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Terminating At-Will Employment Contracts in Utah Subsequent to *Berube v. Fashion Centre*

I. INTRODUCTION

Until the recent decision in *Berube v. Fashion Centre*,[1] Utah recognized a very limited cause of action for unjust termination of at-will employment contracts. An at-will employment contract is one that the employer, or employee, can terminate at any time "for good cause, bad cause, or no cause at all."[2] An at-will contract is created if the employment contract does not explicitly specify the term of duration.[3] Before *Berube*, the Utah courts had recognized two situations where an indefinite contract period did not create an at-will employment contract: (1) if the employee gave good consideration in addition to the service contracted to be rendered[4] or (2) if statutory limitations apply.[5] If either exception applied, the contract in question would no longer be an at-will contract, and the employer would have no absolute right to terminate. Therefore, one of these exceptions needed to be present before the employee could show that there

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1. 771 P.2d 1033 (Utah 1989).

2. *Id.* at 1038.

3. The courts require specific terms of duration. Bullock v. Deseret Dodge Truck Center, 11 Utah 2d 1, 354 P.2d 559 (1960) (the fact that an employee has the option to purchase stock within a specified period does not guarantee employment for that period, and the contract remains at-will); Hancock v. Luke, 52 Utah 142, 161-62, 173 P. 137, 144 (1918) (where the employee is required to purchase stock in the company and cannot sell out for ten years, as an inducement to keep him for that time, the contract is not sufficiently specific to state what period of time the relationship should continue and is, therefore, terminable by either party at any time).

In California, as in Utah, at-will contracts are created by a failure to indicate a time period during which the contract is valid. In fact, California has codified the common law: "An employment, having no specified term, may be terminated at the will of either party on notice to the other." CAL. LAB. CODE § 2922 (West 1976 & Supp. 1990).

Since the Utah Supreme Court relied heavily on California law, several cases from that jurisdiction are referenced for comparison.

4. First mentioned in Utah in Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979) (citing 53 AM. JUR. 2D *Master and Servant* § 32 (1970)).

5. Rose v. Allied Dev. Co., 719 P.2d 83, 85 (Utah 1986). An example of a legislative restriction on the employer's absolute right to terminate is the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988), which prohibits discharge based on race, color, religion, sex or national origin. There were no applicable statutory restrictions in *Berube*.

was an unjust dismissal. If one of the exceptions was present, the employer had to show the dismissal was for good cause.

The decision to change the standard for terminating at-will contracts took three different opinions, none of which was able to gather a majority of the Utah Supreme Court. In the plurality opinion, Justice Durham, joined by Justice Stewart, advocated accepting evidence outside the at-will contract to create implied-in-fact contract terms which may transform an at-will contract into one terminable only for cause. Justice Zimmerman, whose third vote was determinative, agreed in his opinion to adopt the implied-in-fact contract test. Associate Chief Justice Howe, joined by Chief Justice Hall, did not want to address the implied-in-fact contract issue and thought the case could be decided under existing law.

Prior to *Berube*, the only way to overcome the presumption of an at-will employment contract, by using an express or implied-in-fact contract term, was to show that the term specified the duration of the contract. An employment contract could not be made terminable for cause simply by listing in the contract activities for which the employee could not be terminated (e.g., lawful union membership).[6] Even if the contract explicitly stated that termination was for just cause only, but gave no set duration, it was considered at-will.[7] The new test adopted by the court will allow implied-in-fact terms that show an intent to terminate only for cause (without setting a specific duration) as sufficient to take a contract out of the at-will category.[8]

The *Berube* decision creates a major change for Utah employers, making it more difficult to discharge employees hired on an at-will basis. Conversely, the decision benefits employees, providing more job security and less risk of arbitrary termination. This note analyzes the court's reasoning and highlights the changes in at-will employment contracts in Utah. In addition, this note attempts to project how the court may resolve the issues it did not address in *Berube*.

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6. Held v. American Linen Supply Co., 6 Utah 2d 106, 307 P.2d 210 (1957).

7. Price v. Western Loan & Sav., 35 Utah 379, 100 P. 677 (1909).

8. Justice Durham liberally construed the holdings in *Bihlmaier* and *Rose* as standing for this proposition. *See* Berube v. Fashion Centre, 771 P.2d 1033, 1044 (Utah 1989).

