Montana Law Review

Volume 51
Issue 1 *Winter 1990*

Article 3

January 1990

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MONTANA EMPLOYMENT LAW AND THE 1987 WRONGFUL DISCHARGE FROM EMPLOYMENT ACT: A NEW ORDER BEGINS

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I. INTRODUCTION

In January 1982, the Montana Supreme Court crossed a significant threshold in employment law when it recognized an employer's liability for breach of an implied covenant of good faith and fair dealing in *Gates v. Life of Montana Insurance Co.* (*Gates I*).[1] This decision represented a major break from the old era of

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1. 196 Mont. 178, 638 P.2d 1063 (1982). In 1983 this case was brought before the court a second time. Gates v. Life of Montana Insur. Co., 205 Mont. 304, 668 P.2d 213 (1983) [hereinafter *Gates II*]. The employment covenant of good faith and fair dealing had been acknowledged earlier in dictum in *Reiter v. Yellowstone County*, ___ Mont. ___, ___, 627

Montana employment law. The old era was dominated from early statehood by the statutory presumption that employment was an at-will relationship, which either party could end without cause upon a moment's notice.[2] The new era has already gone through three major stages. First, from 1982 through 1985 the Montana Supreme Court steadily expanded the grounds on which a terminated employee could sue.[3] Second, starting in late 1985, the Montana Supreme Court's decisions became much less predictable as the court began to refine the broad policy pronouncements of the previous four years and to look for legal theories to moderate or reverse several of the consequences of *Gates I* and the cases that followed. The third stage began in 1987, when the 1987 Montana Legislature, reacting primarily to an employer backlash against the court's new doctrines, enacted the "Wrongful Discharge From Employment Act" (WDFEA).[4] WDFEA rejected a large part of the case law since *Gates I*, but it also recognized that the statutory at-will presumption left employees overly vulnerable in certain circumstances. In July 1989, the Montana Supreme Court upheld WDFEA against a constitutional challenge in *Meech v. Hillhaven West, Inc.*[5] Since the *Meech* court put its imprimatur on WDFEA, most Montana employers, employees, and employment law practitioners have abandoned the transitional case law of the 1980s. Instead, these groups have headed toward a new legal path, where primary guidance comes no longer from case law, but rather, from statutory citation and interpretation.

This article charts the still uncertain contours of this new era. It first chronicles the development of the covenant of good faith and fair dealing in Montana employment law, concentrating on post-1985 modifications of early covenant rulings, and then com-

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P.2d 845, 849 (1981).

2. The at-will section remains codified at Montana Code Annotated § 39-2-503 (1989).

3. This initial period of expansion of the covenant of good faith and fair dealing has been examined in several articles. *See* Graham & Luck, *The Continuing Development of the Tort of Bad Faith in Montana*, 45 MONT. L. REV. 43, 66-68 (1984); Hopkins & Robinson, *Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future*, 46 MONT. L. REV. 1 (1985); Comment, *Survey: Good Faith and Fair Dealing: An Analysis of Recent Cases*, 48 MONT. L. REV. 193 (1987) (authored by James Hubble). Because these articles cover the period up to 1985, this article will focus primarily on developments since 1985.

4. SEE *Mont. Code Ann.* § 39-2-901 to -914 (1989).

5. ___ Mont. ___, 776 P.2d 488 (1989). The major contention of the plaintiff challenging WDFEA was that *Gates I* and the succeeding cases created a vested common-law remedy that could not be reduced by the legislature because of the "full legal redress" provision in article II, section 16 of the Montana Constitution. The court rejected this argument by reinstating a narrow view of the full legal redress clause. *See infra* part IV, for further discussion.

pares that law to the new regime brought in with WDFEA.

II. The Alternating Expansion and Contraction of Employment Tort Actions

A. *Redefining the Employer Covenant of Good Faith*

By the mid-1980s state supreme courts were well on their way to rejecting the previously dominant presumption of at-will employment.[6] Montana was in the forefront of this movement. The Montana Supreme Court first implied a covenant of good faith and fair dealing in employment contracts in *Gates I*.[7] It then declared the breach of the covenant a tort action rather than a contract action in *Gates v. Life of Montana Insurance Co. (Gates II)*,[8] thereby opening the door for punitive damages and a broader range of consequential damages. One year later, the Montana Supreme Court held in *Dare v. Montana Petroleum Marketing*[9] that an employee could base an enforceable covenant on an employer's oral or unintended "objective manifestations" of job security to an employee.[10] Under the reasoning in *Dare*, an employer could create an obligation not to terminate an employee except for good cause, by giving that employee a positive performance appraisal or a salary increase, regardless of whether the employer intended to "objectively manifest" any assurances of job security. Finally, the court extended the covenant to probationary employees in *Crenshaw v. Bozeman Deaconess Hospital*.[11]

Around the country some state courts required an employee suing for breach of the covenant of fair dealing to show that the employer violated a public policy in terminating the employee.[12]

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6. For excellent summaries of those developments see Gradwohl, *The Search For Policies On Protecting the Opportunity of an Individual To Earn A Livelihood Through Performance of Personal Services*, 67 Neb. L. Rev. 1 (1988). This entire issue of the *Nebraska Law Review* is devoted to articles on wrongful discharge. The several articles subsumed under the broad volume title, taken together, give the reader a glimpse of the voluminous legal literature of the 1980s spawned by the movement to undo the at-will doctrine. Authors include Clyde B. Summers, William B. Gould IV, Theodore J. St. Antoine, and Jack Stieber. No better survey can be found. *See also* Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 Idaho L. Rev. 201 (1985).

7. 196 Mont. 178, 638 P.2d 1063 (1981). *See also* Nye v. Department of Livestock, 196 Mont. 222, 639 P.2d 498 (1982). *Nye* is the first successful suit for a wrongful discharge action based on a violation of public policy. Such cases constitute a subset of covenant of good faith and fair dealing cases. *See infra* note 76 and accompanying text.

8. 205 Mont. 304, 307, 668 P.2d 213, 215 (1983).

9. 212 Mont. 274, 687 P.2d 1015 (1984).

10. *Id.* at 282, 687 P.2d at 1020.

11. 213 Mont. 488, 500-01, 693 P.2d 487, 493 (1984).

12. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), in which an employee prevailed on a claim that she had been fired for insisting on serving as a juror.

Others required a showing that the employer violated an oral or implied contract with the employee.[13] By 1985, the Montana Supreme Court had defined the covenant so broadly that it incorporated all extant theories.[14]

The Montana Supreme Court first indicated its willingness to rein in this expanding cause of action in a non-labor case. In *Nicholson v. United Pacific Insurance*,[15] the court was confronted with a dispute between two parties to a commercial contract. The court expressly declined to imply a covenant of good faith into *every* contract breach.[16] In so doing, the court parted ways with California case law.[17] The court explained this divergence by noting that, in Montana, the focus is not so much on whether a contract has been breached. Instead, the focus is on whether the contract has been breached through especially egregious conduct.[18] The court then laid out a "justifiable expectations" standard for determining whether a breach of contract was serious enough that it breached the covenant of good faith and fair dealing: "The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously or unreasonably, that conduct exceeds the justifiable expectations of the second party."[19] Thus, while the "justifiable expectations" language in *Nicholson* harked back to the "objective manifestations" standard enunciated one year earlier in *Dare*, the "arbitrary, capricious, and unreasonable" language, as applied in an employment case, elevated the level of employer misconduct that a discharged employee must show.

Some ten months later, in *Maxwell v. Sisters of Charity of*

13. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980), in which an employer's oral assurances made at the time of hiring, combined with a personnel manual adopted after the employee's hire, created an implied obligation to terminate only for just cause.

14. The court attempted to define "wrongful discharge" and differentiate it from a "breach of the duty of good faith and fair dealing" in *Dare*. As Justice Morrison noted in his dissenting opinion, this attempt to differentiate among varieties of employment discharge actions could lead to confusion, because in practice the court had allowed the breach of the covenant of good faith and fair dealing to swallow all varieties of discharge actions. *Dare*, 212 Mont. at 284-86, 687 P.2d at 1021-22 (Morrison, J., dissenting). This article uses the term "breach of the duty of good faith and fair dealing" in this broad sense. *See infra* note 76, for further discussion on this point.

15. 219 Mont. 32, 710 P.2d 1342 (1985).

16. *Id.* at 41, 710 P.2d at 1348.

17. *Id.*

18. *Id.*

19. *Id.* at 41-42, 710 P.2d at 1348.

