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Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future

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ARTICLES

EMPLOYMENT AT-WILL, WRONGFUL DISCHARGE, AND THE COVENANT OF GOOD FAITH AND FAIR DEALING IN MONTANA, PAST, PRESENT, AND FUTURE

Shelley A. Hopkins* and Donald C. Robinson**

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I. INTRODUCTION

In Montana, as elsewhere, employees are with greater frequency challenging employers' decisions to terminate employment relationships. The authority of an employer to discharge employees has come under increasing attack. New theories of recovery for the discharged employee have further eroded the long-standing but significantly weakened employment-at-will doctrine. Wrongful discharge is an evolving area of the law where prediction of future developments is difficult.

II. HISTORY

A. *Laissez-Faire Economics*

The doctrine of employment-at-will, when employment is of an unspecified duration, has been of long-standing importance in American employment relationships. Historically, the doctrine permitted "the employer . . . without liability, [to] discharge the employee for a good reason, a bad reason, or no reason at all."¹ Thus, an employer could terminate at any time the at-will relationship without incurring liability. The presumption that employment for an unspecified duration is terminable at-will was recognized as the "American rule" in 1877.² This presumption was contrary to the English common law, where employment was presumed to be for one year unless otherwise specified.³

At-will theory comported with the doctrine of laissez-faire economics popular in the late nineteenth and early twentieth centuries. The at-will rule was ideally suited to an economy that was rapidly industrializing during the *Lochner* era.⁴ Even when laissez-

1. *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054 (5th Cir. 1981).

2. Boyette, *Terminating Employees in Virginia: A Roadmap for the Employer, the Employee, and Their Counsel*, 17 U. RICH. L. REV. 747, 757 (1983) (citing H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877); Feinman, *The Development of the Employment at Will Rule*, 20 AM. JUR. LEGAL HIST. 118 (1976)); DeGiuseppe, *The Recognition of Public Policy Exceptions to the Employment-at-Will Rule: A Legislative Function?*, 11 FORDHAM URBAN L.J. 721, 723 n.5 (1983).

3. *Id.*

4. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983). The United States Supreme Court in *Lochner v. New York*, 198 U.S. 45 (1905), invalidated a state law that prescribed a maximum 10 hour work day and 60 hour work week for New York's bakers. During the "Lochner era," 1897 to 1937, the Supreme Court struck down state and federal economic regulation pursuant to the due process clause of the United States Constitution. The Court closely scrutinized the ends sought and the means employed by the challenged legislation. If no real and substantial relationship between the statute and its objectives could be demonstrated, the Court would hold that the statute improperly interfered with private economic transac-

faire economic policy had begun to be repudiated in the mid-1930's, judicial restraint and reliance on precedent prevented immediate changes in the at-will doctrine.⁵ The common law rule of at-will employment thus has been significant in American employee-employer relationships for more than one hundred years.

B. *Statutory Erosion of the Common Law At-Will Rule*

The common law rule of employment-at-will has eroded at both the federal⁶ and state levels. Initially that erosion resulted from statutory enactments which limited or precluded the employer's authority to terminate certain employment relationships. For example, Congress enacted the National Labor Relations Act in 1935,⁷ the Civil Rights Act of 1964,⁸ and the Age Discrimination in Employment Act of 1967.⁹ Additional special statutory enactments protect veterans,¹⁰ civil servants,¹¹ and employees whose wages have been garnished.¹² Federal legislation protects employees' rights under federal wage and overtime laws.¹³ Under provisions of the Employee Retirement Income Security Act of 1977,¹⁴ employers may not discharge employees to prevent them from obtaining vested rights to pension and welfare benefits. Federal civil service employees are statutorily protected from unfair discharges.¹⁵ Other federal legislation includes the so-called "whistle-blower" statutes designed to encourage employees to report, without threat of discharge, employer violations of environmental or safety standards.¹⁶

tions. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 434-38 (1978). By the late 1930's, the economic realities of the Depression had undermined the freedom of contract and property principles which supported *Lochner* reasoning. Positive governmental intervention became more widely accepted as essential to economic survival. *Id.* at 446-47.

5. Grove & Garry, *Employment-at-Will in Illinois: Implications and Anticipations for the Practitioner*, 31 DE PAUL L. REV. 359, 362 (1982).

6. *Id.* at 364-66; DeGiuseppe, *supra* note 2, at 735-38.

7. 29 U.S.C. §§ 151-169 (1982). Congress provided protection from all types of employer and union retaliation against employees who engage in "protected concerted activity" to improve their wages or working conditions or for employees who choose not to engage in that activity and also created the National Labor Relations Board to hear claims under this act.

8. 42 U.S.C. §§ 2000(a) to 2000(a)-6 (1982).

9. 29 U.S.C. §§ 621-634 (1982).

10. Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2024(c)(A) (1982).

11. Civil Service Act, 5 U.S.C. §§ 7501-7543 (1982).

12. Consumer Credit Protection Act of 1969, 15 U.S.C. § 1674(a) (1982).

13. Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b) (1982).

14. 29 U.S.C. §§ 1140, 1141 (1982).

15. Civil Service Reform Act of 1978, 5 U.S.C. §§ 7503, 7513(a) (1982).

16. *See, e.g.*, 29 C.F.R. §§ 24.1 to .9 (1984); Toxic Substances Control Act, 15 U.S.C. §

The Montana Legislature also has created statutory exceptions to the at-will doctrine. Title 39, chapter 2, of the Montana Code Annotated contains several provisions which protect employees, for example: the prohibition against discharge or layoff because of attachment or garnishment of wages¹⁷ and the prohibition against blacklisting an employee.¹⁸ Nurses and other health care employees have the right not to participate in sterilization and abortion procedures without jeopardizing their job security.¹⁹ Protection against discrimination in employment, both public and private, similarly is provided by statute²⁰ and by the Montana Constitution.²¹

Each of these state and federal statutes has limited the employer's authority to terminate "without liability" the employment relationship "for a good reason, a bad reason, or no reason at all."²² Each of these statutes has eroded an employer's authority to discharge an employee.

III. JUDICIAL EXCEPTIONS TO THE AT-WILL RULE

Some, but not all, state courts have recognized or created exceptions to the at-will rule.²³ Those which have, generally recognize three judicial exceptions: (1) when the discharge constitutes a violation of public policy; (2) when the discharge breaches an implied or express promise of job security; and (3) when there exists an implied covenant of good faith and fair dealing.²⁴

A. Violation of Public Policy

Even when employment is otherwise terminable at-will, if discharging an employee violates public policy, the termination is held to be either a breach of contract or a tort.²⁵ For example, in a

2622 (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1982); Air Pollution Prevention and Control Act, 42 U.S.C. § 7622 (1982); Railroad Safety Act, 45 U.S.C. § 431(a) (1982).