II. Adopting the Implied-in-Fact Exception in Utah

A. *Facts of* Berube

Shirley Berube was employed by Fashion Centre as an assistant manager.[9] The store had a written disciplinary action policy which stated that it would not terminate employment without prior warning except for specific reasons, including failing to pass or refusing to take a polygraph examination.[10] Otherwise, Fashion Center's policy was that employees were to be given a warning and an opportunity to improve performance before being terminated. Berube's employment contract had no specific term of employment, and she understood that her employment could be terminated by either party. However, based on a number of representations and procedures, Berube believed she would be terminated only for good cause.[11]

This litigation arose, when, as a result of a large inventory shortage at the store, Fashion Centre required all employees to either take a polygraph examination or quit. Three employees chose to quit, but Berube and all the other employees agreed to take the examination. Without explanation, Fashion Centre required Berube to take a second polygraph examination. The second examination revealed no signs of deception. Notwithstanding these results, Fashion Centre demanded a third examination again without giving Berube an explanation.[12] Berube asked for a postponement of the third examination because she was extremely nervous and upset, but her request was refused.[13] She did not take the third examination as scheduled but came in the next day prepared to take the examination. Despite Berube's willingness, Fashion Centre terminated her.[14]

Berube filed a complaint including causes of action for wrongful discharge and breach of an employment contract.[15] After a four day trial, the jury determined that there was no employment contract between Fashion Centre and Berube; therefore, the contract remained at-will, and Berube had no cause of action.[16] Berube appealed, arguing that the trial court erred in

9. *Berube*, 771 P.2d at 1035.
10. *Id.* at 1036.
11. *Id.*
12. *Id.*
13. *Id.* at 1037.
14. *Id.*
15. *Id.*
16. Brief for Appellant at 5, Berube v. Fashion Centre, 771 P.2d 1033 (Utah 1989).

refusing to allow the jury to evaluate her case based on an implied covenant of good faith and fair dealing.[17]

The Utah Supreme Court did not adopt the implied covenant of good faith and fair dealing exception to at-will employment contracts. But the court did remand the case for trial, with instructions that the implied-in-fact contract exception be considered.[18]

B. Summary of the Utah Supreme Court Opinions

If the contract is not at-will and the employee shows prima facie evidence of wrongful discharge, the employer must prove the termination was for good cause. In the plurality opinion, Justice Durham proposed three exceptions to take a contract out of the at-will category. The first exception would apply when the employee is terminated for reasons which contravene public policy.[19] The second exception would apply when there is a breach of the implied covenant of good faith and fair dealing which is applicable to all contracts in Utah.[20] The last exception, and the only one ultimately adopted by the court, would apply when implied-in-fact contract terms are found which show that the parties did not intend to have an at-will contract.

Justice Zimmerman, concurring in part and dissenting in part, favored adopting the public policy and implied-in-fact exceptions, but found the covenant of good faith and fair dealing standard too unpredictable and recommended caution before extending the exception too far.[21] Until *Berube*, Utah had not ruled on the public policy exception, and although it was only treated in dicta, a majority of the court appears to be in favor of adopting this exception when the right case is brought before the court.

In the third opinion, Associate Chief Justice Howe did not want to modify the standard for terminating at-will contracts and proposed that the case be disposed by remanding to the

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(No. 20673).

17. *Berube*, 771 P.2d at 1035. Berube argued that the implied covenant of good faith and fair dealing applies to all contracts in Utah and should therefore should be applicable to employment contracts.

18. *Id.* at 1035, 1049.

19. *See infra* text accompanying notes 48-57 for a discussion of the public policy exemption.

20. *See infra* text accompanying notes 58-75 for a discussion of the implied covenant of good faith and fair dealing exemption.

21. *Berube*, 771 P.2d at 1050-51 (Zimmerman, J., concurring).

lower court to determine if being discharged for failure to take a third polygraph examination was procedurally proper under the company's policy manual.[22]

C. *Finding the Existence of Implied-in-Fact Contract Terms*

As previously mentioned, before *Berube*, Utah recognized only two possible exceptions to an at-will contract; if the employee gave consideration in addition to his services, and statutory restrictions. The *Berube* decision eliminated the independent consideration exception but did not address the statutory exceptions. In addition, the court analyzed the three possible new exceptions discussed above which would remove an employment contract from the at-will category.