Providence of Montana,[20] a federal district court made explicit what had only been implied in *Nicholson*. Confronted with an employee's claim that he had been terminated in violation of the covenant of good faith and fair dealing, the court explained that a complaining employee must prove that the employer committed a contract breach in order to base a claim on a breach of the covenant.[21] Citing *Nicholson*, the court granted summary judgment to the employer because the employee failed to prove that his contract had been breached: "Since the court concludes the defendants did not breach plaintiff's employment contract, the defendants cannot be found to have acted unreasonably and in breach of the implied covenant of good faith and fair dealing."[22]

The Montana Supreme Court followed *Maxwell* in *Nordlund v. School District No. 14*.[23] In *Nordlund*, the school district refused to renew a high school superintendent's one-year contract.[24] The superintendent alleged that failure to renew the contract constituted a breach of the covenant.[25] Noting that the language of the contract permitted non-renewal, the court affirmed the grant of summary judgment in favor of the employer.[26] In so doing, the court refused to examine the circumstances surrounding the non-renewal. Rather, it stated the clear principle now governing employment covenant cases: "As in *Maxwell*, because no breach of contract occurred, it cannot be said that the school board breached the implied covenant of good faith and fair dealing."[27]

The *Nordlund* rule, that a contract breach is a condition precedent to a covenant breach, substantially limited the ability of employees with written contracts to escape a summary judgment motion. An employee first had to demonstrate some specific way in which the contract had been breached. General allegations of improper motive or a misevaluation of employee performance usually did not suffice to make a prima facie case, unless the employee could tie the employer's misconduct to a breached contract clause. The requirement of a contract breach brought the employment covenant closer to traditional employment law, in which the plaintiffs and defendants argued about contract breaches rather than covenant breaches. This new emphasis on contract breaches, how-

20. 645 F. Supp. 937 (D. Mont. 1986).
21. *Id.* at 939.
22. *Id.*
23. 227 Mont. 402, 738 P.2d 1299 (1987).
24. *Id.* at 404, 738 P.2d at 1300.
25. *Id.*
26. *Id.*
27. *Id.* at 406, 738 P.2d at 1302.

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ever, created a glaring internal inconsistency in Montana employment covenant law.

In *Gates II* the Montana Supreme Court had followed California's lead by denominating an employee's action for breach of the covenant of good faith and fair dealing as a tort action rather than a contract action. *Gates II* was important, because a plaintiff's recovery in tort could include punitive damages and damages for emotional distress, while recovery on a contract action was usually restricted to back pay and reinstatement or, possibly, some limited front pay. Labeling a breach of the covenant as a tort had such a significant bearing on an employee's potential recovery that it elicited strong sentiments on the Montana Supreme Court. *Gates II*, decided by a four-three vote, with two separate dissents, reflected the deep division present on the court. This designation of the breach of the covenant as a tort constituted Montana employers' major, but not sole, objection to the new case law. After *Nordlund*, a suit for breach of the covenant of good faith and fair dealing became something of a hybrid action. An employee had to show a contract breach, just as in any other contract action; but, once the employee had established a breach, the tort measure of damages would come into play.

B. Creating Exceptions to the Covenant

As the Montana Supreme Court struggled to define the basic elements of an employer's duty of good faith and fair dealing, it also carved out exceptions to the covenant. Within a two-month period in 1986, the court exempted judicial employees, church employees, and unionized employees from the coverage of the covenant. The first exception occurred in *Mead v. McKittrick*,[28] in which a court secretary sued a district court judge for wrongful discharge and breach of the implied covenant of good faith and fair dealing.[29] The court held that a statute giving the judges judicial immunity extended the immunity to personnel actions.[30] Shortly thereafter, the court created the second exception to the covenant in *Miller v. Catholic Diocese of Great Falls*.[31] In *Miller*, the court held that a discharged parochial school teacher could not sue her church employer under the covenant, because such an action would constitute judicial interference with the church's affairs in viola-

28. 223 Mont. 428, 727 P.2d 517 (1986).
29. *Id.* at 430, 727 P.2d at 518.
30. *Id.* at 431, 727 P.2d at 519.
31. 224 Mont. 113, 728 P.2d 794 (1986).

tion of the constitutional guarantee of free exercise of religion.[32]

The Montana Supreme Court established the third, and most important, exception to the right to sue for a breach of the covenant of good faith and fair dealing in *Brinkman v. State*.[33] In *Brinkman*, the plaintiff was a state employee covered by a collective bargaining agreement, who had been terminated from his job.[34] The negotiated agreement contained a grievance procedure ending in binding arbitration by a neutral third party,[35] and terminations were grievable under the contract.[36] Despite these provisions, the employee chose not to file a union grievance contesting his termination. Instead, he went to court alleging breach of the covenant of good faith and fair dealing.[37] The Montana Supreme Court began its analysis with a lengthy discourse on federal labor law. The court, noting the similarities between state and federal collective-bargaining statutes, relied on federal case law to support the general rule that a person covered under a collective-bargaining contract may not evade the grievance procedure in the contract by filing a common-law action to remedy the alleged wrong.[38] The court based its strong deference to contractual grievance procedures on the judicial presumption that collectively bargained grievance procedures are effective and efficient forums for dispute settlement, and on the fact that the legislature had endorsed statutorily this method of handling workplace disagreements.[39]

Thus, the policy reasons that had moved the court to imply a covenant of good faith and fair dealing in other settings did not exist in unionized environments. The implied covenant doctrine developed, because courts had been confronted with grievously wronged employees who could not vindicate themselves through any existing legal remedy. In *Brinkman*, for example, the court noted that an employee who has access to a formal grievance procedure ending in arbitration is presumed to have a legal remedy: "It cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."[40]

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32. *Id.* at 116-17, 728 P.2d at 796.
33. 224 Mont. 238, 729 P.2d 1301 (1986).
34. *Id.* at 239, 729 P.2d at 1302.
35. *Id.* at 241, 729 P.2d at 1304.
36. *Id.*
37. *Id.*
38. *Id.* at 244-45, 729 P.2d at 1306.
39. *Id.* at 250, 729 P.2d at 1309.
40. *Id.* at 244, 729 P.2d at 1306 (citing Small v. McRae, 200 Mont. 497, 651 P.2d 982

The court then linked the existence of a contractual grievance procedure to the "objective manifestations" standard it had developed in *Dare*. The court stated, "Here the collective bargaining agreement contained the objective manifestations of the employer to the employee about the latter's status. . . . [N]o other covenant need be implied."[41] Thus, under *Brinkman*, an employee covered by a contractual grievance procedure could not bring suit under an implied covenant unless by his claim he could "invoke state interests in protecting the general public which outweigh the interest in supporting the collective bargaining process and justify application of the covenant."[42] The case law cited in *Brinkman* summarily dismissed implied covenant cases, even when the plaintiff alleged he was fired for reporting statutory violations or enforcing statutory rights. In light of these precedents, the circumstances in which an employee covered by a collective-bargaining agreement could bring suit seemed narrow indeed.

The employees covered by the exceptions of *Mead*, *Miller*, and *Brinkman* were a minority of the state work force. Nevertheless, these cases have an importance that goes beyond the number of employees directly affected by the decisions. These three cases reflect the ideological pulling and tugging going on within the court. None of the decisions were unanimous and in each case, at least two justices dissented who had earlier helped form a majority in the cases expanding the concept of the implied covenant. The cases indicate that a majority of the justices was unsatisfied with the present state of the law but was unwilling to reverse *Gates I*, *Gates II*, *Nye*, and *Dare*. Thus, a majority could be cobbled together under one or another exception, but no consistent or cohesive majority evolved to guide development of employment covenant law.

C. *Shifting Standards for Applying the Covenant*

In late 1987, the court decided the first of a group of cases that suggested the covenant of good faith and fair dealing offered primarily procedural protections to an employee and placed few substantive restrictions on the grounds an employer may use to terminate an employee. In *Belcher v. Department of State Lands*,[43] the court rejected the claims of an employee, because his

(1982)).

41. *Id.* at 250, 729 P.2d at 1309.

42. Riley v. Warm Springs State Hosp., 229 Mont. 518, 521, 748 P.2d 455, 457 (1987) (in which the court reaffirmed and explained *Brinkman*).

43. 228 Mont. 352, 742 P.2d 475 (1987).

employer had followed proper procedures in making the termination.[44] The court's decision was simplified by the employee's acknowledgment that he had been less than an exemplary employee, but, in the employee's opinion, not bad enough to be fired.[45] This decision displayed a deference, unseen since before *Gates I*, to the subjective judgment of employers. The court emphasized that the employer had the right to establish and enforce employee performance standards free of interference from the judiciary: "This Court will not interfere with the Department of State Lands' right to manage its affairs and hire employees who will perform their jobs so long as there is a standard of discipline and the Department has abided by it."[46]

A subsequent decision also indicated that if an employer followed reasonable procedures or progressive discipline, a court would rarely look behind the reasons given for the discharge.[47] Upholding summary judgment for the employer, the court in *Coombs v. Gamer Shoe Co.*[48] stated:

> Even if the implied covenant of good faith and fair dealing governs the employment relationship, an employer may still terminate an employee as long as the employer gives a fair and honest reason.
>
> . . . .
>
> [T]his Court recognizes that employers must have discretion in making personnel decisions. Thus, absent any evidence of dishonesty or pretext . . . [the employer's] actions would be appropriate given an employer's discretion to make personnel decisions it feels are in its best interests."[49]

The *Coombs* test of honesty or lack of pretext thus appears to be a subjective rather than an objective test. That is, if an employer genuinely believes that grounds for discharge exist, then the discharge is valid even if the employer's beliefs eventually prove unfounded.[50]

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44. *Id.* at 356-57, 742 P.2d at 477-78.