17. MONT. CODE ANN. § 39-2-302 (1983).

18. MONT. CODE ANN. § 39-2-803 (1983).

19. MONT. CODE ANN. §§ 50-5-503, 50-20-111; Swanson v. St. John's Lutheran Hosp., 182 Mont. 414, 417, 597 P.2d 702, 704 (1979).

20. MONT. CODE ANN. §§ 49-1-101 to 49-4-102 (1983).

21. MONT. CONST. art. II, § 4.

22. *Phillips*, 651 F.2d at 1054.

23. See C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS § 9 (1983). The present state of the at-will rule in all states is described. *Id.* at app. A.

24. See *id.* at § 9.1.

25. *Id.* The public policy exception may be viewed not so much as erosion of the at-will rule, but as application of developing principles of contract law. *Id.*

landmark case recognizing a public policy exception to the employment-at-will rule, the California Court of Appeals held that an employee had been wrongfully discharged for refusing to commit perjury.²⁶ Public policy exception cases generally fit into three categories: discharge as retaliation for refusing to commit an illegal act, discharge as retaliation for exercising vested statutory rights, and discharge for "whistle-blowing."²⁷

B. *Promise of Job Security*

When there has been an express²⁸ or implied²⁹ promise of job security, courts have recognized an exception to the at-will rule. These cases arise when the parties have not agreed to the duration of the contract nor to limit their right to terminate the employment relationship, and there is an allegation of an express or implied promise of continued employment.

C. *Good Faith and Fair Dealing*

The principle of contract law that each party to the contract implicitly promises the other to act in good faith now has been applied to the employment setting, but in the tort context.³⁰ Not surprisingly, the recognition of tort actions for bad faith in employment relationships parallels the recent development of bad faith actions in insurance,³¹ banking,³² and other commercial relationships. Unlike bad faith actions in the latter categories, however, in which courts base liability upon violations of insurance and commercial transactions statutes, the courts use no such statutory underpinning to extend the tort to the employment relationship.

D. *The Montana Perspective*

While court decisions from outside Montana are helpful in un-

26. *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

27. BAKALY & GROSSMAN, *supra* note 23, § 9.1 at 117. This article also provides a discussion of non-Montana cases. *Id.* at § 9.1.

28. *See, e.g., Pugh v. See's Candies*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee was promised job security so long as he did "a good job" and was loyal); *Fox v. Fifth W., Inc.*, 153 Mont. 95, 454 P.2d 612 (1969) (suit on an express oral contract for one year of employment as construction manager).

29. BAKALY & GROSSMAN, *supra* note 23, § 9.2; *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

30. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Gates v. Life of Mont. Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982).

31. *Klaudt v. Flink*, ___ Mont. ___, 658 P.2d 1065 (1983).

32. *First Nat'l Bank in Libby v. Twombly*, ___ Mont. ___, 689 P.2d 1226 (1984).

derstanding the development of this area of employee relations law, the law in Montana is unique in several aspects. Exercising caution when relying on non-Montana cases in this quickly developing area, the practitioner should review the Montana law carefully, being cognizant of differences between Montana's treatment of the subject and the treatment given by other jurisdictions.

IV. MONTANA CASES: THE ATTACK ON THE AT-WILL RULE

In the past seven years several decisions from the Montana Supreme Court and the Montana Federal District Court have affected employee rights under Montana law. Decisions responding to challenges to the employment-at-will doctrine, which exists by virtue of statute,³³ have changed employment relations law in Montana. This article chronologically collects and annotates the significant decisions.

The first Montana case to refer to the tort of bad faith in breach of an employment contract was *Sovey v. Chouteau County District Hospital*.³⁴ The plaintiff Sovey claimed bad faith when the defendants allegedly wrongfully discharged him as hospital administrator. The district court dismissed Sovey's initial and amended complaints on procedural grounds³⁵ and the Montana Supreme Court affirmed, without any comment on Sovey's substantive claims.³⁶

In *Keneally v. Orgain*,³⁷ the Montana Supreme Court considered as a question of first impression wrongful discharge arising from a public policy violation. The plaintiff-employee Keneally alleged he was wrongfully discharged when he challenged the quality of service and equipment maintenance provided to defendant National Cash Register Company's (NCR) customers in Keneally's district. Although it held that Keneally was not wrongfully discharged, the court indicated a willingness to recognize the tort in proper circumstances. In dictum, the court stated: "We do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee. The District Court here could not discern that any public policy had been violated by Keneally's termination and neither can we. Accordingly, we must

33. Notwithstanding the holding in *Crenshaw v. Bozeman Deaconess Hospital*, ___ Mont. ___, 693 P.2d 487 (1984), that the employment-at-will statute is very much alive, MONT. CODE ANN. § 39-2-503 (1983) no longer codifies the historical at-will doctrine.

34. 173 Mont. 392, 567 P.2d 941 (1977).

35. *Id.* at 392-93, 567 P.2d at 942.

36. *Id.* at 395, 567 P.2d at 943.

37. 186 Mont. 1, 606 P.2d 127 (1980).

concur.”³⁸ Although it recognized the possibility of a wrongful discharge claim based upon a “violation of public policy,” the court on these facts rejected this “whistle-blower theory” as a means to establish the claim.

We can find no public policy violated by the discharge of Keneally unless it may be considered that the public is hurt when a corporation allows sales of its machines to be made upon promises of adequate service and maintenance and then fails with respect to the adequate service or maintenance. Keneally had complained on this point to his supervisors, and he contends that this is one of the principal grounds for his discharge.³⁹

The Montana Supreme Court, in *Reiter v. Yellowstone County*,⁴⁰ specifically applied the at-will statute as controlling. The plaintiff Reiter had been employed by Yellowstone County for nearly eighteen years when he was discharged. No written contract governed his employment. Reiter sought to overcome the at-will statute⁴¹ on a theory of implied contract that included an implied covenant of good faith and fair dealing. As stated by the court, “In effect his argument [was] that due to his longevity of service he had an implied contract of employment, that in the implied contract there was an implied covenant of good faith, and that his discharge was in bad faith.”⁴²

Soundly rejecting Reiter’s implied contract argument, the court stated:

Appellant’s argument on implied contracts cannot successfully circumvent the Montana statute which clearly denies his claim of entitlement to continued employment. Even though appellant may have had an implied contract with the county by virtue of his longevity of service, it would be a contradiction in terms to say that he had an “implied specified” period of employment. A specified term is one which the parties expressed, and there was no expression here concerning the length of the employment. Section 39-2-503, MCA, operates to fill the gap left by the parties by defining the relationship as an “at-will” employment. While the rule may well be outdated, it is uniquely a province of the legislature to change it.⁴³

The court, moreover, rejected (albeit temporarily) the implied cov-

38. *Id.* at 6-7, 606 P.2d at 130.

