to enact a comprehensive law protecting at-will employees from wrongful discharge. Advocates of legislation as a panacea for either curtailing abusive termination practices or reducing judicial confusion and inconsistency should take a close look at the Montana statute and its judicial progeny. The Montana statute has essentially gutted fundamental common law protections and theories of

common law employment-at-will doctrine).


106. Infra part III.

107. Mont. Code Ann. §§ 39-2-901 to 914 (1987); see also Allmaras v. Yellowstone Basin Properties, 812 P.2d 770, 771-72 (Mont. 1991) (finding no violation of plaintiff's right to jury trial, no violation of Privileges and Immunities Clause, no violation of Equal Protection Clause, no violation of substantive due process, and no violation of the obligation of contracts clause of the Montana constitution); Meech v. Hillhaven West, 776 P.2d 488, 489-90 (Mont. 1989) (finding that the Montana Wrongful Discharge From Employment Act was not unconstitutional); see also Larson, supra note 80, § 5.07 (listing Puerto Rico, Virgin Islands, and Montana as adopting a “just cause” standard); Perritt, supra note 4, § 9.10 (discussing those states that have proposed a “just cause” standard).

recovery. Moreover, Montana courts have ironically turned to prestatute case law to interpret the statute, which was passed expressly to preempt that case law.109

Montana’s Wrongful Discharge From Employment Act centers around the “just cause” standard: “A discharge is wrongful only if: ... (2) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment.”110 “Good cause” is defined in the statute as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.”111 The statute also purports to codify very limited public policy and express contract principles. Under the statute, the employer may not discharge an employee without just cause, either in retaliation for the employee’s refusal to violate public policy or willingness to report such a violation, or in situations when dismissal would violate express provisions of the employer’s written personnel policy.112

While this may sound progressive, a close reading of the legislation shows that it effectively insulates employers from true contract damages or tort compensation. Recovery by a plaintiff is limited to lost wages and benefits for no more than four years.113 Even this recovery must be mitigated by “amounts employee could have earned with reasonable diligence.”114 Compensatory damages are limited to lost wages; in addition, damages for pain and suffering and emotional distress are specifically disallowed.115 Punitive damages may be awarded only if actual malice or actual fraud by the employer is “established by clear and convincing evidence ...”116

Additionally, if an employer maintains “written internal procedures” by which a discharged employee can appeal, the employee must do so before bringing an action.117 The employer is free to drag these

108. Mont. Code Ann. § 39-2-902 (1993). “Except as [otherwise provided by federal or state statute, collective bargaining agreement, or term contract], this part provides the exclusive remedy for a wrongful discharge from employment.” Id.; see also id. § 39-2-913 (1993) (“Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.”).
109. Id. § 39-2-913.
110. Id. § 39-2-904 (emphasis added).
111. Id. § 39-2-903(5). Moreover, under the statute damages are available for lost wages and benefits for up to four years, while punitive damages are only available if the employee can establish actual fraud or malice by the employer. Id. § 39-2-905. Otherwise, equitable and legal remedies such as pain and suffering, emotional distress, and most often compensatory and punitive damages are eliminated by the statute. Id. § 39-2-905(5).
112. Id. § 39-2-904.
114. Id.
115. Id.
116. Id.
117. Id. § 39-2-911.
procedures out for up to four months, during which the aggrieved employee is presumably exposed to whatever coercion and indignities his now frankly adversarial ex-employer can use to influence "internal procedures for appeal."

Not surprisingly, the leading proponents of the Montana legislation were employer groups whose main concerns were the run-away juries and the large damage awards common in the 1980s. Employers blamed the judiciary's interpretation of the common law for the great uncertainty and expense of wrongful discharge litigation. This concern with the common law's shortcomings spawned the unjust dismissal legislation in Montana. Armed with a "just cause" standard to entice employee interest groups, Montana employers successfully extinguished magnanimous jury awards by restricting recovery to a showing of no "good cause," limiting compensatory damages to lost wages, and raising the level of proof for punitive damages.

Workers in other jurisdictions could probably expect the same pro-employer cast existing in the Montana legislation. A recent survey has shown a strong correlation between liberally applied common-law employee remedies and the willingness of a state legislature even to consider wrongful discharge legislation. This suggests that not only is legislation likely to be reactionary, but that "the prospects for the passage of unjust-dismissal legislation are linked to the erosion of the common law employment-at-will doctrine."

b. Montana's highest court equates "good cause" with "bad faith"

Despite the court's and the employers' hopes for clarity in employment litigation, wrongful discharge legislation did not reduce the judicial tasks of Montana's highest court. Rather, with the legislature's blessing, the Supreme Court of Montana has entered the employment arena to interpret the amorphous "good cause" standard. When faced with its first opportunity to interpret the Wrongful Discharge from Employment Act in September of 1990, the Montana Supreme Court, by turning to prestatute case law to interpret the Act, erased any hopes of the employee that the statute would provide more protection. In fact, as will be seen in the cases that follow, Montana's highest court lapsed back into the chaos of the common law implied covenant—a result which has encouraged even more litigation concerning the issue of what is and what is not "good cause." The judiciary in Montana has defined the legislative

119. Krueger, supra note 104, at 647.
120. Id.
122. Krueger, supra note 104, at 656.
123. Id. at 659.
“good cause” standard in terms of subjective good faith and thus has made the legislation essentially ineffective to protect at-will employees.

In *Cecil v. Cardinal Drilling Co.*, a 57 year-old top management employee was fired without any prior warning or indication of poor job performance. Although the employer continued to grant substantial raises and bonuses to the remaining management staff, continued to meet its expense account, and continued to expand its drilling operations, the employer claimed that Cecil’s termination was a result of an anticipated decline in the price of crude oil. Faced with the issue of what is “good cause,” or “legitimate business reason,” the court merely stated: “It is well-settled in the case law prior to the Act that economic conditions constitute a ‘legitimate business reason.’” The court further applied a discretionary standard for employers in making employment and retention decisions. Finally, the court noted that, absent any other evidence, the employee had not shown that the employer acted unfairly or dishonestly.

The *Cecil* court’s reference to prior case law was its only attempt at defining “good cause” in this initial case dealing with the wrongful discharge legislation. Montana’s prior case law on the point of “legitimate business reason” leads directly to the implied covenant of good faith and fair dealing, which requires an employee to show that an employer exercised bad faith in its decision to discharge. In *Heltborg v. Modern Machinery*, the Montana Supreme Court held that “the employer is not under a duty to use reasonable care in decision-making,” and thus, no action existed for a breach of the implied covenant of good faith where a business decision was made to reduce forces. The court concluded further that “[e]ven an honest, though mistaken, belief that the employer for legitimate business reasons had good cause for the discharge would negate bad faith.” In other words, the burden on an employee to show

125. Id. at 233.
126. Id. at 233-34. The district court found that crude oil prices did fall dramatically, and therefore, in the absence of any genuine issue of material fact regarding the reason for the employee’s termination, entered summary judgment for the employer. Id. at 234.
130. 795 P.2d 954 (Mont. 1990).
131. Id. at 961.
132. Id. at 962 (quoting *Pugh v. See’s Candies*, 250 Cal. Rptr. 195, 213 (Ct. App. 1988)); *see also Scott v. Eagle Watch Inv.*, 828 P.2d 1346, 1350 (Mont. 1991) (holding that an employer’s honest, though mistaken, belief that athletic club was not profitable would negate
bad faith discharge is monumental. Moreover, to successfully rebut allegations of bad faith, the employer need merely articulate some colorable reason for discharge, regardless of its substantive validity.

The problem with Montana’s wrongful discharge legislation and the case law interpreting the legislation is primarily the placement of the burden of proof. In Montana, the burden has been placed on the employee to show lack of “good cause,” which is equated to a showing of “bad faith.” There is a marked difference between an employee proving lack of good cause and an employer proving a good cause for discharge. Only the latter standard makes the responsibilities of the parties clear, and thus, gives meaning to a wrongful discharge hearing. Placing the burden on the employer to show “good cause” alleviates several problems. First, it keeps the courts out of the amorphous arena of “bad faith.” Second, by placing the burden on the party with the most information, it ensures that disputes are settled quickly and effectively. Finally, with the burden on the employer, employers, rather than the courts, remain in control of legitimate business judgment. As a result, the common law approach to wrongful discharge is more open and fair to both employers and employees.

In light of the policies underlying the burden of proof in wrongful discharge cases, the Montana Supreme Court’s reliance on the implied covenant of good faith in defining “good cause” in cases involving Montana’s wrongful discharge legislation is striking. In *Buck v. Billings Montana Chevrolet, Inc.*, the general manager of an automobile dealership was discharged when his dealership was acquired by new ownership. The new ownership justified the employee’s dismissal by stating its long-standing policy to place its own personnel in management positions of newly acquired dealerships and by claiming it would save money by hiring one person to perform two positions.

Again faced with the issue of whether the employer’s reasons were tailored to the “good cause” language of the Act, the Supreme Court endeavored “to arrive at a precise meaning of the term ‘legitimate business reason.’” The court admitted the vagueness and impracticability of the statutory language and attempted to define “legitimate business reason” in the form of a “good faith” standard:

All attempts to more specifically define this term or like terms have resulted in definitions that are as general as the term itself. We are therefore forced to fill in the gap left by the legislature and to define and apply the term in an equitable fashion that most nearly effectuates the
intent of the legislature.
A legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of an employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.

After discussing the employee's and employer's positions, the court concluded that "[b]ecause Buck has not come forward with any evidence showing bad faith or falsehood, we hold summary judgment was properly awarded."