45. *Id.* at 356, 742 P.2d at 477.

46. *Id.* at 358-59, 742 P.2d at 479.

47. An exception to this rule exists when an employee claims that his discharge violated public policy.

48. ___ Mont. ___, 778 P.2d 845 (1989).

49. *Id.* at ___, 778 P.2d at 887 (citation omitted).

50. This test is comparable to the test used in the Uniform Commercial Code (UCC), in which "good faith" is defined as "honesty in fact." U.C.C. § 1-201(19) (1989). The UCC good faith requirement has generally been interpreted as imposing a subjective test or, as at least one court has called it, the "white heart" test, which relies on motive instead of actual knowledge. *See*, Eldon's Super Fresh Stores v. Merrill Lynch, 296 Minn. 130, 136, 207 N.W.2d 282, 287 (1973); Frantz v. First Nat'l Bank, 584 P.2d 1125, 1127 (Alaska 1978). The

The subjective standard of employer good faith used in *Coombs* differs from the standard of employer good faith used by the court five years earlier in *Crenshaw*. In *Crenshaw* the court found a breach of the covenant of good faith and fair dealing, in part, because the employer failed to adequately investigate whether a probationary employee was guilty of misconduct before firing her.[51] The *Crenshaw* court used a higher, objective standard akin to the Uniform Commercial Code's "observance of reasonable commercial standards of fair dealing in the trade."[52] Further, the court allowed expert testimony to determine whether the employer had met this higher standard.[53] The *Coombs* test also differs from the standard of good faith the court articulated three years earlier in *Nicholson*.[54] While the *Coombs* test is similar to the test of "honesty in fact," the Montana Supreme Court has stated that a "breach of the implied covenant of good faith and fair dealing, as defined in *Nicholson*, requires more than a lack of 'honesty in fact.' "[55] Reconciling the standards of conduct enunciated by the court in *Crenshaw, Nicholson,* and *Coombs* is a difficult task.

Another example of the shifting standards that have bedeviled this area of law in the past several years is a four-three decision handed down only six months before *Coombs*. In *Prout v. Sears, Roebuck & Co.*,[56] the court was faced point blank with the question of whether, through a clearly worded contract clause, an employee could waive her rights to the protection of the covenant of good faith and fair dealing.[57] In *Prout*, the employee had signed the following boilerplate waiver form developed by Sears to protect itself against implied covenant of good faith claims:

> In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck & Co. and my employment and compensation can be terminated with or without no-

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Montana Supreme Court has said, "[t]he tort of breach of the implied covenant of good faith and fair dealing, as defined in *Nicholson*, requires more than a lack of 'honesty in fact.' " McGregor v. Mommer, 220 Mont. 98, 109, 714 P.2d 536, 543 (1986). Such a test for employer conduct might be labeled the "cream heart" or "beige heart" standard, because the court need not even look at the motive behind a termination, unless the employee makes some showing that the termination was carried out in an "arbitrary, capricious or unreasonable" manner as stated in *Nicholson*.

51. 213 Mont. at 500, 693 P.2d at 493.

52. *Id.*

53. 213 Mont. at 501-04, 693 P.2d at 493-95.

54. See *supra* text accompanying notes 15-19, for discussion of the *Nicholson* standard of good faith.

55. *McGregor*, 220 Mont. 98, 109, 714 P.2d 536, 543 (1986). For further discussion on this point, see *supra* note 50.

56. ___ Mont. ___, 772 P.2d 288 (1989).

57. *Id.* at ___, 772 P.2d at 289.

> tice, at any time, at the option of either the company or myself. I understand that no . . . representative of Sears . . . has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.[58]

The court looked this clause straight in the eye, and blinked; it refused to hold the clause invalid as a matter of public policy and it refused to give it effect in this case.[59] Instead, the court held that the employer's counsel waived the right to rely on the signed statement by not mentioning it in relation to a contested issue of law in the pre-trial order.[60] The court then enunciated a standard for employer conduct that allowed an employer to terminate at-will employees "without cause," but conditioned that right on the contradictory requirement that the reason for termination not be a "false cause." The court stated:

> [W]e give effect to the employment application and record card. These give the employer the right to fire without cause. They do not give the employer the right to fire for a false cause. If the at-will employer who can fire without cause under the employment contract chooses instead to fire an employee for dishonesty, the discharged employee must be given the opportunity to prove the charge of dishonesty false.[61]

Prout is an example of the court giving with one hand and taking away with the other. On the one hand, the decision affirmed the right of an employer to maintain an indefinite at-will status under which employees could be fired without cause. On the other hand, the decision qualified that right by requiring that employers not terminate for a false cause. This left open the possibility of a legal challenge to almost any discharge merely by an employee's allegation of false cause. The court earlier had vacillated between an objective and subjective standard for determining a false cause. In *Prout*, however, it appeared that an employer could be found in breach of the covenant even if the employer terminated an employee under the sincere, but mistaken, belief that cause existed. This certainly was not the standard the court laid out in *Belcher* or in *Coombs*. Under the rule of those cases, the issue in *Prout*—even if the court had invalidated Sears' waiver—should have been whether Sears had reason to believe that Prout was dishonest, not whether Prout was in fact dishonest. The former is a

58. *Id.*
59. *Id.* at ___, 772 P.2d at 291-92.
60. *Id.*
61. *Id.* at ___, 772 P.2d at 292.

subjective standard derived from *McGregor*, *Belcher*, and *Coombs*; the latter is an objective standard harking back to *Crenshaw*. Additional examples exist on how the court relied on a principle in one case, without explaining how it meshed with principles laid down in previous covenant cases. For example, in *Flanigan v. Prudential Savings & Loan*,[62] the court held that a "long-term employee has an expectation of continued employment provided that the employee's work performance is satisfactory."[63] Thus, the court upheld a jury award of almost $1.5 million to a discharged bank teller with 28 years of service.[64] The pronouncement in *Flanigan*[65] reversed the rule stated in *Reiter v. Yellowstone County*,[66] that lengthy employment alone was not sufficient to create an implied contract term that the employer could terminate only for good cause.[67] The court, however, made absolutely no mention of *Reiter*, and merely treated the creation of a good cause standard through lengthy employment as a natural consequence of the *Dare* "objective manifestations" standard.[68] The *Flanigan* court made clear it was drawing from California law for guidance by its reliance on a leading California case, *Cleary v. American Airlines*.[69] The question of whether lengthy employment could by itself give rise to good cause protection against termination was one of the most controversial aspects of California covenant law. Therefore, one might have expected something other than a *sub silentio* reversal of prior Montana law on that controversial issue.

All through the 1980s, as the court struggled to define the employer's covenant, it continued to use the rhetoric of at-will employment and insisted that the employer maintained the right to terminate an at-will employee without cause. The court refused to acknowledge that, by qualifying the right to terminate without cause and by adding a requirement of good faith, it effectively eliminated at-will employment. When the law requires an employer to show that every employee termination is supported by something variously called cause, good cause, just cause, reasonable cause, a reasonable basis, or a valid reason, then the employment is no longer at-will. Whenever an employer has the obligation of jus-

62. 221 Mont. 419, 720 P.2d 257 (1986).
63. *Id.* at 426, 720 P.2d at 261.
64. *Id.* at 421, 720 P.2d at 258.
65. *Id.* at 427, 720 P.2d at 262.
66. ___ Mont. ___, 627 P.2d 845 (1982).
67. *Id.* at ___, 627 P.2d at 848-50.
68. 221 Mont. at 427, 720 P.2d at 262.
69. *Id.* (quoting Clay v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722, 729 (1980)).

tifying an employee termination, that employment is not at-will employment. To say, as the court stated in *Crenshaw*, that "[e]mployers can still terminate untenured employees at-will and without notice [but] simply may not do so in bad faith or unfairly . . . ,"[70] drains all traditional meaning from the term at-will and leaves the at-will statute a hollow shell, devoid of all substance.

The court's continued failure to acknowledge forthrightly that it had eliminated at-will employment stemmed from the continued presence of the at-will provision in Montana statutes.[71] The court engaged in a judicial repeal of the at-will statute, because it thought the statute was poor public policy. The court, however, could not admit to such an action because such an acknowledgement would be evidence of the boldest kind of judicial overreaching.[72] Instead, the court continued to talk as if the statute still had some meaning, while at the same time it developed new law that was inconsistent with the statute. It is this dilemma, the need to assert the validity of a statute even while draining meaning from it, that makes one employment covenant decision so difficult to reconcile with another.