39. *Id.* at 6, 606 P.2d at 129-30.

40. ___ Mont. ___, 627 P.2d 845 (1981).

41. MONT. CODE ANN. § 39-2-503 (1983).

42. *Reiter*, ___ Mont. at ___, 627 P.2d at 849.

43. *Id.*

enant of good faith when the employment is at-will: "Further, assuming arguendo that appellant had an implied contract with an implied covenant of good faith, the employer did not act in bad faith because its conduct [discharge] was statutorily permissible. Reiter was not employed on a 'discharge for cause only' basis, according to the [at-will] statute."⁴⁴ Thus, the Montana court in *Reiter* affirmed the statutory at-will doctrine, denied that an oral or implied contract could contain the necessary "implied specified term," and seemingly foreclosed any recognition of an implied covenant of good faith in an at-will employment relationship because, based on the statute, any termination was permissible.⁴⁵

In *Staudohar v. Anaconda Co.*,⁴⁶ United States District Judge Russell Smith granted summary judgment on behalf of the company by whom Staudohar contended he was wrongfully discharged in violation of public policy. Staudohar, who was discharged because he was found to be in unauthorized possession of company property, argued that his approximately thirty-five years of continuous employment with the company created an entitlement to employment that his discharge violated. Judge Smith held that the employment was terminable at-will and that Staudohar's firing was not violative of any public policy because such considerations are "simply not involved" when a discharge is based on unauthorized possession of an employer's property.⁴⁷

Six months after the *Reiter* decision, the Montana Supreme Court established a limited exception to the at-will doctrine based on an implied covenant of good faith and fair dealing in *Gates v. Life of Montana Insurance Co. (Gates I)*.⁴⁸ Gates, working pursuant to "an oral contract of indefinite duration,"⁴⁹ was given the option of resigning or being fired. The parties disputed whether Gates had resigned or had been fired. The court ordered a new trial to determine by what method she had been terminated and whether her termination had violated an implied covenant of good faith and fair dealing.

Gates heavily predicated her theories upon an employee handbook which had been distributed two years after she was hired.

44. *Id.* at ____, 627 P.2d at 849-50.

45. While more recent cases make *Reiter* suspect, the case still might be relied upon to defeat an employee's claim of entitlement to a procedural due process hearing arising from a property interest in the at-will employment. See *infra* note 56 and accompanying text.

46. 527 F. Supp. 876 (D. Mont. 1981).

47. *Id.* at 878 (citing *Reiter*, ____, Mont. ____, 627 P.2d 845; *Keneally*, 186 Mont. 1, 606 P.2d 127).

48. 196 Mont. 178, 638 P.2d 1063 (1982) [hereinafter cited as *Gates I*].

49. *Id.* at 180, 638 P.2d at 1064.

The handbook provided that "prior warning"⁵⁰ should be given if an employee was to be dismissed because of inadequate performance. The court held that "[a]n employee handbook distributed *after* the employee is hired *does not* become a part of that employee's contract,"⁵¹ and thus found no contractual basis for Gates' claims. The court also rejected an argument that Gates had stated a claim for wrongful discharge in tort, because she had not demonstrated that her termination was in violation of any public policy, the requirement set out in *Keneally*.

The *Gates I* court then outlined an obligation of good faith in employment contracts:

Recent decisions in other jurisdictions lend support to the proposition that a covenant of good faith and fair dealing is implied in employment contracts. *Fortune v. National Cash Register Co.* (1977), 373 Mass. 96, 364 N.E.2d 1251; *Monge v. Beebe Rubber Co.* (1974), 114 N.H. 130, 316 A.2d 549. These cases emphasize the necessity of balancing the interests of the employer in controlling his work force with the interests of the employee in job security. In adopting the doctrine of good faith in employment contracts the courts did not seek to infringe upon the interests of the employer, but recognized that:

" . . . [a]n employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer needs flexibility in the face of changing circumstances." *Fortune v. National Cash Register Co.*, *supra*, 364 N.E.2d at 1256.

Yet the employee is entitled to some protection from injustice.⁵²

The bad faith claim arose from the employer's failure to follow its own employee handbook which, although not a contract, "presumably" was promulgated "to secure an orderly, cooperative and loyal work force by establishing uniform policies If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done."⁵³ On this basis, the court held:

that a covenant of good faith and fair dealing was implied in the employment contract of the appellant. There remains a genuine issue of material fact which precludes a summary judgment, i.e.

50. *Id.* at 183, 638 P.2d at 1066.

51. *Id.* (emphasis added).

52. *Id.* at 184, 638 P.2d at 1066-67.

53. *Id.* at 184, 638 P.2d at 1067.

whether the [employer] failed to afford appellant the process required *and if so, whether the [employer] thereby breached the covenant of good faith and fair dealing.*⁵⁴

The significance of *Gates I* is the court's holding that in employment contracts there is an implied "covenant of good faith and fair dealing,"⁵⁵ even though the employee is working at-will. The court thus implicitly abandoned its dictum in *Reiter*,⁵⁶ that had suggested that termination of an at-will employee could not be in bad faith because the termination was statutorily authorized. It should be noted that the court did *not* hold that failure to follow the handbook processes was, *ipso facto*, a violation of the covenant of good faith and fair dealing. The court said "[a]nd if so" then there must be a determination as to whether the failure was "in good faith."⁵⁷

Shortly after *Gates I*, the Montana Supreme Court in *Nye v. Department of Livestock*⁵⁸ specifically established the tort of wrongful discharge when the discharge is in violation of public policy. Nye was hired by the Department of Livestock originally as a permit clerk. She was later promoted to general office clerk V and was to be on probationary status in her new position for six months. During her probationary period, department supervisors warned Nye of deficiencies in her work which had to be corrected for Nye to continue in her position. Upon her failure to correct, the Department discharged Nye without fully complying with department rules governing termination of employment. When Nye filed suit in district court claiming wrongful discharge, the Department argued that her employment was at-will and therefore not subject to a wrongful discharge claim. Holding that "the tort of wrongful discharge may apply to an at will employment situation,"⁵⁹ the court ruled that administrative rules of a state agency could be the

54. *Id.* at 184-85, 638 P.2d at 1067 (emphasis added).