By relying upon a "good cause" standard which equals the bad faith standard of the implied covenant, Montana officials have fostered the worst of both worlds in the employment-at-will context. Employee interests are undermined by an extremely high burden of proof of bad faith, coupled with the reality that, even if the employee meets this burden, the legislation has eliminated all remedies except backpay. Likewise, employer interests are also negated as courts are more actively involved in defining and perhaps even second-guessing business judgment. As a result, Montana's wrongful discharge legislation has provided neither employers nor employees relief from the chaotic world of employment-at-will. The legislature has acted, yet courts still avoid their responsibility by applying an amorphous doctrine, and employers and employees continue to lack solid rules to guide their relationships. The problems of the Montana legislature and judiciary in understanding wrongful discharge legislation are representative of the larger national problems with wrongful discharge.


a. META: An overview

Attempting to define Montana's efforts as the rule rather than the exception, the National Conference of Commissioners on Uniform State Laws approved the Model Employment Termination Act ("META") in August of 1991 to serve as a model for state legislative efforts. META,
interesting similar to Montana's wrongful discharge legislation, was proposed as uniform legislation, but defeated as such by a four state margin.META prohibits discharges without "good cause" only for an employee "who has been employed by the same employer for a total period of one year or more" and has worked at least twenty hours for the employer for twenty-six weeks prior to the termination. "Good cause" is defined in the statute as follows:

(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct (on the job or otherwise), job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer.

Under META's "good cause" standard, the employer's business judgment is preserved.

In addition, META provides that the employer and the employee can agree as to what constitutes good cause prior to the employment relationship, essentially handing over the tools of statutory construction to the employer—an extremely interested and biased party. This same provision even allows the employer and employee to waive good cause altogether if the employer agrees to provide one month's severance pay for every year of employment. Again, META's cost-efficient and business outlook portrays a system granting only lip service to a true good cause standard. Damages under META also encourage efficient resolution, including reinstatement, full or partial back pay, some form of severance pay, and the possibility of reasonable attorney's fees. Jury trials are waived under META, and arbitration is compulsory. While META "extinguishes" common law discharge claims based on public policy or contract principles, it does not eliminate claims arising under state or federal statutes, collective bargaining agreements, or express agreements between the employer and the employee.

META's leading supporter and principal draftsman, Theodore St. Antoine, believes that the model act addresses the uncertainty of rights and
random remedies under the current common law system.\textsuperscript{150} St. Antoine has noted that META guarantees "certain minimum rights against wrongful discharge" while reducing liability of employers.\textsuperscript{151} Other supporters have stated that META broadens the application of wrongful discharge to blue-collar and rank-and-file workers who previously could not bring lawsuits because of the lack of funds available to them for attorneys—a barrier which the supporters believe is overcome by arbitration.\textsuperscript{152}

Despite the support of its drafters, META has been met by disinterest in state legislatures. No state has adopted it, and it is unlikely that any will.\textsuperscript{153} Even its most ardent supporters concede that META may not provide a solution to the plight of every wrongfully discharged employee. In addition, the remaining states are unlikely to pass the META legislation as long as the states' business interests are generally happy with judicial reluctance to recognize basic common law remedies.

\textbf{b. META: The legislation is illusory without judicial participation}

Contrary to the vague hopes of META supporters, this author believes that wrongful discharge legislation will not provide more certainty, will not decrease the amount of litigation, and, ultimately, will not better balance employer and employee interests. Some of the major flaws of META include the extensive pro-employer "opt-out" provisions of the statute.\textsuperscript{154} For example, employers can avoid liability by firing employees before a year of employment passes, by keeping employees working less than twenty hours per week, or by treating employees as independent contractors.\textsuperscript{155} These exceptions, which favor the employer, defeat the purpose of enacting legislation—to deter wrongful discharge. A legitimate fear of META's opponents is that employers will use the statute to force all employees to agree to opt-out provisions when such agreements are inappropriate.\textsuperscript{156}

The damages provisions of META also exhibit the inequities within the statute which clearly favor the employer. By limiting recovery to reinstatement or back pay, the statute has "reduce[d] claims to an affordable business expense."\textsuperscript{157} Traditionally, compensatory and punitive damages have provided the incentive for employers to refrain from

\textsuperscript{150} Act Would Improve Remedies, supra note 35, at A-2.
\textsuperscript{151} Id.
\textsuperscript{152} Leigh, supra note 104, at 8.
\textsuperscript{153} Telephone Interview with John McCabe, Staff Attorney and Legislative Liaison, National Conference of Commissioners of Uniform State Laws (March 6, 1995).
\textsuperscript{155} Adoption Seen As Surprise, supra note 154, at A-2.
\textsuperscript{156} Leigh, supra note 104, at 8.
\textsuperscript{157} Samborn, supra note 35, at 40.
unlawful employment actions. However, META may provoke employers to practice unlawful terminations which they simply assess to their overhead and cost of doing business.

Finally, and most importantly, the definitions of "good cause" under the Montana Wrongful Discharge From Employment Act and the Model Employment Termination Act are, by no means, precise or insightful. Both statutes generally acclaim that "good cause" exists when the employer's reason for discharge is reasonably related to job performance or within the employer's legitimate business judgment. This definition of "good cause" provides no certainty; employers and employees can almost always legitimately argue over what constitutes grounds that are reasonably related to job performance. As a result, litigation will increase, not decrease, as courts will inevitably be called upon to define "good cause." To answer the question of precisely what is "good cause," or "reasonably related to job performance," or perhaps even "legitimate business judgment," judges should turn to their experience in other at-will settings such as the application of public policy and implied contract principles. Thus, the legislation would have accomplished nothing except for accentuating the uncertainty of the role of the courts in the wrongful discharge arena.

Such half-hearted and ultimately ambiguous legislation will merely encourage the further marginalization of this prosaic species of contract and tort law.

III. A PROPOSED ANALYSIS FOR THE JUDICIAL REFORM OF EMPLOYMENT-AT-WILL: A RETURN TO BASIC CONTRACT AND TORT PRINCIPLES

A. Expanding Contract Protection for the At-Will Employee

In some jurisdictions, a common law limitation to an employer's broad right to discharge exists when an employee demonstrates that her at-will termination breached an express or implied agreement by the employer to terminate only for cause. The at-will rule is a rule of contract construction that creates a rebuttable presumption that, absent a term of duration, an employment relationship may be terminated by either party at will. This presumption may be overcome, however, by an affirmative showing by the employee that the parties expressly or impliedly intended a specific term of employment or agreed to terminate the relationship only for cause. An employee, therefore, may maintain an action under an

158. See supra notes 110-12, 141-49 and accompanying text.
159. Moreover, because META only provides a model and no uniformity, the battle to enact legislation will take place in the 50 states. As one commentator noted, these 50 battles will take place without the representation of the worker who needs the legislation the most—the unorganized American worker. Sambom, supra note 35, at 40. The lack of uniformity will still haunt wrongful discharge because states will fight their own battles without regard to META or any other state legislature.
162. Foley v. Interactive Data Corp., 765 P.2d 373, 385 (Cal. 1988); see also Restatement
explicit breach of contract or an implied-in-fact breach of contract theory by virtue of the understanding of the parties.

In the past, employees have had great difficulty rebutting the presumption in favor of at-will employment. Most contemporary courts, however, do not revere the at-will rule as their predecessors once did. Yet, contemporary courts often deny recovery to meritorious employees who demonstrate that their employers had impliedly restricted their right to discharge at will. When employers restrict their ability to discharge for no reason, whether expressly or impliedly, employees should be given full opportunity to rebut the at-will presumption. If the employee raises facts that rebut the presumption, he should receive the appropriate contract damages. The at-will rule should not operate to frustrate the employee's expectations when the employer has explicitly or impliedly provided job security. "A cardinal rule in construing any contract is to give effect to the intentions of the parties." Contracts of employment should not be exempted from this traditional contract principle.

1. The Current Status of Implied-in-Fact Employment Contracts

Presently, almost all courts allow an employee to remove his contract from the at-will category by showing an express agreement to a specific period of employment or to a provision limiting dismissal to that for
cause alone. Thus, parties to an employment contract are generally permitted to prove any express terms of that contract so as to accomplish the agreement's intended purpose.

A substantial majority of courts also permit an employee to remove her contract from the at-will category by proving the existence of an implied-in-fact term of the contract specifying duration of employment or limiting the reasons for dismissal. Courts have found that such promises arise from a variety of sources, including personnel policies, employee handbooks, oral agreements, a regular course of dealing, the custom of the particular industry, or other circumstances of the employment relationship which demonstrate an intent to terminate only for cause or to continue employment for a specified period. The employee bears the burden of proving to the jury that sufficient indicia of an implied-in-fact promise exists.

While a substantial majority of courts acknowledge an implied-in-fact exception to the at-will rule, these courts have reached varying results in definitely state that it is for some measurable period of time, such as one year or ten years. Id. Contracts for "permanent" or "lifetime" employment are typically construed to indicate merely that the parties intended that this was to be a steady job, as opposed to casual or temporary employment. Id. Absent legislation, a contract for wages at a specified amount per year or month does not generally create a contract for the term specified, but is merely indicative of the payment term. Id.

168. See, e.g., Terrio v. Millinocket Comm. Hosp., 379 A.2d 135, 138-40 (Me. 1977) (holding that a nurse with a 20 year employment history had an employment contract for a definite period, which was her retirement age, based on the employee handbook, the retirement plan, and oral statements promising continued employment).

169. See, e.g., Weiner v. McGraw-Hill, 443 N.E.2d 441, 445-46 (N.Y. 1982) (finding that an employee had a claim sounding in contract when the employee was assured that McGraw-Hill terminated employees only for just cause).