D. The Uncertain Future for the Common Law Employment Tort

In 1988, the Montana Supreme Court in *Frigon v. Morrison-Maierle, Inc.*,[73] limited the employment covenant by declaring it applicable only in cases of employee termination, but not applicable in cases involving resignation, demotion, faulty evaluation, or a whole range of other potential employee misconduct.[74] Just months before, in *Stark v. Circle K Corp.*,[75] the court refused to overturn an award of $70,000 in punitive damages and ten years front pay to a convenience store manager, who was discharged with less than three years total employment with the employer and less than ten

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70. 213 Mont. at 498, 693 P.2d at 492.

71. MONT. CODE ANN. § 39-2-503 (1989).

72. The court could have declared the at-will statute unconstitutional on the basis that it was inconsistent with article II, section 3 of the Montana Constitution, which guarantees all persons the inalienable right to pursue life's basic necessities. The court could have viewed security in one's livelihood as one of life's basic necessities. In his concurring opinion in *Dare*, Justice Morrison hinted at this avenue for declaring the at-will statute inoperative, but no subsequent decision followed this line of reasoning. *Dare*, 212 Mont. at 285-86, 687 P.2d at 1021-22.

73. 233 Mont. 113, 760 P.2d 57 (1988).

74. *Id.* at 117, 760 P.2d at 60. However, if an employer's conduct were egregious enough, a constructive discharge might be provable, in which case the covenant would apply.

75. 230 Mont. 468, 751 P.2d 162 (1988).

months experience as a regional manager.[76] By limiting the cause of action in *Frigon*, just after broadening the scope of available damages in *Stark*, the Montana Supreme Court made it difficult to discern the case-law principles governing the various tort actions commonly encompassed under the rubric of the covenant of good faith and fair dealing and wrongful discharge.[77]

By late 1989 it appeared that the court had circumscribed the reach of the covenant since 1985, with occasional exceptions in visible high damage suits. This seemingly rightward drift, possibly the response to a public perception that courts in general were creating too many new causes of action, was not the result of a logical easy-to-chart progression of decisions. Rather, the case law as reviewed above can be characterized as two steps to the right, followed by one step back to the left, repeated several times over.[78] From 1982 to 1989 almost every major decision had, if not a vigorous dissent, a concurrence expressing philosophical reservations. In *Prout* all of these reservations came to the fore in a vigorous three-member dissent, which amounted to nothing less than a declara-

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76. *Id.* at 470-71, 751 P.2d at 163-64.

77. The court at various times categorized employee termination torts into four different actions: 1) violation of public policy, 2) breach of an implied or express promise of job security, 3) breach of the covenant of good faith and fair dealing, and 4) negligence. As the majority noted in *Prout*, these four causes of action frequently overlap. *Prout*, ___ Mont. ___, ___, 772 P.2d 288, 291 (1989). This is an understatement. As noted in the concurrence in *Dare*, virtually all employer related conduct that is prohibited under the first, second, or fourth theories above is also proscribed under the general breach of the covenant of good faith and fair dealing. *Dare*, 212 Mont. at 284-85, 687 P.2d at 1021-22 (Morrison, J., concurring). This broad meaning of the phrase "duty of good faith and fair dealing" is the usage that is generally employed in this article. Readers of Montana Supreme Court cases should be alerted to the fact that the court often (but not always) uses the term "wrongful discharge" in a restricted sense to denominate a discharge made in violation of public policy.

> [B]reach of a covenant of good faith and fair dealing is a separate tort from wrongful discharge. The latter is premised on acts by the employer in violation of public policy, while the former is broader, and does not require a public policy violation.

Frigon, 233 Mont. at 117, 760 P.2d at 60. For an explanation of the Montana Supreme Court's division of wrongful discharge, negligent discharge, and bad faith discharge into three causes of action, see *Rupnow v. City of Polson*, 234 Mont. 66, 761 P.2d 802 (1988).

78. This general trend on the court toward a narrowed view of the covenant of good faith and fair dealing is the result of a gradual change in the philosophical tenor of the court's membership since *Gates I*. From 1982 through 1988, every newly seated justice on the court has been more conservative on the employment covenant issue than his predecessor. This is demonstrated by taking every major employment good faith decision, from *Gates I* through *Coombs*, and noting whether a justice voted for a narrow construction of the covenant, as urged by the employer, or for an expansive construction of the covenant, as urged by the employee. The results are as follows, with the justices listed in order of their accession to the court:

tion of intent to reverse *Gates II*.[79] Just as the court in *Gates II* had earlier looked to California case law in labeling breach of the covenant a tort action, the dissenting justices in *Prout* looked to a recent California case that now declared such suits to be contract actions.[80] Whether the dissenters can forge a majority on this question remains to be seen. For most Montana employees and employers, however, the question today is of less importance than it might have been just a year or two earlier due to the enactment of WDFEA in 1987.

III. The Passage of the Wrongful Discharge From Employment Act

Prior to 1987, the case-law development from *Gates I* to *Crenshaw* generated a belief among Montana employers and insurance companies who paid the damages for many employment tort actions that their best hope for changing the direction of the law was through direct legislative action.[81] These groups turned for advice to the Montana Association of Defense Counsel, made up, to a large extent, of lawyers who defend employers and insurance companies. The result was a draft of a bill that, after several legislative reworkings, became the Wrongful Discharge From Employment

Justice	Narrow Construction of Covenant	Broad Construction of Covenant
Harrison	9	4
Haswell (succeeded by Turnage)	0	6
Daly (succeeded by Gulbrandson)	0	2
Shea (succeeded by Hunt)	0	3
Sheehy	5	10
Morrison (succeeded by McDonough)	0	9
Weber	11	5
Gulbrandson	11	1
Hunt	2	5
Turnage	9	1
McDonough	5	2

The decisions reflected in the chart are: *Gates I, Gates II, Nye, Dare, Crenshaw, Nordlund, Mead, Miller, Brinkman, Belcher, Flanigan, Frigon, Stark, Prout, Meech*, and *Coombs*.

79. *Prout*, ___ Mont. at ___, 772 P.2d at 292-97 (Weber, J., dissenting).

80. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

81. In 1988 the Montana Supreme Court gave insurers some measure of relief for damages resulting from employee terminations. In Daly Ditches Irrigation Dist. v. National Sur. Corp., 234 Mont. 537, 539, 764 P.2d 1276, 1278 (1988), the court held that terminating an employee is an intentional act; thus damages flowing therefrom are not the result of an accident, which would remove the discharge from the coverage of the employer's liability insurance policy. See Mutual Serv. Casualty Ins. Co. v. Co-op Supply, Inc., 699 F. Supp. 1488 (D. Mont. 1988), for an earlier contrary federal court decision.

Act of 1987.[82]

The introduced bill was, itself, a dramatic example of the shift in employers' perceptions of what was an acceptable (or perhaps achievable) public policy on employee discharges. The initial bill did not seek to turn back the clock to a the at-will philosophy that existed prior to *Gates I*. Rather, it incorporated the general principle that lengthy employment entitled employees to protection from arbitrary discharge. Toward that end, the bill mandated that employees with five years seniority could be terminated only for good cause.[83] Additionally, the bill acknowledged the legitimacy of the so-called wrongful discharge cases that had forbidden discharge of an employee for enforcing or refusing to violate some public policy. Although the bill defined public policy narrowly, it prohibited any discharge made "in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy."[84]

Whether these concessions to case-law innovations of the preceding several years were made out of an acceptance of those principles, or merely demonstrated the sponsors' desire to avoid the appearance of being unacceptably reactionary, made little difference. Once the drafters of House Bill 241 decided to incorporate good cause and public policy discharges into the bill, the end result could not be a return to the status quo existing prior to *Gates I*.[85] Nevertheless, the sponsors of House Bill 241 made sure that they had ample leeway to make concessions while still retaining an acceptable bill. Between the bill's introduction and its passage, the legislature adopted numerous changes, which made the bill more favorable to employees. First, the legislature expanded protections against wrongful discharge to cover any non-probationary employee, rather than only those who had been with an employer five years or more.[86] Second, discharges in violation of an employer's written personnel policies were made specifically actionable,

82. MONT. CODE ANN. §§ 39-2-901 to -914 (1989).

83. H.B. 241, First Reading, section 4(2). The enacted bill differed from the first reading, however, because the drafters extended the protection against discharges made without good cause to "employees who had completed the employer's probationary period of employment," rather than to employees having a minimum of five years of seniority. MONT. CODE ANN. § 39-2-904(2).

84. H.B. 241, First Reading, section 4(1) (codified at MONT. CODE ANN. § 39-2-904(1) (1989)).

85. An employer's attorney who lobbied for passage of H.B. 241 told this author: "Good cause and public policy discharges were illegal aliens in the statutory world, protected only in judicially created sanctuaries, and we have gone and made them full-fledged citizens."