55. *Id.*

56. The court distinguished *Reiter*, ___ Mont. ___, 627 P.2d 845, as follows: The doctrine of implied covenant of good faith in employment contracts has been neither adopted nor rejected by this Court, although it was discussed in *Reiter v. Yellowstone County*, *supra*. *Reiter* is distinguishable in that the issue there was whether an employee at will had a property interest in continued employment and was entitled to procedural due process prior to termination. In *Reiter* we did not reach or decide the issue presented here.

Gates I, 196 Mont. at 183, 638 P.2d at 1066. *See also* *Leland v. Heywood*, 197 Mont. 491, 643 P.2d 578 (1982) (a college could terminate, without violating public policy, a nontenured teacher without formal hearing).

57. *Gates I*, 196 Mont. at 185, 638 P.2d at 1067.

58. 196 Mont. 222, 639 P.2d 498 (1982).

59. *Id.* at 228, 639 P.2d at 502.

source of a public policy supporting such a claim of wrongful discharge.⁶⁰

In August, 1983, the Montana Supreme Court again reviewed the *Gates* case in *Gates v. Life of Montana Insurance Co. (Gates II)*,⁶¹ and affirmed the award of \$50,000.00 in punitive damages granted by the jury upon remand and trial. Based on her previous appeal to the Montana Supreme Court, *Gates* was allowed to establish that the employer's failure to follow handbook disciplinary procedure had violated the implied "covenant of good faith and fair dealing."⁶² Holding that the "[b]reach of the duty owed to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered if defendant's conduct is sufficiently culpable,"⁶³ the court thus established an independent tort of bad faith in at-will employment relationships existing "apart from, and in addition to, any terms agreed to by the parties."⁶⁴

The Montana Supreme Court recently expanded the parameters of this new tort in *Dare v. Montana Petroleum Marketing Co.*⁶⁵ Relying on *Gates I*, *Dare* alleged breach of an implied covenant of good faith and fair dealing when she was fired after not completing a work shift due to illness. The trial court held that absent a handbook setting out employment policies and procedures, the plaintiff's claim must fail. The supreme court, however, held that a plaintiff need not prove a handbook violation to establish a cause of action for breach of the implied covenant of good faith and fair dealing. Rather, "[i]mplication of the covenant depends upon existence of objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."⁶⁶ Noting that "the implied covenant protects the investment of the employee who in good

60. *Id.* The *Nye* decision has been subsequently cited by the Montana Supreme Court as a case involving wrongful discharge in violation of public policy. *Dare v. Montana Petroleum Mktg Co.*, ___ Mont. ___, 687 P.2d 1015, 1018-19 (1984). It is difficult to understand how failure to follow agency procedural employment rules constitutes a violation of public policy, unless the violation arises because the rules were promulgated by a state agency. *Swanson*, 182 Mont. 414, 597 P.2d 702, is a better example of a public policy violation case. In *Swanson*, the hospital employee was discharged for refusal to assist in a sterilization procedure. Such a refusal is protected by the "conscience statutes" for health care employees. MONT. CODE ANN. §§ 50-5-502, -503 (1983).

61. ___ Mont. ___, 668 P.2d 213 (1983) [hereinafter cited as *Gates II*].

62. *Gates I*, 196 Mont. at 184-85, 638 P.2d at 1067.

63. *Gates II*, ___ Mont. at ___, 668 P.2d at 215.

64. *Id.* at ___, 668 P.2d at 214.

65. ___ Mont. ___, 687 P.2d 1015 (1984).

66. *Id.* at ___, 687 P.2d at 1020.

faith accepts and maintains employment reasonably believing their job is secure so long as they perform their duties satisfactorily,"⁶⁷ the court held that the district court had erred in dismissing tort claims for emotional, mental, and financial distress.⁶⁸

On December 6, 1984, in *Crenshaw v. Bozeman Deaconess Hospital*,⁶⁹ the Montana Supreme Court extended the duty of good faith and fair dealing established in *Gates I* to "probationary employment relationships."⁷⁰ Shirley Crenshaw had provided respiratory therapy services to Bozeman Deaconess Hospital as independently contracted services. In December, 1981, the hospital purchased the respiratory therapy department and Crenshaw became a hospital employee on probationary status in conformance with usual hospital procedure. A personnel policy manual provided that a probationary employee could be discharged at any time without notice during the 500-hour probationary period. Under disputed circumstances, the hospital discharged Crenshaw during her probationary period. The discharge memorandum included charges of insubordination and breach of patient confidentiality. Crenshaw's subsequent efforts to obtain employment through the Bozeman Job Service were unsuccessful. As a result, Crenshaw filed suit against the hospital, alleging wrongful discharge and breach of the implied covenant of good faith and fair dealing.

Applying the *Dare* standard of "objective manifestations . . . giving rise to [plaintiff's] belief that she had job security"⁷¹ to the facts, the court found that Crenshaw had reason to believe her job was secure and that as an employee she was entitled to good faith and fair dealing by the employer. As in *Gates I*, the court again distinguished its earlier decision in *Reiter* on the basis that *Reiter* was a "property interest" case, not a good faith and fair dealing case.⁷² The court similarly distinguished between "wrongful discharge" claims which arise only when there has been a violation of public policy⁷³ and claims of violation of the covenant of good faith and fair dealing.⁷⁴

67. *Id.*

68. *Id.*

69. ___ Mont. ___, 693 P.2d 487 (1984).

70. *Id.* at ___, 693 P.2d at 491.

71. *Id.*

72. *Id.* at ___, 693 P.2d at 492; see *supra* note 56 and accompanying text.

73. See *supra* text accompanying notes 37-39, 65-68.

74. *Crenshaw*, ___ Mont. at ___, 693 P.2d at 493. The court explained further that when it "adopted the concept of implied covenant of good faith and fair dealing" from *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), it did not agree to adopt the subsequent limitation to situations when the termination violated public policy found in *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980).