170. See Dan B. Dobbs, Remedies § 4.2 (1973) (stating that an implied-in-fact contract means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words and can be proved by circumstantial evidence.); see also Calamari & Perillo, supra note 42, § 2-19, at 89 (1987) ("A contract is implied-in-fact where the intention is not manifested by direct or explicit words before the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction.").

171. See Foley v. Interactive Data Corp., 765 P.2d 373, 388 (Col. 1988) (finding that plaintiff had sufficiently proven an implied contract to terminate only for good cause, based on oral assurances of job security and consistent promotions, salary increases, and bonuses during the term of his employment); Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (III. 1987) (holding that "language in employee handbook, that non-probationary employee could be discharged only after written notice, was sufficient to modify at will nature of plaintiff's employment"); see also, J. Peter Shapiro & James F. Tune, Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 350-66 (1974) (reviewing factors courts have used in implied contract analyses).

172. Foley, 765 P.2d at 388.

173. See Shapiro v. United Medical Serv., 205 N.E.2d 293, 294, 296-99 (N.Y. 1965) (holding that the existence of an implied contract is a question of fact); Calamari & Perillo, supra note 42, § 2-19, at 89 (stating that whether a promise will be implied in a given circumstance is a question of fact).
determining whether sufficient indicia exist to establish an implied-in-fact promise of job security. Although courts generally agree that personnel policies and employee handbooks can establish an implied-in-fact promise of job security, some courts have a less expansive view of the implied-in-fact contract exception and require that any promise of job security contained in policies or handbooks be express.

---

174. See, e.g., Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 978, 386 (6th Cir. 1983) ("[E]mployees had a legitimate expectation that upon completion of the probationary period they would not be terminated except for cause based not only on the policy statement contained in the employee manual but also on the basis of the [employer's] conduct and practices."); Thompson v. American Motor Inns, 623 F. Supp. 409, 416 (W.D. Va. 1985) (holding that where handbook spoke of specific policies for warning and dismissal, the employer has fixed the duration of employment according to the procedures articulated in the employee handbook); Hoffman-LaRoche, Inc. v. Campbell, 512 So. 2d 725, 735-38 (Ala. 1987) (stating that provisions in employee handbook issued by employer, combined with former employee's continuation of employment following receipt of handbook, created unilateral contract which modified at-will relationship); Finley v. Aetna Life & Casualty Co., 520 A.2d 208, 213-14 (Conn. 1987) ("[W]hether the defendant's personnel manual gave rise to an express contract between the parties [is] question of fact [for] the jury."); Falls v. Lawnwood Medical Ctr., 427 So. 2d 361, 362 (Fla. Dist. Ct. App. 1983) ("[C]ourt has to look at personnel policies of employer to determine if they are a part of the employee's contract of employment."); Kinoshita v. Canadian Pac. Airlines, 724 P.2d 110, 117 (Haw. 1986) (stating that employer is obligated to comply with procedures set forth in manual for employees even if they are unaware of the manual); Duldulao, 505 N.E.2d at 312 (holding that language in employee handbook, asserting that nonprobationary employee could be discharged only after written notice, was sufficient to modify at-will nature of plaintiff's employment); Sweet v. Starmart Vail Regional Medical Ctr., 647 P.2d 1274, 1280 (Kan. 1982) ("In determining the rights which accrue under an employment contract, the contract controls so long as it is not unreasonable or illegal."); Damrow v. Thumb Coop. Terminal, 537 N.W.2d 338, 342-43 (Mich. Ct. App. 1983) (finding that employer was obligated to comply with rules set forth in employee policy manual in discharging its employees, including employee hired before manual was adopted); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) ("[B]y preparing and distributing its handbook, the employer chooses, in essence, either to implement or modify its existing contracts with all employees covered by the handbook."); Southwest Gas Corp. v. Ahmad, 668 P.2d 261, 264-65 (Nev. 1983) (holding that parties were bound by termination clause appearing in employee information and benefits handbook provided by employer). But see Larson, supra note 80, § 8.02, at 2-4 (citing cases finding that terms of personnel manuals are not part of the employment contract).

Some reasons given for finding that personnel manuals are not part of the employment contract include: lack of independent consideration, lack of mutuality of obligation, and lack of reliance on the manual's provisions by the employee. See, e.g., Spero v. Lockwood, Inc., 721 P.2d 174, 175 (Idaho 1986) (holding that at-will employment was not modified into a contract of employment from which employee could only be terminated for just or good cause when employee was not shown to have ever read or relied on manual or to have continued employment in reliance on its terms); see also Larson, supra note 80, § 8.03, at 18-25 (discussing reliance on manuals' provisions).

175. See, e.g., Mursch v. Van Dorn Co., 851 F.2d 990, 994, 997-98 (7th Cir. 1988) (holding that statements in written handbook manifestly expressing intent may be sufficient to create implied contract, but oral statements by vice-president of company were insufficient as a matter of law); Gladden v. Arkansas Children's Hosp., 728 S.W.2d 501, 505 (Ark. 1987) (refusing to recognize implied contract for cause, whether implied from job security statements or from discharge proceedings; stating that even though promise to discharge for
Yet, other courts do not require an express promise of job security to be contained in the personnel policy or employee handbook. These courts state that whether the employee handbook or personnel policy modifies, or is part, of the employment contract is a question of fact. In other words, the question becomes whether the language contained in the personnel policy or employee handbook instills reasonable expectations of job security and gives the employee reason to rely on its representations. This analysis is identical to the analysis used to determine cause may be implied from statements in personnel handbooks or manuals, the promise must be express to be enforced; see also Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 91 (N.Y. 1983) (stating that a limitation on employer's right to discharge its employees at-will must be express to be enforceable); cf. Weiner v. McGraw-Hill, 443 N.E.2d 441, 446 (N.Y. 1982) ("If it is not employer's subjective intent, nor any single act, phrase or other expression, but the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain, which will control.").

176. See, e.g., Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984) (holding that whether any particular personnel manual modifies any particular employment-at-will relationship and becomes an employment contract is a question of fact); Foley, 765 P.2d at 388 (explaining that employee must plead facts which, if proved, may be sufficient for a jury to find an implied-in-fact contract limiting employer's right to discharge him arbitrarily); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 896 (Mich. 1980) (stating that it is a question for the jury to decide whether the employer and employee entered into an agreement to discharge only for cause).

However, some courts will not find an implied-in-fact promise if the employment agreement contains disclaimer language that expressly permits the employer to terminate the employee at any time for any reason. See, e.g., Gerlund v. Electronic Dispensers, Int'l, 235 Cal. Rptr. 279, 284 (Ct. App. 1987) (refusing to abrogate parole evidence rule to bring in evidence of oral promises where the contract language was clear); Shapiro v. Wells Fargo Realty Advisors, 199 Cal. Rptr. 613, 622 (Ct. App. 1984) (stating allegations of implied-in-fact contract for continuing employment and benefits could not rebut former officer's contract status as at-will).

Other courts say that disclaimers may not circumvent the employer's promise of job security. See Loffa v. Intel Corp., 738 P.2d 1146, 1151 (Ariz. 1987) (holding an employee agreement which stated no restriction on employer's right to terminate did not exclude any modification or supplementation of at-will nature of relationship); McClain v. Great Am. Ins., 256 Cal. Rptr. 863, 868 (Ct. App. 1989) (finding an implied promise not to discharge without cause, even though the application form the employee filled out expressly stated that he could be terminated with or without cause, because the employer's actions before and after hiring the employee modified the contract). For a more extensive discussion on disclaimers, see Larson, supra note 80, § 8.02, at 14-17; Cynthia W. Scherb, The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions, 12 J. Corp. L. 105 (1986); Julius M. Steiner & Allan M. Dabrow, The Questionable Value of the Inclusion of Language Confirming Employment-at-Will Status in Company Personnel Documents, 37 Lab. L.J. 639 (1986).

177. Leikvold, 688 P.2d at 173. In Leikvold, the Arizona Supreme Court established a very sensible three-part test to determine whether the policy or manual rebutted a presumption of at-will employment. First, the jury determines whether the manual forms part of the terms of the employment contract. Second, if the jury determines that the manual is part of the employment contract, the jury must ascertain the terms of the employment contract. If the terms are unambiguous, the construction of the contract is a question of law for the court. If the terms are ambiguous, the jury must interpret the contract's meaning, considering both the manual's language and extrinsic evidence. Third, after the contract is construed, the jury
whether a traditional contract has been formed: Would a reasonable person looking at the objective manifestations of the parties' intent find that the parties intended this obligation to be part of the contract? This equivalence suggests that traditional contract principles should be applied to employment relationships in the same manner.

Still other courts, although fewer in number, apply the "totality of the circumstances" approach. These courts find that promises may be implied not only from written personnel policies and employee handbooks but also from oral statements concerning job security, course of dealing, industry practice, or the surrounding circumstances of the relationship which create an expectation of continued employment. These courts decide whether the contract has been breached. Id. at 174.

178. Larson, supra note 80, § 8.02, at 5.

179. See, e.g., Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 364 (9th Cir. 1988) (applying Arizona law and giving retroactive effect to the new position that oral statements can modify the at-will presumption); Cleary v. American Airlines, 165 Cal. Rptr. 722, 729 (Ct. App. 1980) (determining that cause of action for wrongful discharge was established by the employee where longevity and the express policies of the employer required good cause for termination); Kestenbaum v. Pennzoil Co., 766 F.2d 280, 284 (N.M. 1989) (finding that oral statements made by employers may be sufficient to create an implied contract which provides that an employee shall not be discharged except for cause); Larson v. Kreiser's, Inc., 427 N.W.2d 833, 834 (S.D. 1988) (finding oral promise that employee would become president of company sufficient to create a definite employment contract).