86. MONT. CODE ANN. § 39-2-904(2) (1989).

thereby incorporating the principle adopted in *Nye*.[87] Third, the legislature expanded the amount of damages recoverable by a wrongfully discharged employee from a maximum of two years to four years wages, plus lost fringe benefits.[88] In its final form, WDFEA represented a compromise that came down somewhere between the traditional at-will rules and the high-damage tort rules promulgated by the Montana Supreme Court after *Gates I*.

A major feature of the law is that it "provides the exclusive remedy for a wrongful discharge from employment"[89] and expressly prohibits claims for discharge arising "from tort or express or implied contract."[90] Under WDFEA a wrongful discharge can arise in three different ways.

> A discharge is wrongful only if:
> (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
> (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or
> (3) the employer violated the express provisions of its own written personnel policy.[91]

WDFEA defines public policy as "a policy . . . concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."[92] Three different phrases define good cause, with the broadest phrase—"legitimate business reason"—subsuming the other two phrases.[93] As noted above, the damages available to a wrongfully discharged employee are limited to a maximum of four years of salary and fringe benefits, minus "amounts the employee could have earned with reasonable diligence."[94] Thus, WDFEA reverses recently adopted employment case law by prohibiting damages for "pain and suffering," "emo-

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87. MONT. CODE ANN. § 39-2-904(3) (1989).

88. MONT. CODE ANN. § 39-2-905(1) (1989).

89. MONT. CODE ANN. § 39-2-902 (1989).

90. MONT. CODE ANN. § 39-2-913 (1989). The bill contains some exceptions to its "exclusive" coverage and these exceptions are discussed in sections E and F of part V, *infra*.

91. MONT. CODE ANN. § 39-2-904 (1989).

92. MONT. CODE ANN. § 39-2-903(7) (1989).

93. MONT. CODE ANN. § 39-2-903(5) (1989). The other phrases are "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties" and "disruption of the employer's operation." *Id.*

94. MONT. CODE ANN. § 39-2-905(1) (1989). Unemployment benefits were also to be deducted from any damages in the introduced version of H.B. 241. The Judiciary Committee of the House of Representatives deleted this provision. 1987 H. JOUR. 483. Presumably, this means that unemployment benefits may not be used as an offset in damage calculations, contrary to the apparent holding in Dawson v. Billings Gazette, 223 Mont. 415, 417, 726 P.2d 826, 828 (1986).

tional distress," and any damages not explicitly allowed by WDFEA.[95] Punitive damages are available only in public policy based discharges, if "actual fraud" or "actual malice" is shown.[96]

WDFEA establishes a one-year statute of limitation for filing a wrongful-discharge action.[97] This provision contrasts with the three-year statute of limitation that had previously been applicable to employment-based tort actions.[98] However, if an employer has a written internal grievance procedure, notifies a discharged employee of the procedure, and supplies the employee with a copy of the procedure, the employee is then obligated to process his complaint first through the employer's grievance procedure. If the employee fails to use the employer's grievance procedure, such failure "is a defense to an action brought under [WDFEA]."[99]

Moreover, WDFEA contains a unique arbitration clause.[100] Once a plaintiff files a wrongful discharge suit, either party may, within sixty days, request the commencing of arbitration under the provisions of the Uniform Arbitration Act.[101] If the other party rejects the request to arbitrate, the litigation goes forward; however, if the party who refused to arbitrate loses the lawsuit, then that party will be liable for the other party's attorney fees.[102] Also, if an employee tenders an arbitration offer that the employer accepts, and the employee subsequently prevails at arbitration, then the employer must reimburse the employee for all expenses attributable to the arbitration.[103] This provision was adopted to ensure that an impoverished employee with a meritorious claim would not hesitate to request arbitration because of an inability to pay the costs of arbitration.

WDFEA contains three exemptions. It does not apply to any discharge actionable under the Human Rights Act or Equal Employment Opportunity Act.[104] Further, it excludes "an employee covered by a written collective bargaining agreement" or any employee covered by "a written contract of employment for a specific term."[105]

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95. MONT. CODE ANN. § 39-2-905(3) (1989).
96. MONT. CODE ANN. § 39-2-905(2) (1989).
97. MONT. CODE ANN. § 39-2-911(1) (1989).
98. *See* MONT. CODE ANN. § 27-2-204(1) (1989).
99. MONT. CODE ANN. § 39-2-911(2)-(3) (1989).
100. MONT. CODE ANN. § 39-2-914 (1989).
101. MONT. CODE ANN. § 39-2-914(2)-(3) (1989).
102. MONT. CODE ANN. § 39-2-914(4) (1989).
103. MONT. CODE ANN. § 39-2-914(5) (1989).
104. MONT. CODE ANN. § 39-2-912(1) (1989).
105. MONT. CODE ANN. § 39-2-912(2) (1989). The collective bargaining exemption codifies the rule adopted in *Brinkman*. *See also supra* notes 147-56 and accompanying text.

Similar legislative attempts to mitigate or codify state court decisions on the employment covenant have failed in several states and in Congress in recent years.[106] Currently, Montana is the only state in which legislation such as WDFEA has been enacted. After WDFEA's enactment, the next major question was whether WDFEA could survive a constitutional challenge before the Montana Supreme Court. In 1987 every reason existed to believe that it would not.

IV. THE SUPREME COURT UPHOLDS THE ACT

The Montana Supreme Court's creation of the employment tort of breach of the duty of good faith and fair dealing was only one chapter in a story of increasing court activism in Montana. During the early 1980s, the court repeatedly invalidated legislative policy choices limiting the liability of public agencies and the rights of welfare-system beneficiaries.[107] The centerpiece of the court's justification for its activism was article II, section 16 of the Montana Constitution, commonly referred to as the "full legal redress" clause.[108] In a 1919 decision, *Shea v. North Butte Mining Co.*,[109] this provision was interpreted to require courts to mete out justice speedily and evenhandedly; but the clause conveyed no substantive right to any particular remedy. In 1983, however, Justice Morrison, writing for a four-member court majority in *White v. State*,[110] announced the broad principle that article II, section 16 had a substantive aspect to it.[111] The court overturned *Shea*, holding that legislative authority to modify common-law remedies was limited.[112] Under the new interpretation of article II, section 16, once the legislature or supreme court created a legal remedy—either by statute or case law—an individual's ability to seek that remedy became a vested, fundamental right, which the legisla-

106. *See* Gould, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28, 40-41 (1988); Stieber & Baines, *The Michigan Experience with Employment-At-Will*, 67 NEB. L. REV. 140, 172 (1988).

107. A critical analysis of what is portrayed as the Court's increasing intrusion on the powers of the legislative branch is found in Lopach, *The Montana Supreme Court in Politics*, 48 MONT. L. REV. 267 (1987) [hereinafter *Lopach*].

108. "Courts of Justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress . . . ." *Id.* This provision was identical in the 1889 Montana Constitution. MONT. CONST. art. III, § 6 (1889).

109. 55 Mont. 522, 179 P. 499 (1919).

110. 203 Mont. 363, 661 P.2d 1272 (1983).

111. *Id.* at 368-69, 179 P.2d at 1274-75.

112. *Id.* at 369, 179 P.2d at 1275.

ture could remove or reduce only by showing a compelling state interest.[113]

To many people it appeared that the court had created a system in which the rights of plaintiffs were steadily ratcheted upward and the legislature was rendered powerless to stop the process. One response to this was the appearance of Constitutional Initiative 30 on the 1986 general election ballot. This initiative deleted the words "every injury" and "full legal redress" from article II, section 16.[114] The intent of the initiative was to restore to the section its previous interpretation under the *Shea* rule. The initiative passed by a vote of 172,502 to 136,653.[115] The Montana Supreme Court, however, by a vote of four-three, invalidated the election results for two reasons. First, the Secretary of State failed to publish the exact wording of the initiative as required by statute.[116] Second, the Attorney General inadequately summarized the initiative in his formal explanation to the voters.[117]

The Governor signed WDFEA on May 11, 1987. Constitutional Initiative 30 was invalidated on May 22, 1987. With the death of the initiative, the *White* rule limiting the legislature's authority to reduce remedies remained intact. As long as *White* applied, WDFEA's abolition of the newly created tort of breach of the duty of good faith and fair dealing and WDFEA's limitation on damages were clearly in jeopardy. It was in this legal atmosphere that the Montana Supreme Court considered the constitutionality of WDFEA in *Meech v. Hillhaven West, Inc.*[118] during the summer of 1989.

The Montana Supreme Court did not avoid the broad constitutional issues raised by WDFEA and made no attempt to reconcile WDFEA with the *White* rule limiting legislative authority.[119] Rather, the court used the opportunity to demolish the full legal

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113. See *Lopach*, *supra* note 106, at 31, for a more complete chronology of the development of the vested-right doctrine.

114. For wording of the initiative and a report of the election results of Constitutional Initiative No. 30, see 1987 Mont. Laws 2080-81.

115. 1987 Mont. Laws 2080.

116. State *ex rel.* Montana Citizens for the Preservation of Citizen's Rights v. Waltermire, 224 Mont. 273, 738 P.2d 1255-56 (1987).