In response to the defendant's allegation that the at-will statute⁷⁵ conflicts with the covenant of good faith and fair dealing, the court held "that the 'at-will' statute . . . is *very much alive*."⁷⁶ The court explained that the "requirement of good faith and fair dealing . . . merely supplements [the at-will statute]."⁷⁷ Thus, "[e]mployers can still terminate untenured employees at-will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages."⁷⁸

In addition to affirming the viability of the at-will statute, the court made new law on a number of important issues. Holding that the trial court's issuance of a jury instruction defining negligence was not in error, the court agreed with Crenshaw's contention that negligence based on a defendant's failure to make a proper investigation of the allegations resulting in discharge was a "theory separate and distinct from the theory of breach of good faith and fair dealing."⁷⁹ Further, noting that negligence was a separate basis of the plaintiff's cause of action, the court relied on a Montana statute⁸⁰ and stated that "it is necessary to prove more than ordinary negligence"⁸¹ to recover punitive damages. The court, however, found that the evidence of the defendant's malicious acts set forth by the plaintiff in this case justified the submission of the issue of punitive damages to the jury.⁸²

Crenshaw underscores the significant alteration over the past seven years of Montana statutory law concerning the discharge⁸³ of

75. MONT. CODE ANN. § 39-2-503 (1983).

76. *Crenshaw*, ___ Mont. at ___, 693 P.2d at 492 (emphasis added).

77. *Id.*

78. *Id.* The defendant hospital acted in bad faith when it notified the local Job Service of the plaintiff's unsatisfactory work performance thereby depriving her of local employment, and when it made false charges and allegations in the discharge memorandum thereby jeopardizing her career.

79. *Id.* at ___, 693 P.2d at 493.

80. MONT. CODE ANN. § 27-1-221 (1983).

81. *Crenshaw*, ___ Mont. at ___, 693 P.2d at 495.

82. *Id.* at ___, 693 P.2d at 496.

83. Constructive discharge can occur when an employee has resigned. See *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975), in which the court defined "constructive discharge" as follows:

The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee. (Citations omitted).

Id. at 144.

The definition of "constructive discharge" propounded in *Young* was quoted with approval by the Montana Supreme Court in *Snell v. Montana-Dakota Utilities Co.*, 198 Mont. 56, 65, 643 P.2d 841, 846 (1982). The Montana court in *Snell* rephrased the test to be whether "the employer has rendered working conditions so oppressive that resignation is the

employees working at-will. At the present time, an employee may sue in tort for wrongful discharge if he can demonstrate that the discharge was in violation of public policy. The leading cases in this regard are *Keneally*, *Staudohar*, and *Nye*. The Montana Supreme Court also has established an implied covenant of good faith and fair dealing in employment contracts, even when there is no express or written contract and the employee is working under an oral contract of indefinite duration. The significant cases in this regard are *Reiter*, *Gates I*, *Gates II*, *Dare*, and *Crenshaw*. The court in *Crenshaw* apparently now has recognized negligence as an additional cause of action in an employment termination case.

Illustrating the need for close attention to this area of law is the court's statement in *Crenshaw* that because *Gates I* had been decided two months prior to *Crenshaw*'s discharge,⁸⁴ the employer was "on notice to deal in good faith at the time [of the discharge]."⁸⁵ In light of this statement, however, it is significant that the employer in *Gates I* was liable even without such notice.

V. DAMAGES

"[T]hose who suffer legally recognized injuries are entitled to damages."⁸⁶ In Montana, in the termination of at-will employment relationships, legally recognized injuries may result from at least the torts of wrongful discharge, breach of covenant of good faith and fair dealing, and negligence. These tortious acts by an employer may give rise to claims for compensatory or punitive damages.

Compensatory damage claims may include, for example, past wages, future earnings,⁸⁷ medical insurance coverage, pension and profit benefits, stock options, and raises. Claims for emotional distress and loss of self-esteem or reputation also may arise. Montana case law is still scant with regard to the viability of some of these claims.⁸⁸

only reasonable alternative." *Id.* at 65, 643 P.2d at 846.

84. *Gates I* was issued January 5, 1982, and *Crenshaw* was discharged on March 12, 1982.

85. *Crenshaw*, ___ Mont. at ___, 693 P.2d at 495.

86. H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 5.27 (1984) (citing D. DOBBS, *LAW OF REMEDIES* § 3.1 (1973)).

87. BAKALY & GROSSMAN, *supra* note 23, § 10.5.2. Such claims may be offset by actual earnings or reasonably expected earnings. The extent to which lost future earnings ("front pay") may be awarded has not been adjudicated in Montana. *Cf.* *Panhandle E. Pipe Line Co. v. Smith*, 637 P.2d 1020, 1025 (Wyo. 1981) (upholding district court determination that wrongfully discharged employee who had 26 years work life expectancy could be awarded eight years' front pay).

88. In dictum in *Dare*, Justice Morrison in a concurring opinion indicated the view

The Montana Supreme Court, however, has held that punitive damages clearly are recoverable when a breach of the covenant of good faith and fair dealing has been proven.⁸⁹ Presumably, the wrongful discharge tort, based on a violation of public policy, also can give rise to recovery of punitive damages.⁹⁰

VI. ROLE OF THE JUDGE AND JURY

A. *Public Policy Torts*

In a wrongful discharge case alleging violation of public policy, the plaintiff initially must identify the public policy which gives rise to the tort action. "[T]he threshold question is what public policy would be jeopardized if the plaintiff's dismissal were allowed to go uncompensated."⁹¹ When clear statutory or constitutional language is violated, identification of public policy is relatively uncomplicated. More difficult to identify are the policies embodied in, for example, professional codes of ethics or popular notions of public good.⁹²

Once the plaintiff has identified the public policy, the question arises whether the judge or the jury should determine public policy requirements.⁹³ At least one author has suggested that "it is the court's job to decide what the applicable public policy is, . . ." reasoning that it is better for judges to make value judgments that are subject to appellate review, than for juries to make value judgments which are unpredictable and immune from appellate review.⁹⁴ Within this scheme, the jury decides as a matter of fact the employer's reasons for discharging an employee; the judge, as part

that reinstatement is not a remedy in a wrongful termination case. — Mont. at —, 687 P.2d at 1022 (Morrison, J., concurring).

89. *Crenshaw*, — Mont. at —, 693 P.2d at 495; *Gates II*, — Mont. at —, 668 P.2d at 215.

90. The standard of proof for presumed malice with regard to a punitive damage claim in an employment termination context is:

When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice.