180. See, e.g., Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1038 (Ariz. 1985) (finding that language used in the personnel manual as well as the employer's course of conduct and oral representations goes to show the particular contract); Foley, 765 P.2d at 387 (finding that a breach of an oral contract based on a course of conduct, including various oral representations, created a reasonable expectation); see also Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969) (holding that a university's tenure policy may be implied by its past treatment of other, similarly situated, employees).

181. See, e.g., Perry v. Sindermann, 408 U.S. 593, 602 (1972) ("Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960), so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure."); Novosel v. Nationwide Ins. Co., 721 F.2d 894, 902-03 (3d Cir. 1983) (finding that employer's custom, practice, or policy creating a contractual just cause requirement or contractual procedure was a factual matter for trial); Greene, 412 F.2d at 1133-34 (finding that the policy handbook of a college incorporated the published principles of the American Association of University Professors, thus providing the court with the articulated common law of the industry from which to interpret an employment relationship); Still v. Lance, 182 S.E.2d 403, 407 (N.C. 1971) (holding that public schoolteachers' contracts are presumed to extend until the end of the school year, and before then, school board must show cause to terminate).

182. See, e.g., Foley, 765 F.2d at 388 (approving Pugh's totality of the circumstances approach and finding an implied promise not to fire without cause where the employee had worked for the employer for six years and had received salary increases, promotions, and assurances of continued employment, and where the employer had not followed its own written termination guidelines); Pugh v. See's Candies, 171 Cal. Rptr. 917, 925-26 (Ct. App. 1981) (setting forth a totality of the circumstances approach to determine whether an implied contract existed requiring good cause for termination and finding that Pugh had a cause of action since he had been employed 32 years, had not been criticized directly, had been
have generally found that employers can create expectations of job security through expressed or implied expressions of satisfaction with an employee’s work. Courts have inferred job security from statements approving an employee’s “good work,” salary increases, and permission to participate in special compensation programs.183

Recognition of implied-in-fact terms in contracts, as in the latter jurisdictions in which even oral statements can create contractual liability, is the only way to assure that the true intentions of both parties are respected. To preserve the employment relationship and the reasonable expectations of both parties, strict adherence to the implied-in-fact exception to the at-will doctrine is necessary. Courts should expand their current levels of recognition of implied contracts to satisfy the interests at stake in employment disputes.

2. Expanding the Application of the Implied-in-Fact Contract Exception to the At-Will Doctrine

Most jurisdictions that have not adopted a vigorous standard for enforcing the implied-in-fact exception to the employment-at-will doctrine base their reluctance on one of three illusory problems which are perceived to exist: the lack of independent consideration; the lack of mutuality of obligation; or the absence of explicit language from the employer. However, none of these potential problems deserves the attention it has received. In fact, a close analysis of these issues proves that the application of the implied-in-fact exception would create more stability in the employment relationship than a misguided rejection of traditional principles in the employment context.

Some courts have refused to accept an implied-in-fact exception to the at-will rule because the employee has provided no independent consideration to support the employer’s promise to discharge only for cause.184 In other words, the employee has provided no additional

assured his performance was adequate, and had been told by company officials that the company did not discharge administrative personnel without cause); Alexander v. Phillips Oil Co., 707 P.2d 1385, 1389 (Wyo. 1985) (holding that actions of employer may be considered to interpret ambiguous handbook language to determine if expectation was created in employee that employer would follow handbook provisions); see also Morris v. Coleman Co., 738 P.2d 841, 848-49 (Kan. 1987) (basing terms of any implied-in-fact contract on totality of the circumstances); Newberry v. Allied Stores, 773 P.2d 1231, 1233 (N.M. 1989) (holding that court can find implied contract based on words and conduct of parties and provisions of personnel manual or handbook).

183. See Greene, 412 F.2d at 1183 (stating that one of the factors involved was that the professor received a “good” rating from his superior); Pugh, 171 Cal. Rptr. at 919 (noting that the employee received regular salary increases and statements about his good work); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 898 (Mich. 1980) (recognizing that the employer had permission to participate in stock option); Neth v. General Elec. Co., 399 P.2d 314, 318 (Wash. 1965) (holding that the employee did not have the right to rely on neutral arbitrator for discharge when promised that she was receiving same benefits as union employees).

consideration to support this promise of job security, beyond the services to be rendered. Lack of independent consideration, however, should not be fatal to a cause of action based upon an express or implied-in-fact promise by the employer that removes the employee's contract from at-will status. Such a requirement is contrary to the general contract principle that courts should not inquire into the adequacy of consideration. The doctrine of consideration does not require that the parties' promises mirror one another. As long as some consideration is present, there is no additional requirement of equivalence in the values exchanged. Simply stated, one consideration may support several promises.

Therefore, an employee's constant promise to render services over a period of time can support an employer's promise to pay a salary as well as a promise not to discharge except for cause. It is inconsistent for
courts to distinguish the employment relationship from all other contract relationships and to insist on applying different standards regarding consideration to employment law cases. Recognizing an employee's promise to render services as consideration for an employer's promise not to discharge the employee except for cause will realign the employment relationship with other typical contract transactions.

Additionally, courts have refused to imply a promise of job security out of fear that such action would eliminate mutuality of obligation under the contract.\textsuperscript{191} The ostensible need for mutuality arises from the nature of the at-will relief itself. Courts rigidly adhering to the at-will rule have stated that, since an employee may end the employment relationship at any time, the employer should be free to do likewise.\textsuperscript{192}

In recent years, however, courts and commentators have eschewed the requirement of mutuality.\textsuperscript{193} Mutuality of obligation should not be a barrier to the enforcement of an implied-in-fact promise of job security for several reasons. In \textit{Pine River State Bank v. Metille}, the court rejected a mutuality of obligation argument, calling it "appealing in its symmetry, [but] simply a species of the forbidden inquiry into the adequacy of consideration."\textsuperscript{194} Along these same lines, some courts and commentators have stated that traditional \textit{bilateral} contract analysis requiring mutuality of obligation is just as inappropriate in the employment setting as mutuality of consideration.\textsuperscript{195} Furthermore, some courts have attacked the need for

---

\textsuperscript{191} See, \textit{e.g.}, Swart v. Hutson, 117 P.2d 576, 579-80 (Kan. 1941) (finding that contract failed to include any mutual or reciprocal obligation between the parties and was therefore unenforceable).

\textsuperscript{192} See Russell & Axon v. Handshoe, 176 So. 2d 909, 915-16 (Fla. Dist. Ct. App. 1965) (holding that "the contract is so lacking in mutuality of obligation as to render it invalid"); Pitcher v. United Oil & Gas Syndicate, 139 So. 760, 761-62 (La. 1932) (holding that an employment-at-will "contract was terminable at the will of either party, employer as well as employee"); Rape v. Mobile & O.R., 100 So. 585, 588 (Miss. 1924) (ruling that "a contract for permanent employment which is not supported by... independent consideration is terminable at the will of either party").

\textsuperscript{193} See \textit{Pine River State Bank}, 333 N.W.2d at 629 (pointing out that "the concept of mutuality in contract law has been widely discredited"); Restatement (Second) of Contracts § 79 (1981) (stating that mutuality of obligation is not required in order to make a contract enforceable); 1A Corbin, supra note 85, § 152, at 16-17 (criticizing this rule as follows: "These decisions [requiring mutuality of obligation in employment contracts] can be found in considerable number; but the decisions to the contrary are far better considered, both in justice and in theory.").

\textsuperscript{194} \textit{Pine River State Bank}, 333 N.W.2d, at 269.

\textsuperscript{195} See, \textit{e.g.}, 1 Corbin, supra note 85, § 70, at 293-94 (stating that employment contracts are usually unilateral); see also Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958, 960 (Alaska 1983) (holding that employment contract is unilateral, rather than bilateral, since a promise is given in return for a performance); Watson v. Idaho Falls Consol. Hosp., 720 P.2d 632, 636 (Idaho 1986) (finding that hospital manual and employee handbook created a unilateral employment contract which did not require mutuality of obligation); \textit{Pine River State Bank}, 333 N.W.2d, at 629.
mutuality of obligation altogether, stating that, since many employees are relatively immobile, having no other place to market their skills, the freedom of the employee to terminate the employment is largely illusory. For these reasons, the requirement of mutuality of obligation under a contract is inapplicable in the employment context and should not prevent courts from utilizing the implied-in-fact contract to balance the interests at stake.

Finally, several courts refusing to find implied-in-fact contracts have expressed their reluctance to imply a promise of job security from nonspecific job security language. These courts have stated that only clear indications of job security will overcome the presumption that the contract may be terminated for no reason by the employer. Failure of the courts to find an implied-in-fact promise in these instances, and their rigid adherence to the at-will rule, inevitably frustrate the employee's reasonable expectations. For example, the Washington Supreme Court found that

---

River State Bank, 333 N.W.2d at 627 (stating that an employee's continued work constitutes acceptance of the offer of a unilateral contract); Duty to Terminate, supra note 41, at 1818 ("The employment relationship is not regarded as creating an ongoing contract, but rather a series of unilateral contracts. The employee in effect 'accepts' the employer's unilateral offers through her continued job performance"); see generally Parker, supra note 61, at 936-44 (providing an extensive discussion of the distinction between unilateral and bilateral contracts and their application in the employment context).