The only new exception actually adopted, allowing implied-in-fact contract terms to show the parties meant the employment to be terminable for cause only, had been expressly rejected in the past.[23] The most significant effect of *Berube* on Utah law is reflected in the court's changed attitude toward at-will contracts. The court now recognizes that the at-will doctrine creates only a presumption as to what the parties intended.[24] The presumption can be rebutted by demonstrating that the parties did not intend the arrangement to be at-will.[25]

> The at-will rule, after all, is merely a rule of contract construction and not a legal principle. The rule creates a presumption that any employment contract which has no specified term of duration is an at-will relationship. This presumption can be overcome by an affirmative showing by the plaintiff that the parties expressly or impliedly intended a specified term or agreed to terminate the relationship for cause alone. . . . Although in the past the presumption in favor of at-will employment has been difficult to overcome, rigid adherence to the at-will rule is no longer justified or advisable.[26]

Berube allows implied-in-fact terms, which show an intent to create a contract terminable only for cause, to rebut the presumption of an at-will contract, and therefore become terminable only for cause without requiring the contract to specify a du-

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22. *Id.* at 1050 (Howe, A.C.J., dissenting).
23. *See supra* text accompanying notes 6-8.
24. *Berube*, 771 P.2d at 1051 (Zimmerman, J., concurring).
25. *Id.* at 1052.
26. *Id.* at 1044 (citations omitted) (plurality opinion).

ration.[27] The employee can now rebut the presumption of an at-will contract by presenting evidence which shows that the intent of the parties was to create a contract terminable for cause without regard to whether the contract was for a set time period. The ultimate determination of whether an implied-in-fact contract has been created is a question for the jury, with the burden of proof resting on the plaintiff-employee.[28]

1. *Evidentiary problems with implied-in-fact terms*

a. Mutuality. In the past, one problem with using implied-in-fact terms to show that a contract is no longer at-will was that the contract terms were often disallowed. The problem occurs because if the employee could terminate at any time, the employer also must be able to terminate, or there is no mutuality of obligation.[29] The *Berube* court rejected this approach,[30] stating that mutuality of obligation should not prevent enforcement of an implied-in-fact promise.[31]

b. Consideration. The *Berube* court ruled that an employee's giving of consideration, in addition to services, is no longer a separate standard for determining whether an employment contract is at-will.[32] Independent consideration is now simply used as further proof of the parties' intent. The court therefore adopted the view that consideration has primarily an

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27. California also does not require a set duration if the parties intended the contract to be terminable for cause. The California Supreme Court ruled that an implied-in-fact term can be created by a course of conduct, including various oral representations, which create a reasonable expectation that the employee would not be terminated without good cause. This was sufficient to take the contract out of the at-will category and make it terminable for just cause since the courts will try to determine and enforce the understanding of the parties. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 675-82, 765 P.2d 373, 383-88, 254 Cal. Rptr. 211, 221-27 (1988); *see also* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 917, 924 (1981) (evidence that shows the employment relationship will continue indefinitely, absent some cause for termination, can rebut presumption of an at-will contract).

28. *Berube*, 771 P.2d at 1044 (plurality opinion).

29. *See* Price v. Western Loan & Sav., 35 Utah 379, 100 P. 677 (1909) (articulating requirement of mutuality, also adopting at-will contracts in Utah).

30. *Berube*, 771 P.2d at 1051 (Zimmerman, J., concurring).

31. *Id.* at 1045 (plurality opinion). California courts also have rejected the mutuality of obligation requirement. "A contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit his employment." Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917, 924 (1981).

32. *Berube*, 771 P.2d at 1045, 1051 (Zimmerman, J., concurring).

evidentiary function.[33] To determine whether the contract is at-will, the Utah courts will now look at both express and implied terms. The presence of independent consideration is only one term to be considered.