Owens v. Parker Drilling Co., — Mont. —, 676 P.2d 162, 164 (1984).

91. *PERRITT supra* note 86, § 7.9.

92. *Id.*

93. *Id.*

94. *Id.* at §§ 7.8, 7.9.

of his balancing responsibility, determines if the employer had legal justification for the discharge.⁹⁵ In fact, Comment k to section 870 of the RESTATEMENT (SECOND) OF TORTS requires the judge to balance the employer's interests against those of the employee and of the public to determine whether tort liability exists for employee dismissal in the circumstances alleged by the plaintiff, and to decide what employer justifications apply.⁹⁶ Thus, the jury is limited to factual questions within a public policy framework that the judge has determined and embodied in the jury instructions.⁹⁷

In cases where the court has decided as a matter of law that certain activity comes within the ambit of protected public policy, the jury's role, not unlike that of the jury in an employment discrimination suit, would be to determine whether the termination was for the prohibited public policy reason or for another legitimate reason. To put it differently, was the reason given for termination a pretext for the public policy reason? In that type of case, the trial court is required to give instructions on the shifting burdens of proof⁹⁸ and the "but for"⁹⁹ issues.

B. *Breach of the Employment Agreement or Violation of the Covenant of Good Faith and Fair Dealing*

An employee may allege that his dismissal was motivated by a reason that violates the implied covenant of good faith and fair dealing, as in *Gates I*,¹⁰⁰ *Dare*,¹⁰¹ or *Crenshaw*.¹⁰² Or, the employee may allege that the express or implied in fact contract of employment permits dismissal only for certain reasons ("just cause") and the employer dismissed him for some other reason.¹⁰³ In either case, the employer's motive is essential in determining liability.¹⁰⁴

In *Gates I*, the court held that there was a genuine issue of material fact, i.e., whether the employer had breached the covenant of good faith and fair dealing, which precluded summary judgment.¹⁰⁵ It is clear that the jury may infer a breach of the cov-

95. *Id.* at § 7.8.

96. *Id.*

97. *Id.* See *id.* at § 7.14 for sample jury instructions.

98. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Martinez v. Yellowstone County Welfare Dep't*, ___ Mont. ___, 626 P.2d 242 (1981).

99. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Swanson*, 182 Mont. 414, 597 P.2d 702.

100. 196 Mont. 178, 638 P.2d 1063.

101. ___ Mont. ___, 687 P.2d 1015.

102. ___ Mont. ___, 693 P.2d 487.

103. PERRITT, *supra* note 86, § 7.18.

104. *Id.*

105. *Gates I*, 196 Mont. at 184, 638 P.2d at 1067.

enant of good faith and fair dealing¹⁰⁶ and that the plaintiff has the burden of proving that the employer acted in bad faith.¹⁰⁷ The jury should be instructed regarding that burden and its right to draw inferences from the facts.¹⁰⁸ The Montana Supreme Court held in *Crenshaw* that expert testimony is appropriate to assist "the jury to understand the evidence and ultimately the breach of implied covenant of good faith and fair dealing question at issue."¹⁰⁹ The court stated that when a complex labor issue is involved and the covenant of good faith and fair dealing allegedly has been breached, "[f]ault . . . is not easily comprehensible to the average person."¹¹⁰ This ruling apparently confirms that it is the jury who will decide if the covenant has been breached.¹¹¹

In breach of covenant of good faith and fair dealing cases, the role of the trier of fact varies. For example, if the employer's decision to discharge was predicated upon underlying facts which are disputed (e.g., determining who was the aggressor in a physical altercation between two employees), the jury's role is to decide whether the investigation was fair and had been done in good faith.¹¹² If the jury concludes that the investigation was fair and done in good faith, the jury then should not be allowed to reexamine the employer's decision to determine whether, under similar circumstances, the jury also would have chosen to discharge the employee. In cases in which the underlying reason for termination is not in basic dispute, however, the jury's role is to determine whether the employer's procedural handling of the discharge was in compliance with either written personnel policies,¹¹³ unwritten personnel policies,¹¹⁴ or policies which an expert witness has testified were unfair and a deviation from good personnel practice.¹¹⁵ After making this determination, the jury then must decide whether the violation of policies or good personnel practices was

106. PERRITT, *supra* note 86, § 7.18.

107. *Id.*

108. *Id.*

109. *Crenshaw*, ___ Mont. at ___, 693 P.2d at 495.

110. *Id.* at ___, 693 P.2d at 494.

111. Presumably, if the employer has articulated applicable discharge procedures "embodying the rudiments of procedural fairness, e.g., notice, an unbiased decision maker, and an opportunity for the employee to tell his or her side of the story," the jury will decide only if those rules were followed and will not look to the fairness *per se* of those procedures. PERRITT, *supra* note 86, § 9.2 at 330. *Cf. Reiter*, ___ Mont. ___, 627 P.2d 845 (at-will employee does not have right to due process hearing).

112. *See, e.g., Crenshaw*, ___ Mont. ___, 693 P.2d 495.

113. *Gates I*, 196 Mont. 178, 638 P.2d 1063.

114. *Dare*, ___ Mont. ___, 687 P.2d 1015.

115. *Crenshaw*, ___ Mont. ___, 693 P.2d 494.

done in bad faith or was motivated by some other illegal reason.

The jury's role in cases in which the employee has established the right to be discharged only "for cause" is still unclear. If the jury is allowed to decide whether there was "good cause" or "just cause" for the dismissal, i.e., whether it too would have discharged the employee in a case in which the employer had relied upon what it reasonably believed to be a legally proper and sufficiently factual basis to exercise its at-will rights, the jury simply would be substituting its decision for the employer's.¹¹⁶ The better procedure¹¹⁷ is for the jury *not* to review the accuracy of the employer's factual determination, but to decide only whether the employer reasonably believed *in good faith* that the decision to discharge was legally proper and was predicated upon accurate factual information.¹¹⁸

C. *The Montana Perspective*

The Montana Supreme Court has not directly addressed the problems relating to the role of the court and the jury in employment termination cases. When the court does, its decision will be significant in determining the parameters of employment termination actions. As Justice Morrison stated in his concurrence in *Dare*, "I . . . do not envy the trial court the task of developing instructions from what we have said."¹¹⁹

VII. STATUTES OF LIMITATIONS

Since the actions of wrongful discharge and breach of the covenant of good faith and fair dealing are relatively new in Montana and elsewhere, little law has been developed on the specific issue of the applicable statutes of limitations. There is no Montana case in which the Montana Supreme Court has recognized a wrongful employment termination cause of action that was predicated upon a contract theory. Given the Montana court's emphasis in *Gates I*

116. See *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980), for this view. The *Toussaint* decision effectively requires shifting the burden of proof to the employer. PERRITT, *supra* note 86, § 7.20.