196. See Cleary v. American Airlines, 168 Cal. Rptr. 722, 725 (Ct. App. 1980) (noting that in present day economic reality, the freedom bestowed by the rule of law on the employee may indeed be fictional); Palmateer v. International Harvester, 421 N.E.2d 876, 878 (Ill. 1981) (recognizing that employees lack equal bargaining power with employers due to the lack of employment opportunities); see also Blades, supra note 53, at 1408-13 (recognizing that employees do not have adequate bargaining potential to protect against employer abuses); Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 949 (1984) (stating that, due to the lack of employee mobility, employees are vulnerable to management coercion).

197. See, e.g., Lofton, 643 F. Supp. at 173 (finding that employee had shown nothing in employment manual that could "take his case out of the settled employee-at-will rule").

199. See, e.g., Broussard v. CACI, Inc.-Fed., 780 F.2d 162, 168 (1st Cir. 1986) (finding that the employer's statement to employee, "if [you do] a good job [you will] have long-term employment," was insufficient to support a contract claim under Maine law); Chastain v. Kelly-Springfield Tire Co., 735 F.2d 1479, 1480 (11th Cir. 1984) (finding that, under Alabama law, employee had no cause of action where employer told the employee that their jobs were secure as long as they "kept [their] noses clean" and "didn't make waves"); Matson v. Cargill, Inc., 618 F. Supp. 278, 278 (D. Minn. 1985) (explaining that an oral promise of permanent employment does not create a contractual exception to the at-will status); Pine River State Bank, 333 N.W.2d at 622 (finding that the policy statement "employees who work for this company can expect a high degree of job security" was not specific enough).
language in an employer's Policy and Procedure Guide, stating that terminations would be made in a "fair, reasonable, and just" manner, was insufficient to create an implied obligation to discharge only for cause.\textsuperscript{200} On the contrary, when an employer issues personnel policies or makes oral statements regarding job security, these representations instill reasonable expectations of protection from wrongful discharge.\textsuperscript{201} In fact, the employer's purpose in making these representations is to convince the employees that they can rely upon the employer to deal fairly with them.\textsuperscript{202} The reasonable expectations of the employee should not be frustrated by blind adherence to the at-will rule, since the primary purpose of the law of contracts is the "realization of reasonable expectations that have been induced by the making of a promise."\textsuperscript{203} As stated above, the at-will rule is a rule of contract construction;\textsuperscript{204} therefore, courts are called upon to construe the contract by looking beyond its face to the parties' true intentions.\textsuperscript{205}


\textsuperscript{201} Some jurisdictions have recognized the employee's reasonable expectations. See, e.g., Brooks v. Trans World Airlines, 574 F. Supp. 805, 809 (D. Colo. 1983) (finding that employee relied on manual in his daily decisions and promotions); Wagner v. Sperry Univac, 458 F. Supp. 505, 520-21 (E.D. Pa. 1978), aff'd, 624 F.2d 1092 (3d Cir. 1980) (explaining that expectations of employee based on the personnel manual should be used in interpreting the unwritten employment contract); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892-93 (Mich. 1980) (finding that provisions may become part of contract as a result of an employee's legitimate expectations); Arie v. Intertherm, Inc., 648 S.W.2d 142, 153-54 (Mo. Ct. App. 1983) (holding that employees assumption that she was a permanent employee was relevant to the contract meaning); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (holding that an employee deserved his expectation of a termination allowance); Simpson v. Western Graphics Corp., 643 P.2d 1276, 1278 (Ok. 1982) (holding that the meaning intended by the employer in the contract is controlling); Hamby v. Genesco, Inc., 627 S.W.2d 373, 376 (Tenn. Ct. App. 1983) (holding that employee's expectations of the contract were wrong); Piacitelli v. Southern Utah State College, 636 P.2d 1063, 1066 (Utah 1981).

\textsuperscript{202} See Chinn v. China Nat'l Aviation Corp., 291 P.2d 91, 92 (Cal. Ct. App. 1955) (explaining that personnel policies increase employees' contentment with their jobs, causing employees to forego their rights to seek other employment, which helps avoid labor turnover); see also Richard H. Winters, Note, Employee Handbooks and Employment-At-Will Contracts, 1985 Duke L.J. 196, 219 ("Employers do not issue employee handbooks simply out of altruistic impulses; they expect to receive some benefit. Likewise, employees do not read and comply with employee handbooks simply because they have warm feelings about their employer; they, too, expect to receive some benefit.").

\textsuperscript{203} 1 Corbin, supra note 85, § 1, at 2; see also Clare Tully, Note, Challenging the Employment-At-Will Doctrine Through Modern Contract Theory, 16 U. Mich. J.L. Ref. 449, 455 (1983) (explaining that current theories protect the reasonable expectations of both employers and employees).

\textsuperscript{204} See Leikvold v. Valley View Community Hosp., 688 P.2d 170, 175 (Ariz. 1984) (explaining that the employment-at-will rule is not a limit on the parties' freedom to contract).

\textsuperscript{205} Dutton v. Pugh, 18 A. 207 (N.J. Ch. 1889); see also C.V. Hill & Co. v. Weinberg, 19 S.E.2d 430, 432 (Ga. Ct. App. 1942) (holding that "the intention of the parties to a contract should prevail, and that a reasonable construction of the contract should be given"); Motor

An employee's interest in continued employment should be protected by providing liberal grounds on which an implied contract may be found. Although courts have traditionally been reluctant to enforce contracts that are not reasonably definite as to their terms, these same courts, in recent years, have expressed their willingness to ascertain the parties' actual intent and to "fill gaps in contracts to ensure fairness where the reasonable expectations of the parties are fairly clear." This trend has been reflected in the Uniform Commercial Code (UCC) as well. The UCC has a number of provisions designed to fill in the blanks of a commercial contract. The UCC also requires the courts to look trade usage, course of dealing, and course of performance in order to ascertain the intent of the parties.

The employment context should be treated no differently;
standard rules of contractual construction should be applied. The employment contract should not be exempt from ordinary rules of contract interpretation which allow proof of implied terms. Like other contracts, employment contracts should be construed to give effect to the intention of the parties as demonstrated by the language used, the purpose to be accomplished, and the circumstances under which the agreement was made.

Several courts have taken this approach. In Pugh v. See's Candies, Inc., the court used a "totality of the circumstances" approach to determine whether an implied contract requiring good cause for termination existed. The court found an implied contract evidenced by proof that the employee had been employed thirty-two years, had not been criticized directly, had been assured his performance was adequate, and had been told by company officials that the company did not discharge administrative personnel without cause.

Similarly, in Foley v. Interactive Data Corp., the court found a promise not to fire without cause where the employee had worked for the employer for six years and had received salary increases, promotions, and assurances of continued employment and where the employer had not followed its own written "termination guidelines." These opinions recognize that oral assurances of job security, personnel policies, salary increases, consistent promotions, and bonuses instill a reasonable expectation of job security and should impliedly restrict the employer's ability to discharge at will. Lack of specific job security language should not be fatal, just as the lack of explicit language is not fatal in other contractual relationships. It should also be noted that the employee is seeking damages, not reinstatement. Contract principles require less certainty when a party is seeking damages rather than specific performance.

especially creative. The courts have not refashioned the law of contract to conform to their own view of desirable public policy. They have merely applied the extant law of contract to a world of vastly changed business practice.

Id. at 750-51 (citations omitted).

214. See e.g., Morrise v. Coleman Co., 758 P.2d 841, 849 (Kan. 1987) (holding that when implied-in-fact theory is used, the intentions of the parties must be determined from any circumstances surrounding the employment relationship); Newberry v. Allied Stores, 773 P.2d 1231, 1234 (N.M. 1989) (stating that the totality of parties' statements and actions regarding the employment relationship must be used).


216. Id. at 927.


218. Id. at 388.

219. See generally Restatement (Second) of Contracts § 202(1) (1981) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."); see also id. § 19 (Conduct as Manifestation of Assent); id. § 302 (Interpretation of Promise or Agreement).

220. Id. §§ 33-34 cmt. a.
Another rule of contractual construction that should be extended to the employment context is that a contract is to be construed against the party promulgating it.\footnote{221}{See Hamilton v. Stockton Unified Sch. Dist., 54 Cal. Rptr. 465, 467-68 (Ct. App. 1966) (finding "permanent" did not mean "terminable at will" and construing all ambiguities in the policy handbook in favor of the employee); Kennedy v. Brand Banking Co., 266 S.E.2d 154, 157 (Ga. 1980) (holding that where construction of a contract is doubtful, it is to be construed most strongly against the party who prepared it); 3 Corbin, supra note 85, § 559.} When an employer makes representations of job security through personnel policies, oral statements, or any other means, it should not be able to escape their enforcement, especially given that the employer was under no obligation to make such representations.\footnote{222}{See Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 894-95 (Mich. 1980) ("If there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit of improved employer attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.").} Moreover, an employee generally has little, if any, bargaining power in the negotiation of an agreement. Therefore, the agreement should be construed in the employee's favor.

As a final attempt to broaden the application of contract principles in the employment setting, this writer proposes that legislation should be enacted that would award attorney fees in addition to compensatory damages when a breach of an employment contract is found. Contract damages alone may not sufficiently deter employers from breaching the employment contract. Yet, if an employer expects a full trial on the merits with potential liability for both sides attorneys' fees pending at the close of the trial, then the employer should give more serious considerations to options other than discharge. In addition, awarding attorney fees would encourage attorneys to bring claims even when the employee is a wage earner and the potential contract damages are low. This legislative enactment would thereby encourage legitimate claims regardless of the attractiveness of the monetary outcome and serve to integrate traditional contract principles into the employment setting.