Another problem with consideration arose if the implied-in-fact promises to not discharge were made after employment began. An employee's continuing to work was deemed to be not enough consideration to make the promises binding. Although the plurality wanted to change this and allow the continuation of work to be enough consideration,[34] the issue was not addressed by Justice Zimmerman. However, since the court has agreed that separate consideration is not necessary, the employee's continued work is just further evidence of his acceptance of the promises.

c. Other sources of implied-in-fact terms. The *Berube* ruling allows a contract term to be implied from the actions of the parties.[35] Possible sources of implied-in-fact terms include employment manuals, oral agreements,[36] conduct between the parties, personnel policy announcements, trade or industry practices, or other circumstances which show the existence of such a promise.[37] But Justice Zimmerman did not want to fix the precise parameters of the implied-in-fact exception beyond the employee manuals and bulletins needed to decide this case and expressed concern that the implied-in-fact test has been extended in California to the point of being indistinguishable from the good faith and fair dealing test.[38]

The use of an employer's personnel manual to supplement the terms of employment is not new with *Berube*. *Piacitelli v. Southern Utah State College*[39] dealt with a college coordinator of counselling who was improperly terminated according to the

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33. *Id.* California also rejected the requirement of independent consideration from an employee before a contract is no longer at-will, explaining that independent consideration only serves an evidentiary function. *Pugh*, 116 Cal. App. 3d at 326, 171 Cal. Rptr. at 925; *see also* Drzewiecki v. H. & R. Block, Inc., 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972) (contract for permanent employment, without additional consideration, cannot be terminated at the will of the employer if it contains a condition to the contrary).

34. *Berube*, 771 P.2d at 1045 (plurality opinion).

35. *Id.* at 1049 (Justice Durham stating that a majority of the court agrees that the implied-in-fact exception should be adopted).

36. However, the parol evidence rule still precludes an implied-in-fact promise from contradicting a written contract term. *Id.* at 1044.

37. *Id.*

38. *Id.* at 1052.

39. 636 P.2d 1063, 1066 (Utah 1981).

procedures outlined in the college's personnel manual.[40] The issue was whether procedures were properly followed, as opposed to whether the college had the right to terminate at all. The court found that an employer "may undertake a contractual obligation to observe particular termination formalities by adopting procedures or by promulgating rules and regulations governing the employment relationship."[41] But, strict adherence to the manual was not required if substantial compliance was sufficient to satisfy the purpose of the procedures.[42]

In attempting to clarify the intended meaning of employment contracts, the Utah Supreme Court has also considered other factors in addition to employment manuals. In *Rose v. Allied Development Co.*,[43] the court looked at the understanding and intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case to ascertain the terms of the claimed agreement.[44] *Rose* involved a shoe department manager who began attending school with the understanding that he could continue working full time. When his job performance became unsatisfactory, he was terminated.[45] When using implied terms to transform an at-will contract to one with a definite duration, and therefore terminable only for cause,[46] the court ruled that more is required than subjective understandings or expectations—both parties must have agreed to the terms.[47]

In effect, *Berube* has built on past cases which allowed implied-in-fact terms. But *Berube* gave more effect to the terms by reducing the level of evidence required to rebut the presumption of an at-will contract.

III. The Dicta on the Public Policy Exception

Adopting the implied-in-fact exception was the major change wrought in *Berube*. However, Justice Durham felt the public policy exception was important enough to be addressed,

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40. *Id.* at 1064.
41. *Id.* at 1066.
42. *Id.*
43. 719 P.2d 83 (Utah 1986).
44. *Id.* at 86.
45. *Id.* at 84.
46. *Id.* at 85.
47. *Id.* at 86.

even though she recognized that it did not apply in this case.[48] The public policy exception is invoked when "an employee is discharged for a reason or in a manner that contravenes sound principles of established and substantial public policy . . . ."[49] Since a majority, in dicta, favored adopting this exception,[50] it is likely that a majority of the court will recognize the exception in an appropriate case. But if the exception is adopted, it is not clear whether an employee who is terminated contrary to public policy will be able to bring an action in tort or in contract.[51]

The general principle behind the public policy exception is that no citizen should lawfully do that which has a tendency to be injurious to the public or against the public good.[52] A traditional example of an act against public policy is the termination of an employee based upon his refusal to commit a crime.[53] To allow such terminations would encourage employers to coerce their employees to act contrary to the good of society.[54] The public policy exception arises from a breach of duty growing out of the employment contract (a duty to society created by public policy) rather than a breach of a promise set forth in the contract.[55] It is the breach of duty to society, not the breach of contract, that justifies allowing tort damages instead of contract damages.[56]

So, although the Utah Supreme Court endorses the public policy exception, it is necessary to await the proper case before it is determined whether the action would lie in tort or contract and, apart from criminal conduct, exactly what conduct would constitute a violation of the public policy exception.[57]

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48. Berube v. Fashion Centre, 771 P.2d 1033, 1043 (Utah 1989) (plurality opinion).