117. BAKALY & GROSSMAN, *supra* note 23, § 10.1.1 at 148; PERRITT, *supra* note 86, § 7.20.

118. See *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (when reviewing a private employer's decision to discharge for cause, the court only need find that the employer acted on the basis of its determination that facts constituting just cause actually existed). See also *Thomas v. Bourdette*, 45 Or. App. 195, 608 P.2d 178 (1980) (court refused to invade province of employer's decision to discharge managerial employee who willfully disobeyed order not to purchase certain equipment, even though the equipment purchase appeared to have increased profits).

119. *Dare*, ___ Mont. at ___, 687 P.2d at 1022 (Morrison, J., concurring).

and *II, Dare*, and *Crenshaw* that these are tort actions, tort statutes of limitations apparently apply. Montana statutes provide that tort actions for general and personal injury must be filed within three years¹²⁰ of the date of the commission of the tort.¹²¹ There is no Montana case, however, in which the court has discussed this application of the tort statute of limitations. Case law from other jurisdictions is likewise sparse.

Recently, however, in a diversity case involving the applicable statute of limitations in a wrongful discharge action, the Ninth Circuit Court of Appeals held that the federal court must apply the state's substantive law on the issue. If the state court has not ruled on the issue, then the federal court "must fashion the rule we believe that court would follow were it confronted with a similar situation."¹²² The circuit court relied upon federal labor laws for the development of California law, noting that the California courts had turned to federal law as a guide to the development of state employment law.¹²³ In Montana the same is true.¹²⁴ Thus, because the factual circumstances of federal labor and employment discrimination cases, as they pertain to statute of limitations is-

120. MONT. CODE ANN. § 27-2-204 (1983).

121. Any action for restoration to office by a person wrongfully removed, or any suit for recovery of salary by any person wrongfully removed or excluded from office, must be filed within six months from the date of the wrongful removal or exclusion. MONT. CODE ANN. § 27-2-212 (1983). It is not clear whether this statute applies only to public employees or to both public and private employees.

122. *Daniels v. Fesco Div. of Cities Serv. Co.*, 733 F.2d 622, 623 (9th Cir. 1984) (citing *Roesgen v. American Home Prod. Corp.*, 719 F.2d 319, 321 (9th Cir. 1983)). See also *Messenger v. Volkswagen of Am.*, 585 F. Supp. 565 (D. W. Va. 1984) (federal district court looked to state law and held that the two year tort statute of limitations in West Virginia applied to wrongful termination suit); *Scott v. Union Tank Car Co.*, ___ Ind. App. ___, 402 N.E.2d 992 (1980) (wrongful termination suit arising out of a discharge allegedly in retaliation for filing a workman's compensation claim, in specific violation of Indiana statute, was governed by the tort statute of limitations); *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679 (W. Va. 1981) (wrongful termination suit based upon alleged contravention of public policy sounds in tort; it is not an action arising out of contract).

123. The plaintiff *Daniels* alleged that although he was notified of his termination from employment on October 24, 1980, he was not actually terminated from salary payments until November 30, 1980. He brought his action on November 29, 1982, one day before the statute of limitations expired, if the statute of limitations commenced running on the date of his last salary payment. The Ninth Circuit not only found that the applicable statute of limitations was two years, it further held that the statute begins to run upon notification of the termination "even though the employee continues to serve the employer after receipt of such notice." *Daniels*, 733 F.2d at 623. Accordingly, *Daniels'* suit was dismissed because it was filed one month and six days too late.

124. See, e.g., *Teamsters, Local 45 v. State ex rel. Bd. of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981); *State v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *Local 2390 of Am. Fed'n of State, County, Mun. Employees v. City of Billings*, 171 Mont. 20, 555 P.2d 507 (1976); *State Dep't of Highways v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974).

sues, are similar to those factual circumstances in cases of wrongful discharge or breach of the implied covenant of good faith and fair dealing, federal laws and decisions¹²⁵ are relevant to the development of Montana statute of limitations case law.

VIII. DEFENSES: PREEMPTION, EXCLUSIVITY, AND EXHAUSTION

Federal statutory remedies may preclude resort to common law judicial remedies under the preemption doctrine.¹²⁶ Also, if an administrative agency has been authorized by statute to address the factual circumstances, the administrative agency proceeding may be at least the prerequisite, if not the exclusive, remedy.

A. *Preemption by Collective Bargaining Agreements Under the National Labor Relations Act*

When a collective bargaining agreement provides for arbitration of grievances as the exclusive and final dispute resolution procedure, the employee generally may not circumvent the collective bargaining agreement by bringing a tort action.¹²⁷ This precludes a state court from adjudicating labor contract grievances in the guise of tort claims. There has been, however, rapidly developing case law which either questions the validity of the preemption doctrine as a defense to wrongful termination tort claims, or creates exceptions to the doctrine. The courts are not in agreement as to the circumstances which excuse a plaintiff from using and exhausting the dispute resolution procedures of a collective bargaining agreement.¹²⁸ Confronted with a wrongful termination case involving an

125. See, e.g., *United States Postal Serv. (Wittenberg)*, 116 L.R.R.M. 1417, 1419 (1984). The National Labor Relations Board held that the six-month time limitation to file an unfair labor practice charge against the employer begins to run on "the date of the alleged unlawful act," which is the date the adverse employment decision is communicated to the employee. In the context of employment discrimination cases, see *Evans v. United Air Lines*, 534 F.2d 1247 (7th Cir. 1976), *rev'd* 431 U.S. 553 (1977). See also *Milton v. Weinberger*, 696 F.2d 94 (D.C. Cir. 1982); *Terry v. Bridgeport Brass Co.*, 519 F.2d 806 (7th Cir. 1975); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975); *Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973).

126. U.S. CONST. art. VI, cl. 2.

127. The National Labor Relations Act may preempt "state common law action for wrongful discharge if the plaintiff employee is covered by the federal statutes and if the employer conduct at issue in the state action bears a close relation to collective bargaining." (Footnotes omitted.) PERRITT, *supra* note 86, § 2.26. *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984). See also *Republic Steel Corp. v. Maddox*, 275 Ala. 685, 158 So. 2d 492 (1963), *rev'd*, 379 U.S. 650 (1965) (when provided, arbitration is the exclusive remedy for breach of a collective bargaining agreement).