117. *Id.* The official voter information pamphlet distributed by the Secretary of State made it appear as if the words "full legal redress" were being added to the constitution instead of accurately showing that the initiative deleted those very words. *Id.*

118. ___ Mont. ___, 776 P.2d 488 (1989).

119. Such a reconciliation could have been based on the fact that the common-law employment torts abrogated by WDFEA had not become vested, because they were of recent vintage or because they were themselves a drastic modification of traditional employment law.

redress holding of *White* in a broad opinion that has constitutional ramifications well beyond employment law. The four-member majority restored to article II, section 16 the meaning that it had under *Shea*, thereby upholding WDFEA and restoring the legislature's authority to revise traditional remedies.[120]

In overturning *White*, the court discarded the principle that any reduction of employee common-law remedies by WDFEA must be based on a compelling state interest. The court clarified "that the proper test to apply to the Act's classifications burdening one class and not another is the rational basis test."[121] With this lower standard as its guide, the court majority had no trouble finding reasons why WDFEA was, in fact, rational.

> [L]awmakers perceived an unreasonable financial threat to Montana employers from large judgments in common-law wrongful discharge claims. The Act's limitation on damages is intended to alleviate these threats.
>
> . . . Some awards for common-law wrongful discharge have included wages which extend far into the claimant's employment future. The effect of the Act's limitations on damages to four years lost wages rationally relates to reducing this potential liability.[122]

The court then noted that even if the full legal redress provision of Montana's Constitution required the legislature to provide a new benefit for any pre-existing remedy it abrogates, WDFEA still passed muster, because "the benefits of the Act for employees are not illusory."[123] In the court's eyes, the major benefit of WDFEA was its requirement that employers show good cause before terminating any employee who has completed a probationary period.[124]

In order to highlight the rights gained by employees in

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120. *Meech* resulted not from a change of heart by any of the high court justices, but rather from a change of one body on the court. In Pfost v. State, 219 Mont. 206, 713 P.2d 495 (1985), a four-member majority stoutly defended and followed *White* while three dissenting votes were cast by Chief Justice Turnage and Justices Weber and Gulbrandson. In *Meech* these three justices plus newly elected Justice McDonough formed the majority. The three *Meech* dissenters were Justices Sheehy, Harrison, and Hunt, all of whom formed the majority along with Justice Morrison in *Pfost*. In other words, the substitution of McDonough for Morrison switched the balance of opinion on the court.

It is not the purpose of this article to explore the far-reaching constitutional implications of *Meech*, although the constitutional implications themselves are certainly a worthy subject. Rather, it is enough to note here that *Meech* is an important waystation on the road from at-will employment to *Gates I*, to WDFEA, and beyond.

121. *Meech*, ___ Mont. at ___, 776 P.2d at 507.

122. *Id.* at ___, 776 P.2d at 504 (citation omitted).

123. *Id.* at ___, 776 P.2d at 506.

124. *Id.*

WDFEA, the court stressed that employers would have great latitude in terminating employees in the absence of WDFEA. But the court's discussion of employer rights that had been taken away by WDFEA exaggerated the amount of discretion employers actually possessed under the court's recent case law. For example, the court cited *Prout* for the proposition that without WDFEA an employer could easily preserve the right to fire an employee "without cause."[125] The court, however, failed to mention the major qualification *Prout* placed on that right, that a termination could not be for a "false cause."[126] In *Meech* the majority's description of pre-WDFEA case law made it sound as if the at-will presumption still remained the dominant feature of Montana employment law and the case law since *Gates I* had been only a minor deviation from that principle. This certainly was not correct, and as a vigorous dissent pointed out, WDFEA enhanced, rather than diminished, employer rights.[127]

The debate in *Meech* over whether WDFEA increased or decreased employer rights was really just a sideshow. Once the court decided that *White* was no longer good law and that the legislature possessed broad authority to craft legal remedies, the validation of WDFEA was foreordained.

V. The Impact of the New Legislation

A. *National Attention*

WDFEA attracted national attention.[128] The *Wall Street Journal* followed the *Meech* case noting that it involved "Montana's unique worker-discharge statute."[129] The American Civil Liberties Union submitted an amicus curiae brief in Meech urging the court to uphold WDFEA.[130] In the brief, the ACLU reviewed national developments in employment covenant law as follows:

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125. *Id.* (citing *Prout*, ___ Mont. at ___, 772 P.2d at 292).

126. *Prout*, ___ Mont. at ___, 772 P.2d at 292.

127. *Meech*, ___ Mont. at ___, 776 P.2d at 507-17 (Sheehy, J., dissenting). Justice Sheehy was so pained by the diminution of employee rights, that he stated the decision marked "the blackest judicial day in the history of the state." *Id.*

128. *See, e.g.*, Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 Employee Rel. L.J. 387 (1988). Barrett, *Wrongful Dismissal Laws May Feel Effect of Dispute Before Montana's High Court*, Wall St. J., Nov. 8, 1988, at B1, col. 3. *See also* Dickens, *Wrongful-Firing Case in Montana May Prompt Laws in Other States*, Wall St. J., July 3, 1989, at 11, col. 1.

129. Barrett, *supra* note 126; *see also* Dickens, *supra* note 126.

130. The author of the ACLU brief was Henry H. Perritt, Jr., author of one of the leading employment law textbooks on employee dismissal rights. *See* H. Perritt, Employee Dismissal Law and Practice (2d ed. 1987).

> Montana has been in the forefront of the development of these common law theories, this court having articulated one of the broadest versions of the implied covenant of good faith doctrine. . . . Many commentators have concluded that legislative reform in the area is necessary to protect the interests of employees, employers, and the public. . . . Montana was in the forefront of the reform movement when it enacted the Wrongful Discharge from Employment Act. . . . Unless the decision of the trial court is reversed [and the Act upheld], Montana will move from the forefront to the background . . . .[131]

In August 1989, the National Conference of Commissioners on Uniform State Laws completed its first reading of a draft Uniform Employment Termination Act, several provisions of which are modeled after WDFEA.[132] In Montana, the concerns of employers and employees were more prosaic: Exactly how was WDFEA going to operate in the workplace? Several of WDFEA's provisions leave room for question.

B. Probationary Employees

WDFEA draws a distinction between probationary and non-probationary employees. The "good cause" provision of WDFEA defines a discharge as wrongful "if [it] was not for good cause and the employee had completed the employer's probationary period of employment . . . ."[133] "Probationary period," however, is not defined by WDFEA. Rather, WDFEA allows the employer to establish the length of the probationary period. Thus, probationary periods may extend from a few weeks, to six months, to several years.[134] WDFEA appears to keep open the possibility that employers may adopt a practice or policy of not permitting employees to attain non-probationary or permanent status. The use of an employment contract of the type at issue in *Prout* would do just that. Such a contract or policy would state that both employer and employee agree that the employee is in a state of perpetual probation and may be terminated at any time merely upon notice. The court

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131. Amicus Curiae Brief for the American Civil Liberties Union at 1-2, Meech v. Hillhaven West, Inc., ___ Mont. ___, 776 P.2d 488 (1989) (No. 88-410) (available at the Montana State Library in Helena, Montana).

132. For the text of the draft uniform act see INDIVIDUAL EMPLOYEE RIGHTS MANUAL (IERM) 540:51, BNA (1987)

133. MONT. CODE ANN. § 39-2-904(2) (1989).

134. When WDFEA was under consideration the legislature heard testimony that some employers had established probationary periods as long as seven years. The desire not to upset these probationary systems was, in part, responsible for the adoption of the indefinite probationary language.

was very careful to point out in *Prout* that it was not invalidating such contracts.[135] The WDFEA preamble supports the idea that such contracts are still allowed. It states: "Except as limited in [WDFEA], employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party."[136]

Despite the possibility that a probationary period may exist indefinitely, probationary employees are not left totally unprotected by WDFEA. The prohibition on termination "in retaliation for the employee's refusal to violate public policy" applies to both probationary and non-probationary employees.[137] Similarly, probationary employees are protected by the provision prohibiting discharges in violation of the employer's "own written personnel policies."[138] This latter protection may prove to be illusory, however, if employers insert in their policy manual a waiver similar to the one used in *Prout*. WDFEA allows employers a great deal of latitude in defining the rights of probationary employees. Thus, as long as an employer's conduct is consistent with the employer's personnel policies, the only basis for challenging the discharge of a probationary employee is that the employer discharged the employee in retaliation for refusing to violate a law or for reporting a violation of law.

C. *Internal Grievance Procedures*

WDFEA gives enhanced legal status to employers' internal grievance procedures. WDFEA requires that a discharged employee, must first exhaust internal grievance procedures before that employee may file a lawsuit.[139] However, such exhaustion required if: 1) "the employer maintains written internal procedures under which an employee may appeal a discharge," and 2) the employer notifies the discharged employee of the grievance policy and supplies a copy of the procedures to the employee within seven days of the date of discharge.[140]

Any employer having an internal grievance procedure would

135. ___ Mont. at ___, 772 P.2d at 292.