**B. Expanding the Tort of Abusive Discharge for the At-Will Employee**

The most widely accepted common law limitation to an employer's broad right to discharge an at-will employee exists when an employee is discharged for a reason which violates public policy.\footnote{223}{Discharges which subvert public policy create tort rights for the employee because the public's interest predominates over the employer's interest. Larson, supra note 80, §§ 4.01-10. In addition to the public policy tort, traditional tort theories such as intentional inference with contractual relations, intentional infliction of emotional distress, fraudulent misrepresentation, defamation, or invasion of privacy can be asserted by dismissed employees. Id. For an in depth discussion of these theories, see Perritt, supra note 4, §§ 5.40-46.} Presently, most states recognize a tort cause of action\footnote{224}{See Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1334 (Cal. 1980) (holding that because courts, rather than contract provisions, prohibit employers from dismissing employees} for abusive discharges that
contravene specific public policy interests of the state. Only a few jurisdictions still do not recognize any public policy exception to the at-will rule.

This tort of abusive discharge represents a straightforward application of traditional tort principles; in fact, it is grounded in the fundamental theory of a "prima facie tort." However, a major conceptual difficulty haunts the development of the cause of action: What are the proper sources of public policy on which to ground the tort? Courts and commentators alike have struggled to define the parameters of the public policy tort. In the courts’ search for the law as to what actions by employers give rise to the public policy tort, a broad spectrum of proper public policy claims has emerged.

1. Current Judicial Approaches to Determining Sources of Public Policy that Justify Tort Liability in the Abusive Discharge Setting

a. Public policy is found in a statute pertinent to the employment relationship that specifically prohibits discharge

The most narrow public policy exception exists when a statute explicitly governs the employment relationship and articulates certain

for any reason that contravene a public policy, a breach of the duty not to contravene a public policy when dismissing employees gives rise to a claim in tort; see also Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978) (deciding whether to recognize an action in tort or contract, court considered that punitive damages may better deter employers from improperly dismissing employees in the future). However, a few jurisdictions permit contract damages only. See, e.g., Johnson v. Kreiser’s, Inc., 433 N.W.2d 225 (S.D. 1988) (stating that a contract action for wrongful discharge is more appropriate than a tort action based on a breach of an implied provision); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (holding that contract damages were the most appropriate because they make the wronged employee "whole").

225. For a state-by-state review of wrongful discharge law, see Larson, supra note 80, §§ 10.01-52; Perritt, supra note 4, § 1.12.


227. See Restatement (Second) of Torts § 870 (1979) ("One who intentionally causes injury to another is subject to liability to the others for injury if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."). See also Perritt, supra note 4, §§ 5.5-7 (discussing extensively the analytical framework that is given by § 870 of the Restatement).

228. See Perritt, supra note 4, § 5.4 (stating that "the public policy tort is a new tort struggling for definition and recognition."); William C. Martucci & Georgann H. Eglinski, Emerging Employment Litigation: Wrongful Discharge Update, 45 J. Mo. B. 179, 182 (1989) (commenting that "the difficulty is determining when public policy requires courts to intervene on behalf of a discharged employee"); John W. Loseman, Note, Unraveling the Illinois Retaliatory Discharge Tort, 1989 U. Ill. L. Rev. 517, 517 (stating that "[t]he failing to clearly define 'public policy,' the court forces employers and employees to speculate regarding the scope of the new retaliatory discharge tort . . . ").
prohibitions against the discharge of an employee. For example, in *Ducote v. J.A. Jones Construction Co.*, the Louisiana Supreme Court reinstated a judgment for an employee where a statute specifically prohibited retaliation for filing a workers' compensation claim. Likewise, in *Perks v. Firestone Tire & Rubber Co.*, the Third Circuit, applying Pennsylvania law, allowed an employee to bring a tort action after he was fired for refusing to take a polygraph test in contravention of a Pennsylvania statute prohibiting such dismissals. In these cases, the legislature clearly designed the statute to protect the employee and to prohibit discharge. Under these narrow and sparse circumstances, the legislature has already defined what it perceives to be the proper balance between employers and employees. In essence, the question is answered before the judiciary enters the discussion. It is unnecessary for courts to balance the interests of employee and employer; rather, the courts merely need to apply tort remedies pursuant to the public policy prescribed within the statute.

Given that the courts need not question the public policy articulated in state employment related statutes, there is no reason that any court should hesitate to defend the discharged employee in this context. While strict adherence to such public policy principles partially serves the competing interests implicated in an employment-at-will termination, there is the danger that courts will use narrowly tailored statutes to avoid making extra-legislative findings of public policy.

b. Public policy is found in a statutory right pertinent to the employment relationship

Another narrow public policy exception is allowed by some jurisdictions when an employee is discharged for exercising a statutory right designed to protect employees within the employment relationship. The classic example is a statute which expresses the public policy of permitting employees to file claims arising from workers' compensation, personal injury, or discrimination. However, these employees are often given no express statutory protection from retaliatory discharge for exercising their rights under the statute. Nevertheless, many courts imply a private remedy for the discharged employee.

229. 471 So. 2d 704 (La. 1985).
230. Id. at 707.
231. 611 F.2d 1363 (3d Cir. 1979).
232. Id. at 1366.
233. See, e.g., id. at 1363 (allowing action for employee to file tortious discharge after allegedly being fired for his refusal to take a polygraph test in violation of the statute); Montalvo v. Zamora, 86 Cal. Rptr. 401, 405 (Ct. App. 1970) ("[V]iolations of public policy statutes, including those dealing with certain aspects of employer-employee relations, have been declared justiciable in civil actions.").
234. See Ind. Code Ann. § 22-3 (Burns 1993) (failing to provide an employee with a cause of action for abusive discharge).
235. See Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (permitting wrongful
The most common situation falling under this exception occurs when an employee is discharged for filing a workers’ compensation claim. Courts have typically recognized a cause of action for abusive discharge, reasoning that the workers’ compensation system would be undermined if employers could discharge their employees to discourage them from realizing their statutory rights. Again, this exception is narrow because the legislature has already struck a balance between employers and employees relieving the courts of that responsibility. The legislation is designed to protect the individual employee in his capacity as an employee by expressly placing responsibility on the employer to respect the employee’s statutory rights. Denying recovery would hinder the effectuation of the legislative purpose because employees, fearful of losing their jobs, would not file claims, and therefore, would not receive the benefits of the statute.

While the logic of the workers’ compensation cases should be equally applicable in other cases involving the exercise of statutory rights, courts have often refused to extend the analysis justifying recovery beyond the workers’ compensation setting. Courts should expand this public policy discharge action by employee who was discharged for filing a workers’ compensation claim and stating that “[w]e cannot believe that the legislature, even in absence of an explicit proscription against retaliatory discharge, [intended no remedy for aggrieved parties]”).

236. See, e.g., Sventko v. Kroger Co., 245 N.W.2d 151, 151-52 (Mich. Ct. App. 1976) (allowing action for wrongful discharge as a retaliation against workers’ compensation claim despite express authorization in the statute); Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 445 (Tenn. 1984) (“[A] cause of action for retaliatory discharge, although not explicitly created by the [worker’s compensation] statute, is necessary to enforce the duty of the employer, to secure the rights of the employee and to carry out the intention of the legislature.”).

237. However a few jurisdictions have not recognized a cause of action for employees discharged for filing a workers’ compensation claim. See, e.g., Martin v. Tapley, 360 So. 2d 708 (Ala. 1978) (following the rule that employment-at-will means termination can occur for good reason, wrong reason, or no reason, even if discharge was malicious or improper); Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978) (holding that there was no cause of action for retaliatory discharge where employment was oral and terminable by either the employer or the employee at any time); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981) (holding that where there was no provision in the Worker’s Compensation law prohibiting retaliatory discharge the court could not imply one; rather such a decision was for the legislature).


[In order for the goals of the [Workers’ Compensation] Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workers’ compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.

Id. at 427.

239. See Price v. Carmack Datsun, 485 N.E.2d 359, 361 (Ill. 1985) (dismissing an employee’s claim, where the employer fired the employee because he filed a health insurance claim, reasoning that, unlike workers’ compensation, employees do not have a statutory right to health insurance and cannot complain when their employers dismiss them for filing
exception to the employment-at-will doctrine by recognizing the public policy of encouraging legitimate statutory claims. Filing claims under the appropriate circumstances will bring about necessary changes in the employment relationship that will balance the competing interests of employee and employer. As a result, predictability in employment law will increase and both employee and employer will be on notice of what is, and what is not, proper conduct.

c. Public policy is found when the employer orders the employee to violate a criminal or civil statute of general application

A somewhat broader public policy exception exists in cases in which an employee is discharged for refusing to perform an illegal act that would subject the employee to criminal or civil liability. A more expansive interpretation of public policy is required because the legislation at issue in these cases is not designed to protect the individual employee in her capacity as an employee. Rather, a universal interest that transcends the employment relationship is at issue. In essence, the employer has placed an illegal condition—a violation of a clearly mandated statutory provision—upon the employee’s continued employment.

Perhaps the most often cited example is the one found in Petermann claims); Kavanaugh v. KLM Royal Dutch Airlines, 566 F. Supp. 242, 243 (N.D. Ill. 1983) (involving an employee who claimed he was fired for retaining an attorney and threatening to sue employer over a wage payment dispute; court found no general public policy favoring right to counsel and access to courts); Morgan Drive Away v. Brant, 479 N.E.2d 1336, 1339 (Ind. Ct. App. 1985) (approving public policy tort for dismissal in retaliation for suing for back wages), rev’d, 489 N.E.2d 933, 934 (Ind. 1986) (declining to expand Indiana public policy tort beyond workers’ compensation retaliation). But see Montalvo v. Zamora, 86 Cal. Rptr. 401, 404 (Ct. App. 1970) (involving nonunion farm workers who were fired for hiring an attorney to negotiate wages with their employers; court found employees had a right to hire counsel for employment negotiations and that this right was enforceable by a private tort action).