49. *Id.* at 1042.

50. *Id.* at 1051 (Zimmerman, J., concurring) (agreeing that the public policy exception should be recognized).

51. Justice Durham favored following California and allowing tort causes of action. *See, e.g.*, Tameny v. Atlantic Richfield, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). *Berube*, 771 P.2d at 1042-43. Justice Zimmerman preferred limiting recovery to contract damages. *Id.* at 1051.

52. *Berube*, 771 P.2d at 1042 (plurality opinion).

53. *Tameny*, 27 Cal. 3d at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

54. *Id; see also* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665, 765 P.2d 373, 376, 254 Cal. Rptr. 211, 214 (1988).

55. *Foley*, 47 Cal. 3d at 667-68, 765 P.2d at 378, 254 Cal. Rptr. at 216.

56. *Id.*

57. In addition to determining if the public policy exemption will sound in tort or contract, the court must define the scope of the exception. This becomes more difficult when dealing with conduct which is not criminally proscribed. The plurality opinion suggested that a wrongful termination must involve substantial and important public poli-

IV. The Rejection of the Implied Covenant of Good Faith and Fair Dealing Exception

In the plurality opinion, Justice Durham proposed allowing a breach of the implied covenant of good faith and fair dealing to serve as evidence of a wrongful discharge. She was unable to get a majority of the court to agree.[58]

A. Lack of a Bright-line Test for the Covenant of Good Faith and Fair Dealing Exception

All contracts in Utah have an implied duty of good faith and fair dealing.[59] Violation of that duty gives rise to a claim for breach of contract.[60] If the contract gives one party discretion to approve the performance of the other party, he must "act fairly and in good faith in exercising that right. He has no right to withhold arbitrarily his approval; there must be a reasonable justification for doing so."[61] Until *Berube*, no good faith and fair dealing case in Utah had involved employment terminations, and the court had never addressed the issue with respect to employment contracts.[62]

Justice Durham justifiably suggests that employment contracts are like all other contracts, and that a breach of the covenant of good faith and fair dealing should be treated like a breach of any other type of contract.[63] Since an at-will employment contract is simply a contract without a set duration, all the covenant of good faith and fair dealing requires, procedurally, to terminate such a contract is reasonable notification prior to the

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cies and that the court will apply "only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good." Berube v. Fashion Centre, 771 P.2d 1033, 1043 (Utah 1989). In his concurrence, Justice Zimmerman did not attempt to define what the precise content of the exception should be. *Id.* at 1051.

58. California courts recognize the covenant of good faith and fair dealing in employment contracts. However, they will not go so far as to find a breach of the implied covenant of good faith and fair dealing as a basis for a wrongful termination action if the same result can be derived from a traditional contract analysis. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981).

59. Beck v. Farmers Ins. Exch., 701 P.2d 795, 798 (Utah 1985).

60. *Id.*

61. Prince v. Elm Inv. Co., 649 P.2d 820, 825 (Utah 1982) (quoting William G. Vandever & Co. v. Black, 645 P.2d 637 (Utah 1982)).

62. In Rose v. Allied Dev. Co., 719 P.2d 83, 84, 87 (Utah 1986), the plaintiff sued for breach of the implied covenant of good faith and fair dealing, but the court did not discuss this issue.

63. Berube v. Fashion Centre, 771 P.2d 1033, 1046 (Utah 1989).

termination.[64] This requirement is designed to avoid surprise, protect good faith judgment and reduce uncertainty.[65] So if proper notice is given, the discharged employee has the heavier burden of showing that the decision to terminate was made in bad faith and, therefore, in breach of the covenant of good faith and fair dealing. The problem with the covenant of good faith and fair dealing, then, is determining what exactly constitutes bad faith.

The Durham opinion recognizes that the difficulty with applying a good faith and fair dealing standard is that it is "not susceptible to bright-line definitions and tests."[66] The scope of the implied covenant of good faith and fair dealing depends on the factual setting of the employment agreement and, therefore, depends on the employee's expectations, as well as the employer's conduct.[67] Not all terminations without cause will be a breach of the covenant of good faith; therefore, the occurrence of a breach remains a question to be resolved by the fact finder.[68]

This lack of a bright-line test as to what standard of duty the good faith and fair dealing covenant imposes on the employer seems to have persuaded Justice Zimmerman to oppose adopting the covenant:

> [T]he lead opinion completely fails to establish predictable guidelines for determining what that duty is and when an employer can be found to owe such a duty to an employee. The result would be to give finders of fact a license to determine the duty's content and to impose their version of the duty, after the fact, on virtually any employer.[69]

Justice Zimmerman's analysis is suspect because juries are frequently required to determine whether the covenant of good faith and fair dealing has been breached in contracts outside the employment context.