136. MONT. CODE ANN. § 39-2-902 (1989). This language seems redundant in light of the old at-will statute found at MONT. CODE ANN. § 39-2-503 (1989), which was not repealed by WDFEA.

137. MONT. CODE ANN. § 39-2-904(1) (1989).

138. MONT. CODE ANN. § 39-2-904(3) (1989).

139. MONT. CODE ANN. § 39-2-911 (1989).

140. MONT. CODE ANN. § 39-2-911(3) (1989).

be well advised to state in any notice of discharge: "If you wish to appeal this decision you must do so under the terms of the attached procedure." The advantages to the employer of such a notice are several. First, the grievance procedure gives the employer a chance to gather more information and reflect on the initial termination decision. If the employer becomes convinced that termination was unwarranted, the decision can be reversed with little or no legal exposure. Second, internal grievance procedures typically specify a limited time in which to file grievances, such as ten working days or maybe thirty calendar days. Therefore, if a discharged employee does not file a grievance within this short time period, that employee will be unable to sustain the claim in court. WDFEA states that an "employee's failure to initiate or exhaust available internal procedures is a defense to an action [for wrongful discharge]."[141] Finally, the presence of an internal grievance procedure can reduce the period of uncertainty for an employer waiting to find out whether a lawsuit will result from a discharge. The WDFEA's statute of limitation is one year,[142] but for an employee who chooses not to use an available grievance procedure, the opportunity to file in court expires when the time limit for filing an internal grievance expires. Because of these significant benefits for employers, WDFEA will probably spur the development of written grievance procedures where none existed previously.

D. Arbitration and Fee Shifting

WDFEA sets up an elaborate system designed to channel discharge lawsuits toward arbitration.[143] WDFEA provides that once a lawsuit commences, either side has sixty days to request arbitration and the other side has thirty days to accept. By itself, this provision is no special incentive, because state law generally allows parties to arbitrate any dispute upon mutual agreement.[144]

As noted earlier, however, the incentive to agree to an arbitration request under WDFEA stems from the fact that failing to accede to the request ultimately may subject the refusing party to paying the other side's attorney fees in the ensuing court case, should the party that tendered the rejected request prevail in the lawsuit. WDFEA does not authorize attorney fees for litigation when the parties do not request arbitration. Thus, if parties do not

141. MONT. CODE ANN. § 39-2-911(2) (1989). Once initiated, the grievance procedures must culminate in 90 days, or the employee is free to proceed to court. *Id.*

142. MONT. CODE ANN. § 39-2-911(1) (1989).

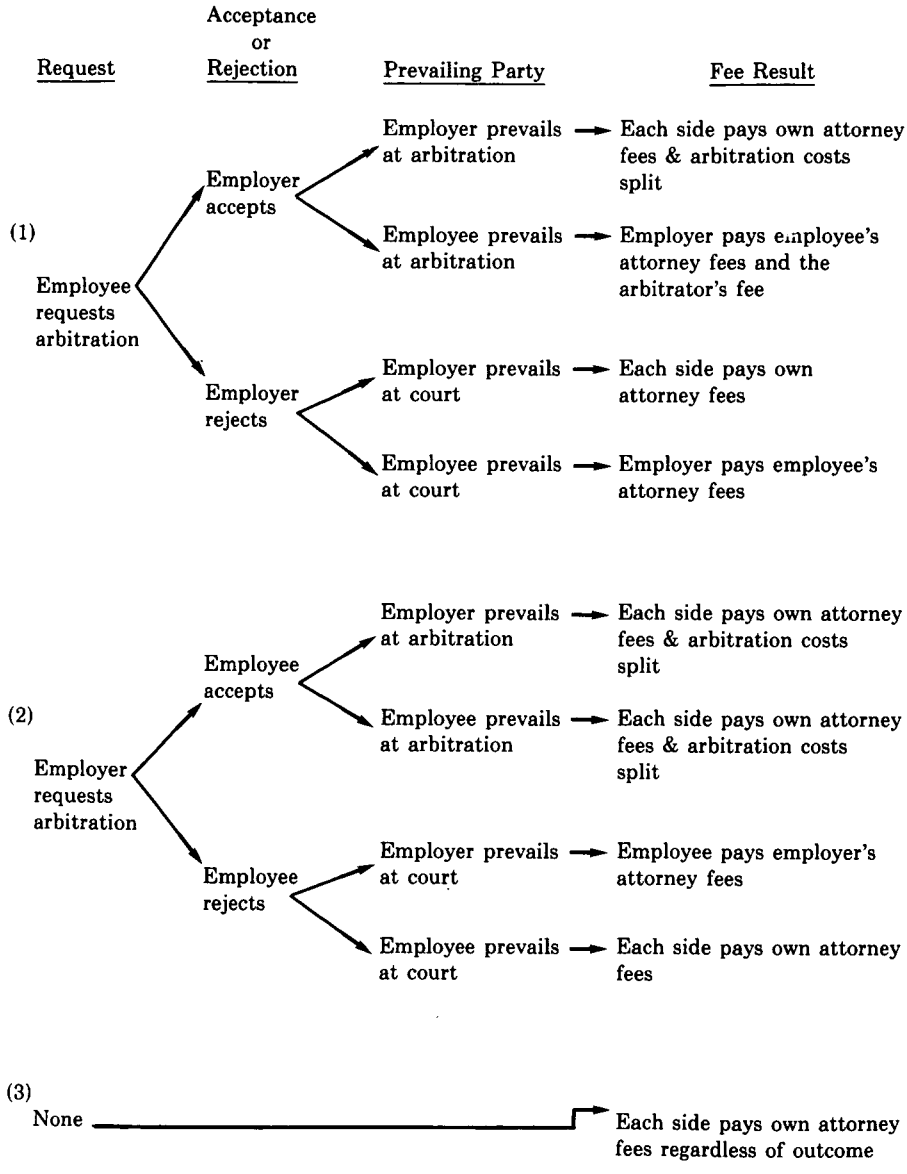
143. MONT. CODE ANN. § 39-2-914 (1989).

144. MONT. CODE ANN. § 27-5-114(1) (1989).

agree to arbitrate under WDFEA, each side must pay its own attorney fees under the "American rule" on fees generally followed in Montana.[145] The WDFEA scheme for shifting can be better understood by examining the following chart.

145. *See, e.g.*, State *ex rel.* Foss v. District Court, 216 Mont. 327, 334, 701 P.2d 342, 347 (1985), and sources cited therein, including Williams, . . . *and Attorneys Fees to the Prevailing Party: Recovering Attorney's Fees Under Montana Statutory Law*, 46 MONT. L. REV. 119 (1985).

WDFEA Arbitration and The Allocation of Attorney Fees



The chart clarifies that the only way a discharged employee with a valid claim can have attorney fees paid is by initially requesting arbitration. Once the employee makes such a request, the employee is assured of receiving attorney fees upon prevailing, regardless of whether the matter goes to arbitration or to court.

On the other hand, if a suing employee allows the employer to request arbitration, the employee is not entitled to attorney fees, win or lose. Worse yet, if the employee refuses to go to arbitration and then loses in court, the employee will end up paying the employer's attorney fees. A suing employee will have to decide whether the fee advantages accompanying an arbitration request outweigh a discharged employee's usual desire to get the matter before a jury, if in fact a jury trial is available under WDFEA.[146]

E. Specific Term Employees

WDFEA "does not apply to a discharge . . . of an employee covered by . . . a written contract of employment for a specific term.[147] Because WDFEA does not apply to such persons, the abolition of common-law employment torts does not apply either. Accordingly, there are some employees in Montana to whom the cases from *Gates I*, to *Dare*, to *Nordlund*, and to *Prout* are more than just historic artifacts. These cases and their present interpretation still govern the employment of specific-term employees. Obviously, once the specific term for which these employees have contracted expires, the employer has no obligation to renew the contract.[148] However, termination of such individuals in mid-contract could give rise to a claim for the breach of the covenant of good faith and fair dealing. Therefore, the evolution of employment tort law is likely to continue in Montana and the Montana Supreme Court

146. WDFEA is silent on whether or not a jury trial is available for litigants. However, jury trials are generally available as a matter of right to litigants where the issue is a matter of money damages. *See, e.g.* 47 AM.JUR. 2D, § 42 (1966) This harks back to the ancient split between legal and equitable claims, wherein jury trials were available for the former, but not the latter. Montana has generally followed this dichotomy. *See, e.g.*, Breese v. Steel Mountain Enters., 220 Mont. 454, 716 P.2d 214 (1986). Reinstatement and backpay have generally been considered equitable damages. Remedies available under WDFEA do not include reinstatement, so the question of whether a jury trial is available under the Act may turn on how the monetary damages are characterized.