240. See e.g., Hansrote v. American Indus. Technologies, 586 F. Supp. 113, 115 (W.D. Pa. 1984), aff’d, 770 F.2d 1070 (3d Cir. 1985) (holding that an employee could maintain an action for wrongful discharge on the basis of his refusal to engage in commercial bribery); McClanahan v. Remington Freight Lines, 517 N.E.2d 390, 393-94 (Ind. 1988) (permitting an employee who refused to drive his employer’s truck because load exceeded state limits was to bring a wrongful discharge claim).

241. See e.g., Pratt v. Caterpillar Tractor Co., 500 N.E.2d 1001, 1002-03 (Ill. App. Ct. 1986) (noting that the court did not allow cause of action for retaliatory discharge action where employee’s conduct allegedly violated two federal statutes because federal concerns cannot support a state common law remedy); Boyle v. Vista Eyewear, 700 S.W.2d 859, 877-78 (Mo. Ct. App. 1988) (noting that, although employers generally are free to discharge at-will employees with or without cause at any time, they are not free to require employees to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the Constitution, statutes, or regulations promulgated pursuant to statute); Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974) (holding that an employee-at-will has a cause of action for wrongful discharge unless the complaint itself discloses a plausible reason for termination that does not violate public policy).
v. International Brotherhood of Teamsters, Local 396. In Petermann, an employee was fired for refusing to perjure himself at the request of his employer. The court stated that existing statutes prohibiting the act of committing perjury and the act of soliciting the commission of perjury would be circumvented if the court allowed the employer to discharge an employee for his refusal to commit perjury.

Other courts have likewise recognized public policy tort claims when an employee discharged for refusing to commit a crime. For example, courts have allowed recovery where employees were discharged for refusing to participate in an illegal scheme to fix retail gasoline prices, refusing to violate state labeling statutes, refusing to handle radioactive cobalt in violation of regulations promulgated by the Nuclear Regulatory Commission, refusing to falsify state pollution control reports, and refusing to perform an unlicensed medical procedure.

Again, strict application and vigorous interpretation of a state's clearly mandated statutory public policy is the most effective tool for courts faced with retaliatory discharge disputes. It is not only unnecessary, but indeed truly wasteful, for a court to delve into the amorphous concept of the

243. Id. at 27-28.
244. Id. at 27. The court stated:

[I]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury, an act specifically enjoined by statute . . . . [I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury.

Id.

248. Trombetta v. Detroit, Toledo & Ironton R.R. Co. & C.P., 265 N.W.2d 385, 388 (Mich. Ct. App. 1978) (adapting the public policy exception and stating that "[i]t is without question that the public policy of this state does not condone attempts to violate its duly enacted laws . . . . [and falsifying pollution reports] would clearly violate the law of this state").
249. O'Sullivan v. Mallon, 390 A.2d 149, 150 (N.J. Super. Ct. Law Div. 1978) (emphasis that the State Medical Practice Act prohibited all but licensed nurses from performing catheterizations). The O'Sullivan court stated that "an employee at will may not be terminated by an employer in retaliation for an employee's refusal to perform an illegal act. This rule is especially cogent where the subject matter is the administration of medical treatment, an area in which the public has a foremost interest . . . ." Id. at 150.
implied covenant of good faith when it has the voice of the people so plainly before it in the form of a legislative pronouncement of public policy. Moreover, interpreting statutory public policy is the traditional role of the courts and is much more accepted by conservative and liberal factions than is the judicial legislation inherent in the implied covenant. Expanding the public policy tort and restricting the implied covenant cause of action will better serve the expectations of employees and employers.

d. Public policy is found in a criminal or civil statute or constitutional provision of general application

While most courts have required a violation of clearly articulated constitutional or statutory authority to justify the imposition of tort liability on an at-will employer, some jurisdictions have extended the public policy exception by allowing the source of public policy to be derived from related, but not directly implicated, statutory and constitutional provisions.250 In these cases, the employer's policies do not directly affect the rights and duties of employer and employee as such, but rather the employer's desires conflict with a clear societal interest. Some jurisdictions have enlarged the public policy exception to include situations in which the employee is discharged for fulfilling a statutory duty or performing a public obligation. In an early case, the Oregon Supreme Court allowed an employee to recover after her employer had discharged her for serving on jury duty.251 The court did not rely on just one legislative pronouncement, but cited constitutional, statutory, and judicial sources which frowned upon employer interference with jury service.252 The logic of the jury service cases also has been employed by courts in similar situations. In Ludwick v. This Minute of Carolina, Inc.,253 the South Carolina Supreme Court recognized a public policy exception when an employer fired employees for responding to subpoenas from state administrative agencies.254 Likewise, in Williams v. Hillhaven Corp.,255 the North

250. See Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1085 (Ariz. 1985) (holding that termination of at-will employee "for refusal to commit an act which might violate [indecent exposure statute] may provide basis of a claim for wrongful discharge"); Nees v. Hocks, 536 P.2d 512, 515 (Or. 1975) (concluding that employer discharge of an employee serving jury duty constitutes "such a socially undesirable motive that the employer must respond in damages for any injury done").
252. Nees, 536 P.2d at 516 (citing state constitutional guarantees of civil and criminal jury trials and statutes limiting the grounds for which a potential juror could be excused from service, and referring to judicial and legislative determinations in other jurisdictions subjecting employers to contempt penalties for dismissing employees absent for jury duty).
254. Id. at 216.
Carolina Court of Appeals ruled that a supervisor stated a claim of wrongful termination when she was discharged six weeks after testifying under subpoena at an unemployment compensation hearing.256

Some whistleblowers have also brought successful public policy tort actions although no clearly mandated source of public policy to protect these employees existed.257 Employees who blow the whistle on their employers or fellow employees are usually compelled by their conscience to report illegal activity rather than by a rare statutory obligation. In the facts of an early whistleblower case, a bank employee was dismissed for reporting that the bank was violating state and federal consumer credit and protection laws by overcharging customers on loans and not making proper rebates.259 The West Virginia Supreme Court permitted the employee's cause of action, finding that "some substantial public policy" had been contravened even though the consumer credit and protection laws were enacted to protect the bank's customers rather than its employees.259

Similarly, in McQuary v. Bel Air Convalescent Home, Inc.,260 a nursing home in-service training director was dismissed for threatening to report patient abuse to a state enforcement agency. The court allowed the claim, relying on a state statute prohibiting mental and physical abuse and requiring that nursing home patients be treated with respect and dignity.261 Finally, an employee was also successful in bringing a public policy tort claim when he opposed the rigging of a contest by his employer even though the statute relied upon was aimed at protecting contest participants.262 All of these examples exhibit the wisdom of courts utilizing available public policy to decide employment disputes in the same way that they would decide any other dispute under the law.

Public policy torts based on a constitutional provision have likewise experienced success.263 In the most prominent of these cases, Novosel v.

256. Id. at 426 ("[T]he public policy of the State is clear: a person who is discharged because of testifying at an Employment Security Act proceeding has a cause of action.").

257. But see Marin v. Jacuzzi, 36 Cal. Rptr. 880, 883 (Dist. Ct. App. 1964) (finding no cause of action for employee who reported that corporate officers had violated state security laws); Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979) (ruling that there was no cause of action for employee who reported that corporate vice-president was taking kickbacks); Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974) (holding that discharge for reporting product defect to top management did not contravene any clearly mandated public policy).


259. Id. at 275. The court stated that "manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the [consumer credit and protection laws], who seeks to ensure that compliance is being made with the [laws], can be discharged without being furnished a cause of action for such discharge." Id. at 276.


261. Id.


263. See Novosel v. Nationwide Ins. Co., 721 F.2d 894, 900 (3d Cir. 1983) (finding that an employee discharged for refusing to participate in an employer-directed lobbying campaign
Nationwide Ins. Co.,\textsuperscript{264} an employee was discharged for refusing to participate in a lobbying campaign directed by his employer. The court held that the employer could not dismiss the employee for exercising his constitutional rights of freedom of political expression.\textsuperscript{265} The court stated that both the United States and Pennsylvania Constitutions expressed a policy of political freedom and that this policy was so important that private employers, as well as the government, must follow it.\textsuperscript{266} Again, like the statutory public policy implicated in the cases above, constitutions can be employed by courts to determine the true intentions of the public. Equal application of constitutional provisions in the employment context can only further the importance of the public policy itself, while also putting an end to the illogical segregation of employment law from traditional tort and contract principles.

e. Public policy is found in the courts' inherent authority, independent of a specific statutory or constitutional basis