Most people, and therefore most jurors, are either employers or employees, and as such, have a general feel for what a breach of the covenant of good faith and fair dealing in the employment context entails—maybe even more so than with other

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64. Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co., 765 P.2d 5, 11 (Utah Ct. App. 1988).

65. *Id.*

66. *Berube*, 771 P.2d at 1047.

67. *Id.* at 1046.

68. *Id.*

69. *Id.* at 1051-52 (Zimmerman, J., concurring).

types of contracts. However, since more people are employees than employers, jury prejudice will most likely be skewed toward the discharged employee. Perhaps the Justices' individual perceptions of jury competence are the motivating factor in their attitudes toward the covenant of good faith and fair dealing.

Justice Durham's contention is that a good faith and fair dealing standard allows the courts to administer relief where true injustice occurs.[70] Conversely, Justice Zimmerman would emphasize the employer's security over an uncertain standard favoring the wrongfully discharged employee. Justice Zimmerman states that adopting the good faith and fair dealing covenant would give finders of fact a license to determine the content of the duty for good faith and fair dealing and to impose their version of the duty on virtually any employer.[71] The result is that "the cost of uncertainty for employers is simply too great to justify creation of the cause of action proposed by the lead opinion."[72] However, concluding that Justice Zimmerman favors employers over employees is overly simplistic. He is primarily stressing the need for caution.[73] To proceed too recklessly may produce consequences that are worse than the problem.

B. Lack of a Bright-line Test for the Implied-in-Fact Contract Exception

While rejecting the covenant of good faith and fair dealing because of the lack of a bright-line standard, the court adopted the implied-in-fact exception. However, the implied-in-fact exception can also be applied inconsistently. As pointed out by Justice Zimmerman, many jurisdictions have adopted the implied-in-fact exception with such a liberal standard that the results are factually indistinguishable from those reached in cases decided on the basis of the covenant of good faith and fair dealing.[74] In these states, where the implied-in-fact duty not to terminate except for good cause cannot be proved, employees still prevail because it is found that the covenant of good faith and fair dealing prohibits terminating without good cause in the circumstances. In other words, the implied-in-fact duty not to ter-

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70. *Id.* at 1047.
71. *Id.* at 1052 (Zimmerman, J., concurring).
72. *Id.*
73. *Id.* at 1050-51.
74. *Id.* at 1052.

minate is proved because good faith prohibits termination. Thus, there is no bright-line distinction between the implied-in-fact and the good faith tests. Justice Zimmerman was aware of this problem and rejected the most liberal approaches but refused to define the precise limits on the facts of this case.[75] However, the lack of distinction between the two tests seems to indicate that it would be best to adopt both (or neither) and to define the limits of both as the case law develops.

C. Development of the Cause of Action for a Breach of the Implied Covenant of Good Faith and Fair Dealing Outside Employment Cases

Since Justice Zimmerman did not reject the good faith and fair dealing exception outright, but rather recommended proceeding with caution, expansion of the law in the this area is possible, and an understanding of the development and application of the good faith and fair dealing exception in other areas of the law is important.

If the implied covenant of good faith and fair dealing exemption is adopted in Utah for employment cases, the cause of action will give rise to contract and not tort damages.[76] As a general rule, Utah has always limited damages for the breach of the covenant of good faith and fair dealing to contract damages only.[77] There is no suggestion in *Berube* that this should be changed,[78] nor could it be justified under existing case law.

Utah has an exception to the general rule of contract damages that allows a tort action for breach of the implied covenant of good faith and fair dealing when an insurer acts in bad faith and fails to settle an insurance claim. This exception applies, and a breach of the covenant of good faith and fair dealing is treated as a tort, in insurance cases where an insurance company defends its insured against the claims of a third party.[79] This exception was first expressed in *Ammerman v. Farmer's Insurance Exchange*.[80]

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75. *Id.*

76. *Id.* at 1046, 1051.

77. Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985).

78. *Berube*, 771 P.2d at 1046.