147. MONT. CODE ANN. § 39-2-912 (1989).

148. *See, e.g., Nordlund, supra* note 22. In Leland v. Heywood, 197 Mont. 491, 497, 498, 643 P.2d 578, 581, 582 (1982), the court stated that there is a significant legal difference between a termination and a mere refusal to renew an expiring contract. In *Prout* the Court stated that even employers who can terminate for *any* reason cannot terminate for incorrect or false reasons. *Prout, supra* note 47. If this standard were applied to non-renewals the distinction made in *Leland* would lose its significance.

will again be confronted with the pre-eminent issue raised in *Gates II* and in *Prout*: Is an action for breach of the covenant of good faith a tort, as the majority held in *Gates II*, or a contract action, as the dissent argued in *Prout*? Similarly, the question of whether the employer is to be judged by an objective or subjective standard may also resurface in suits brought by specific-term employees terminated during the life of their contracts.

F. Unionized Employees

WDFEA also exempts from its coverage any "employee covered by a written collective bargaining agreement."[149] Just as with specific-term employees, employees under union contract are not affected by WDFEA's abolition of common-law causes of action. The question left unanswered is whether any unionized employees are in a legal position to pursue a claim for breach of the duty of good faith and fair dealing or for a "public policy wrongful discharge," as denominated by the Montana Supreme Court.

In *Brinkman*, the most thorough examination of the subject, the court held that a unionized employee could not pursue such a claim.[150] But in that case, the employee had access to a grievance procedure with binding arbitration to vindicate his claim.[151] The court's decision dwelt on this fact and it is not clear whether the same result would apply to a unionized employee under a contract with a nonexistent or ineffectual grievance procedure.[152]

The *Brinkman* court also relied on the U.S. Supreme Court case of *Allis-Chalmers Corp. v. Lueck*.[153] In *Allis-Chalmers*, the Court held that any state tort action implicating rights granted by a collective-bargaining agreement was preempted by federal labor law and must give way to the contractual grievance procedures created pursuant to federal law.[154] Subsequently, in *Lingle v. Norge*, the U.S. Supreme Court backed away from the blanket preemption position it had taken in *Allis-Chalmers*.[155] The Court allowed a unionized worker to bring suit for a retaliatory discharge, even though the employee could have challenged the discharge through the negotiated grievance procedure. Moreover, the Court noted it

149. MONT. CODE ANN. § 39-2-912(2) (1989).

150. Brinkman v. State, 224 Mont. 238, 249, 729 P.2d 1301, 1308 (1986).

151. *Id.* at 241, 729 P.2d at 1303.

152. WDFEA's exemption for unionized employees is absolute as long as a "written collective bargaining agreement" exists. The exemption does not depend on the presence of a grievance procedure or on any other contractual provision.

153. 471 U.S. 202 (1985).

154. *Id.* at 219.

155. Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988).

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would permit an employee to sue in court on any state law claim that was "independent" of the negotiated contract:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement . . . .[156]

As a result of *Lingle*, unionized employees will be able to go forward with "independent" tort claims. But establishing an independent tort claim can not be done in the abstract, so courts must examine the factual underpinnings of every tort claim that a private-sector union employee files, to determine whether it can be evaluated "independent" of the collective agreement. In the *Brinkman* decision, which involved Montana public employees, the court applied separate state statutory provisions and concluded that organized Montana public employees could not bring employment tort actions.[157] However, in cases involving private sector employees, it is unclear whether the Montana Supreme Court disallowed employment tort claims because of the nature of the state cause of action or because it felt compelled to follow *Allis-Chalmers*.[158] If the court is merely following *Allis-Chalmers*, then the combination of *Lingle* and the WDFEA exemption create a new opportunity to argue that suits for breach of the covenant of good faith and fair dealing, including public-policy based "wrongful discharge" actions, are available to private sector employees who are organized.

G. Public Employees and the Immunity Doctrine

Prior to 1987, when the legislature adopted WDFEA, public employees had the ability to bring an employment tort against their employer in the same manner as private-sector employees.[159]

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156. *Id.* at 1887.

157. *See, e.g.*, the court's reliance on the language of the state public employees bargaining act as creating the kind of "objective manifestations," referred to in *Dare*, thereby negating any claim for breach of the covenant of good faith. *Brinkman*, 224 Mont. at 250, 729 P.2d at 1309 (citing *Dare*, 212 Mont. at 282, 687 P.2d at 1020).

158. In Smith v. Montana Power Co., 225 Mont. 166, 170, 731 P.2d 924, 926 (1987), the court said its holding was "required by *Allis-Chalmers*," but then noted special features from *Brinkman* that would support the same result even in the absence of any federal mandate.

159. School teachers are in a unique situation because the state statute already lays out a detailed scheme for terminating teachers and for appeallingf such decisions. *See* MONT. CODE ANN. §§ 20-3-107, 20-3-210, 20-4-204, and 20-4-207 (1989). Final decisions in this process are subject to judicial review under the Montana Administrative Procedures Act. These statutes were a formidable barrier for teachers suing for breach of the covenant of good faith. WDFEA does not expressly exclude teachers, but the specificity of the codes

In fact, several good faith cases, such as *Nye, Nordlund*, and *Belcher*, have involved public employees. However, in the 1988 case of *Bieber v. Broadwater County*,[160] the court rejected a pre-WDFEA good faith claim brought by a terminated county employee.[161] The court declared that employment decisions involving county employees are legislative acts and, therefore, are covered by the statute granting immunity for the legislative acts of governmental entities.[162] In *Bieber*, an elected county commissioner terminated the employee and the discharge was subsequently approved by the entire commission.[163] The court disallowed the suit and declared that the individual commissioner, the commission itself, and the county were all protected by the immunity statute.[164]

Less than a year later, in *Peterson v. Great Falls School District No. 1*,[165] the court expanded the scope of public immunity to cover the pre-WDFEA termination of a public employee by a nonelected administrator who was acting on behalf of a school board.[166] Even though the school district was the only named defendant, the court held that the administrator, the school board, and the school district were all protected by the immunity statute.[167]

Bieber and *Peterson* put much of local government employment outside the reach of a suit for breach of the employer's duty of good faith and fair dealing.[168] It is not clear whether WDFEA has the effect of waiving this newly developed immunity for employment termination suits. Although WDFEA has no exclusion for public employers and employees, it does not specifically cover them, either. A general rule of statutory construction followed in many states, including Montana, is that unless a statute specifically addresses a group, that group will fail to obtain the statute's protections:

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governing them would seem to rule out any WDFEA suits by teachers.

160. 232 Mont. 487, 759 P.2d 145 (1988).

161. *Id.* at 493-95, 759 P.2d at 150-53.

162. The statute being construed was MONT. CODE ANN. § 2-9-111 (1985), which remains unamended yet today.

163. *Bieber*, 232 Mont. at 488-89, 759 P.2d at 149-50.

164. *Id.* at 493-95, 759 P.2d at 150-53.

165. ___ Mont. ___, 773 P.2d 316 (1989). In both *Bieber* and *Peterson*, the employee was terminated before WDFEA was enacted, but the cases did not reach the Montana Supreme Court until later.

166. *Peterson*, ___ Mont. at ___, 773 P.2d at 317-18.

167. *Id.*

168. In Mitchell v. University of Montana, ___ Mont. ___, 783 P.2d 1337 (1989), the Montana Supreme Court refused to extend statutory legislative immunity to the Montana University System. This decision makes it unlikely that state executive branch agencies can partake of the *Bieber* style immunity.

> The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.[169]

Thus, if a court applies this rule of construction to WDFEA, the result appears to be that government employees may not bring suit under WDFEA. Moreover, local government employees are prohibited from bringing common-law employment tort actions by *Bieber* and *Peterson*. On the other hand, if WDFEA is understood as covering governmental employees, then the immunity existing by virtue of *Bieber* and *Peterson* has been waived by the legislature. Any waiver of immunity found in WDFEA would necessarily be an implied waiver, because the 1987 Montana Legislature could not have knowingly waived an immunity that did not exist at the time and was not clearly articulated by the court until 1988.[170]

VI. CONCLUSION

Twice during the 1980s Montana employment law has been convulsed. For most Montana employees, the applicable law is now that established by WDFEA. However, for significant numbers of employees, the operative law is determined by either a collective-bargaining agreement or an individual employment contract. For these employees, the evolving legal doctrines surrounding the breach of the duty of good faith and fair dealing still have primary importance.

169. State *ex rel* City of Livingston v. State Water Conservation Bd., 134 Mont. 403, 408, 332 P.2d 913, 916 (1958) (citing 82 C.J.S. § 317 (1953)). *See also* C. SANDS, 3 SUTHERLAND STATUTORY CONSTRUCTION § 62.01 (4th ed. 1984).

170. Absent WDFEA, governmental employers will have an additional immunity argument if the court ever reverses itself and determines that breach of the implied covenant of good faith is a contract action rather than a tort action. Under the recent case of Peretti v. State, ___ Mont. ___, 777 P.2d 329 (1989), the state is liable only for *express* contracts and is immune against actions based on an *implied* contract.