Finally, a few progressive jurisdictions have allowed public policy tort actions even when neither statutory nor constitutional provisions are implicated.\textsuperscript{267} In Cloutier v. Great Atlantic & Pacific Tea Co.,\textsuperscript{268} the New

\begin{itemize}
\item stated valid claim; Cort v. Bristol-Myers, 431 N.E.2d 906, 912 (Mass. 1982) (upholding discharge, but stating that, if an employer "had no right to ask the questions that the plaintiff declined to answer, [the employer] could be liable for discharging the plaintiffs for their failure to answer those questions"); Slohoda v. United Parcel Serv., 475 A.2d 618, 622 (N.J. Super. Ct. App. Div. 1984), appeal after remand, 504 A.2d 53 (N.J. Super. Ct. App. Div. 1986) (holding that an inquiry by employer into extramarital sexual activities could give rise to tort liability if employee were discharged for that reason). But see Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1357 (Ill. 1985) (holding that an employee failed to state cause of action for retaliatory discharge where the cited statutory and constitutional provisions allegedly violated related to power of government only, not private individuals); Patton v. J.C. Penney Co., 719 P.2d 854, 857 (Or. 1986) (concluding that an employee discharged for having a relationship with a co-worker had no public policy claim for violation of employee's right of privacy).
\item 264. 721 F.2d 894, 896 (3d Cir. 1983).
\item 265. Id. at 900.
\item 266. Id.
\item 267. See Palmateer v. International Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981) (allowing a cause of action for retaliatory discharge for an employee who reported to law enforcement agency a co-employee's actions, since the foundation of the tort of retaliatory discharge lies in the protection of public policy and public policy clearly favors the investigation and prosecution of the suspected crime); Nye v. Department of Livestock, 639 P.2d 498, 502 (Mont. 1982) (stating that administrative rules may be the source of public policy which would support a claim of wrongful discharge); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1144 (N.H. 1981) (stating that public policy exceptions giving rise to wrongful discharge actions may also be based on nonstatutory policy and that employee must show that employer was motivated by bad faith, malice, or retaliation and must demonstrate that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) ("[E]mployee [at will] has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions and judicial decisions.
\item 268. Id.
Hampshire Supreme Court expressly stated that public policy exceptions giving rise to wrongful discharge actions may be based on nonstatutory policies as well as statutory policies, thereby maintaining common law authority to articulate the court's perception of the state's public policy. Likewise in Pierce v. Ortho Pharmaceutical Corp., the court found that public policy could be expressed in legislation, administrative rules, regulations, or decisions, judicial decisions, and a professional code of ethics.

The Illinois Supreme Court further emphasized its own power to decide public policy when, in Palmateer v. International Harvester Co., it required only that the public policy supporting the wrongful discharge claim "strike at the heart of a citizen's social rights, duties and responsibilities." In Palmateer, the employer fired an at-will employee for informing law enforcement officials that a co-employee was possibly violating Illinois' criminal statutes and for agreeing to help the officials gather evidence against the fellow worker. The employee's action for abusive discharge was allowed. The court stated that public policy could be found in the state constitution, statutes, "and when they are silent, in its judicial decisions." The court then acknowledged that no specific constitutional or statutory provision was implicated, but nevertheless decided that "public policy... favors citizen crime fighters."

Allowing judges to direct public policy without the guidance of express statutory or constitutional guidance is indeed the broadest interpretation of the public policy exception to the at-will doctrine. However, its guarded application in cases such as Palmateer and Cloutier...
provides the answer to the fear of judicial legislation. In fact, it would be much better to allow judicial officers to perform the task of ascertaining public policy to further the goals of integrating tort and employment principles, than to allow judges to continue to apply the implied covenant of good faith in a manner isolating "employment law" from traditional tort principles.


This Article suggests that the public policy exception be expanded so that it is not applicable only when a statute, constitutional provision, or other "clearly mandated" legislative pronouncement is violated. Courts should recognize tort liability if a discharge involves any reason that a court would not enforce if the reason had been articulated in a term contract. Under this proposal, courts are not restricted solely to

---

278. See Duty to Discharge, supra note 41, at 1828-29. The author stated that:

Judicial adherence to the at will rule rests on a belief that judges should not interfere with the substantive outcomes of contractual bargaining. This belief relies upon assumptions implicit in traditional contract theory that the parties know what is in their best interests and are freely able to negotiate for them. A... criticism to this approach has been to point out that in some situations the relative bargaining power of the parties is so unequal that traditional contract assumptions are invalid... [J]udicial interference with freedom of contract is justified to redress imbalances by striking an unconscionable term or interpreting the contract against the stronger party. Some commentators have applied this rationale to the at-will rule, advocating judicial intervention to compensate for employees' relative lack of bargaining power. By contending that employers usually offer a job on a take-it-or-leave-it basis with little or no opportunity for negotiation, these critics analogize the at will contract to a standard form contract containing unconscionable, nonnegotiable terms.


For further analogies to the illegal contract, see Peter F. Kuntz, The Muddled State of the Law of Wrongful Discharge in the Private Sector, 30 N.H. B. J. 253, 258 (1989) (describing analogies to the illegal contract). The author asserts that:

[I]f [the employer] is retaliating against [the employee] for acting in furtherance of public policy, then his bad faith it seems must consist of attempting to insert into the employment contract a term which violates public policy. If that is the case, the court ought to make use of the well-established common law for weighing public policy against enforcement of a contract term. Account should be taken of the strength of that policy as manifested by legislation or judicial decisions and the likelihood that refusal to enforce the term will further that policy. There is no reason why similar considerations could not be brought to bear in a tort analysis as well.

Id. at 258; accord David J. Jung & Richard Harness, Life After Foley: The Future of Wrongful Discharge Litigation, 41 Hastings L.J. 131, 138 (1989) (stating that employers should be liable in tort for contract terms that would violate public policy). The authors state that, in Foley v. Interactive Data Corp.:
policies promulgated by the legislature. Rather, courts should hold tortious any discharge that violates public policy as articulated in any legitimate source of policy—whether executive, legislative, or judicial.

Properly understood, abusive discharges that violate public policy present a court with an issue identical to that presented when an "employer attempt[s] to enforce an illegal condition in a term employment contract." If a court would find void as against public policy a provision in a term contract that attempted to allow abusive employer conduct, "that court should not condone the abusive conduct merely because an at-will contract is for an indefinite period." The duration of the contract has nothing to do with whether the court should allow an employer to act contrary to public policy and violate the law with impunity. Illegal conduct is illegal conduct! If the challenged conduct would not be enforceable in a term contract, the employer has overstepped any legitimate expectations of the employment relationship and should be liable in tort to the injured employee. However, if the challenged employer conduct could constitute an enforceable provision in a term contract, there is no abusive discharge.

Courts have voided illegal contracts in two situations: if the act at issue was malum prohibitum (contrary to a statute); or if the act was malum in se (bad in itself as determined by the court). Historically, courts have shown no reluctance to act according to their own perceptions of public policy in the illegal contracts context, stating: "[A]s to the validity of contracts, the law makes no distinction between acts malum in se and acts enforced. Thus, in footnote seven, the opinion draws an analogy between declaring a contract unenforceable if it is for an illegal purpose, and vindicating the public interest by refusing to allow employers to require acts contrary to public policy as a condition of employment. Then, in footnote twelve, the opinion demonstrates the lack of a public interest on the facts in Foley by noting that nothing would prevent an employer from making it an express condition of employment that one worker should not inform on another. Is the court suggesting, with these two footnotes, a new test for the violation of an important public policy—perhaps if the employer legally could contract for the employee to perform a certain act, it does not violate any important public policy if she fires an employee who refuses to perform that act . . . .

279. See Parker, supra note 61, at 905, 912. For a more elaborate discussion of the relation between abusive discharges and illegal contracts, see J. Wilson Parker, The Uses of the Past: The Surprising History of Terminable-At-Will Employment in North Carolina, 22 Wake Forest L. Rev. 167, 212-18 nn. 295-320 (1987); see also Calamari & Perillo, supra note 42, (noting that the doctrine of unconscionability gives the court discretion to examine both the context and content of contractual agreements, and that, although originally limited to the area of sales, unconscionability has entered into the general law of contracts).

280. Parker, supra note 61, at 912; Parker, supra note 279, at 215.

281. Parker, supra note 61, at 914.

282. Id. at 912.

mala prohibita." Likewise, courts should make no distinction when they formulate tort liability in the abusive discharge context. Why should employment transactions be treated differently from any other transaction between individuals executed on any given day? Contract and tort law provide remedies for individuals exposed to illegal activity. Those same principles should apply in the employment context. A violation of public policy found in any source should subject the employer to tort liability, just as a breach of contract gives rise to contract liability.

As has been shown, voluminous sources of public policy are available to courts to assist them in deciding abusive discharge cases. Between public policy and express or implied contracts, employees have ample sources upon which to ground their abusive discharge claims, while an employer’s legitimate business judgment is left intact.

IV. CONCLUSION

Although an inevitable tension exists between the employer’s right to discharge arbitrarily and the employee’s right not to be discharged, these interests are not best accommodated by allowing a discharged employee to seek a legal remedy only if it is based on an alleged breach of the duty of good faith. In light of the aforementioned reasons for refusing to recognize the implied covenant, this Article asserts that implying the covenant of good faith in at-will employment contracts is not the means by which courts should attempt to strike the proper balance between employers and employees.

Similarly, legislative remedies offer little real hope of success. State legislatures seem unwilling even to consider the Model Employment Termination Act, and the experience in Montana has been of dubious value to workers or the courts, where judges have reverted to prelegislation norms in attempting to discern precisely when and where the unjustly terminated worker can recover.

Ultimately, employees can be protected by existing traditional theories, specifically the public policy tort and the implied-in-fact contract.

284. Id.

285. Parker, supra note 61, at 914; see also Parker, supra note 279, at 220. The author stated that courts will be called upon to do tasks which they can do well: determine on a case-by-case basis whether an employer, in discharging an employee, has acted outside the legitimate expectation of the parties’ employment relationship and has acted contrary to the basic public policy of the state. These inquiries are similar to those courts routinely perform in determining whether or not to enforce a possibly illegal contract; such tasks should not be removed from judicial preview merely because the inquiry involves employment - an area historically governed by the common law. The issues in such cases are a far cry from completely prescriptive decisions such as setting a minimum wage or imposing a just cause standard for all dismissals, endeavors appropriate for the fact finding capabilities of the legislature.

Id.
If courts would vigorously apply these relatively routine but central concepts, more workers would be better protected and employers would have a clearer view of what is and what is not acceptable conduct. Perhaps employment law itself could even be demarginalized and assume its proper place in future editions of first year torts and contracts casebooks.