79. California recognizes the same tort action for failure of the insurer to perform its fiduciary duty to defend its insured against third parties. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

80. 19 Utah 2d 261, 430 P.2d 576 (1967).

In the preliminary suit which formed the basis for *Ammerman*, the plaintiff sued the driver of an automobile who caused him injury. The driver's insurer refused to settle for the policy amount. At trial, the plaintiff was awarded damages which exceeded the policy coverage. Because of the driver's inability to pay the excess, the plaintiff sued the insurer in *Ammerman*. This action was based on the theory of bad faith for failing to settle for the policy amount. Although the court refused to allow the injured plaintiff's claim, the court stated that the insured had a tort action against the insurance company due to its breach of the fiduciary duty it owed the insured.[81]

However, the Utah courts distinguish third party from first party situations. First party insurance is where the insured is himself trying to collect from his insurer.[82] In *Lyon v. Hartford Accident & Indemnity Co.*,[83] the Utah Supreme Court refused to allow the insured to collect tort damages in a first party insurance case. The court reasoned that in a third party insurance situation, the insurer must act in good faith and protect the interests of the insured as zealously as its own.[84] In first party situations, on the other hand, the insured and the insurer are adversaries.[85] The court easily disposed of the tort cause of action in first party insurance cases as "distorting well-established principles of contract law."[86] So in situations where the interests of the parties are considered to be conflicting, as with an employer and employee, the court will not allow a tort action. A tort action is available only where there is a fiduciary duty.[87]

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81. *Id.* at 264, 430 P.2d at 578.

82. The California Supreme Court extended tort causes of action from cases involving claims by third parties against the insured to cases by insured parties against their insurers without differentiating between the two. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573-74, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973).

83. 25 Utah 2d 311, 480 P.2d 739 (1971).

84. *Id.* at 319, 480 P.2d at 745.

85. *Id.*

86. Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985); *see also* Gagon v. State Farm Mut. Auto. Ins. Co., 771 P.2d 325 (Utah 1988) (The insurer's breach of implied covenant to act in good faith toward its insured did not, alone, give rise to a cause of action in tort; rather, the cause of action was one in contract. Consequential damages for breach of the covenant are available, tort damages, including punitive damages, are not.).

87. California does allow a tort action in first party insurance cases due to the special relationship between insurer and insured. An insurance company supplies vital services of a quasi-public nature, which impose upon the insurer fiduciary responsibilities. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684-85, 765 P.2d 373, 390, 254 Cal. Rptr. 211, 228 (1988). However, the *Foley* court found no special relationship exists between

One other argument for imposing tort damages is that a primary purpose of tort damages is compensation for inadequate contract remedies. However, the Utah courts have historically reasoned that allowing both general and consequential damages (which could include attorney fees) provides sufficient compensation,[88] so there is little incentive to ever adopt a tort action.

V. Conclusion

A split court in *Berube* created a new exception for taking an employment contract out of the at-will classification and thereby making it easier for an employee to prove an improper termination of an at-will employment contract. Although not necessary to the decision of the case, a majority of the court signaled its willingness to adopt a public policy exception to at-will contracts. The court did not express any opinion as to whether the action would lie in tort or contract or as to what conduct (aside from criminal actions) will constitute a breach of the public policy exception.

The major impact of the decision is the adoption of the implied-in-fact exception. The court now allows implied terms to create a contract terminable for cause without specifying a set duration. The court has made it easier for the employee to show the presence of implied terms. The need for mutuality has been eliminated, so an employer can be prohibited from terminating while the employee can terminate at-will. The independent consideration exception has been eliminated as a separate standard for taking a contract out of the at-will category, but the presence of independent consideration is viewed as proof of the parties' intent to form a contract terminable for cause. An employer's promise not to terminate except for cause is binding without the employee's providing further consideration other than continuing to work. Like other contract breaches, a breach of an implied-in-fact term is actionable only for contract damages. The court has refused to adopt the implied covenant of good faith and fair dealing exception, apparently desiring to proceed with

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the employer and employee which warrants tort damages; so in employment cases, a breach of the implied covenant of good faith and fair dealing is only a breach of contract. Therefore compensation for its breach is limited to contract rather than tort remedies. *Id.* at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234-35.

88. *See, e.g.*, *Beck*, 701 P.2d at 801-02.

care and pursue a conservative and detailed approach to recognizing exceptions to at-will employment contracts.

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