128. The Ninth Circuit has held that a state wrongful discharge action by an employee who is subject to a collective bargaining agreement can avoid federal preemption only when

employee covered by a collective bargaining agreement, the practitioner must analyze carefully the recent cases on the subject.

B. *Montana: Exclusivity and Exhaustion*

The Montana Human Rights Commission is at least the initial, if not the exclusive, Montana forum in which a party alleging employment discrimination pursuant to the Human Rights Act¹²⁹ or the Governmental Code of Fair Practices¹³⁰ must seek a remedy. In *Walker v. Anaconda Co.*,¹³¹ an action predating the "right to sue" procedure, the federal court dismissed the complaint filed against the employer because the plaintiff's exclusive remedy was, at that time, before the Human Rights Commission.

In 1983, the Montana Legislature enacted two statutes which permit claims under the Human Rights Act and Code of Fair Practices to be filed in district court. Either party may request the right to file the action in district court. Before issuance of a "right to sue letter," however, at least the following criteria must be met:

(1) the complaint must have been filed with the Commission for more than 180 days;

(2) efforts of the commission staff to settle the informal investigation must have failed;

(3) the Commission must determine that a contested case hearing cannot be held in the case within twelve months of the filing of the complaint; and

(4) if a right to sue letter is issued at the request of either party, the charging party must bring an action in district court within ninety days of receipt of the right to sue letter or the claim will be barred.¹³²

A claim for discrimination in employment must first be filed before the Human Rights Commission before resorting to the judi-

the discharge violates public policy. *Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984), *U.S. appeal pending* (discharge of truck driver for making complaints to a state agency about spoilage of food products he delivered; separate action for wrongful termination allowed even though discharged employee had unsuccessfully arbitrated his discharge under the collective bargaining agreement). Several courts recently have expressed concern that the right to bring suits for wrongful discharge should not be denied to employees who are employed under collective bargaining agreements. *See, e.g., Midgett v. Sackett-Chicago, Inc.*, 2 LAB. REL. REP. (BNA) (117 L.R.R.M.) 2807 (Ill. Oct. 19, 1984); *Alpha Beta Inc. v. Superior Court*, 160 Cal. App. 3d 1049, 207 Cal. Rptr. 117 (1984); *Lueck v. Aetna Life Ins. Co.*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *U.S. appeal pending*.

129. MONT. CODE ANN. §§ 49-2-101 to -601 (1983).

130. MONT. CODE ANN. §§ 49-3-101 to -312 (1983).

131. 520 F. Supp. 1143 (D. Mont. 1981), *aff'd*, 698 F.2d 1228, *aff'd*, 698 F.2d 1230, *aff'd*, 698 F.2d 1235 (9th Cir. 1982).

132. MONT. CODE ANN. §§ 49-2-509, 49-3-312 (1983).

cial forum. A district court complaint asserting a violation of public policy or violation of the covenant of good faith and fair dealing, however, may be filed simultaneously with the claim before the Human Rights Commission, or the wrongful discharge and bad faith claims may be combined with the discrimination claim in district court after the Commission issues the right to sue letter. The Montana Supreme Court has not ruled on the relationship between employment tort claims and employment discrimination claims. Thus, it still is unclear whether an aggrieved employee can bypass the administrative procedure by enveloping a discrimination claim within a wrongful discharge or bad faith action in a judicial proceeding. If the gravamen of the wrongful discharge action is predicated upon discriminatory conduct prohibited by the Montana Human Rights Act, the complaint may be vulnerable to the defense that the administrative remedy has not been properly used or exhausted.¹³³

IX. FURTHER IMPLICATIONS FOR THE PRACTITIONER

As the law presently exists in Montana, the plaintiff who properly pleads a complaint with conclusory allegations can readily argue that a jury issue has been created in nearly every discharge situation. Since arbitration of disputes pursuant to an arbitration clause in an employment agreement is prohibited under present Montana law, at least as to at-will employees,¹³⁴ it remains to be seen how either the Montana Legislature or the courts will develop limitations, both substantive and procedural, to claims of wrongful termination.

Involuntary termination of employment, by its nature, frequently (perhaps always) evokes the discharged employee's reac-

133. See L. LARSON, *EMPLOYMENT DISCRIMINATION* § 121.10 & n.4 (1984) stating:

Plaintiffs who have asserted that their termination violated both traditional discrimination law and an explicit exception to employment at will have, for the most part, been unsuccessful. Most courts that have considered the question have held that the presence of a statutory remedy precludes a common law wrongful discharge action when the discharge complained of was based on a statutory category such as age, sex, or race.

(Footnote omitted). See also *State ex rel. Jones v. Giles*, 168 Mont. 130, 541 P.2d 355 (1975) (reiterating that administrative remedies must be exhausted in the Departments of Revenue and of Highways respectively); *State ex rel. Sletten Constr. Co. v. City of Great Falls*, 163 Mont. 307, 516 P.2d 1149 (1973).

134. MONT. CODE ANN. §§ 27-5-101 to -304 (1983). See *Palmer Steel Structures v. Westech, Inc.*, 178 Mont. 347, 584 P.2d 152 (1978); *Smith v. Zepp*, 173 Mont. 358, 567 P.2d 923 (1977); *Green v. Wolff*, 140 Mont. 413, 372 P.2d 427 (1962) (contract provisions which provide that all future disputes shall be submitted to arbitration are void because they restrict access to the courts).

tion that the employer made the wrong decision. Virtually every allegation of bad faith or negligence will be viewed as creating a genuine issue of material fact which precludes dismissal at the summary judgment stage of litigation. In the absence of any clear judicial definition of what constitutes a violation of the covenant of "good faith and fair dealing" in the employment relationship, even managerial decisions made in good faith may not avoid full blown judicial scrutiny. Notwithstanding the court's reassurances expressed in *Dare* and *Crenshaw* that the at-will statute remains viable, it appears that the ability of a discharged employee to contest his discharge judicially creates, as a practical matter, an exception that has swallowed the statutory rule. In contrast to the pre-1980's environment where a discharged employee was effectively without recourse unless he was employed under a collective bargaining agreement, today's at-will employee who takes issue with his employer's decision to terminate the employment relationship has access to traditional judicial remedies in the Montana courts.

X. CONCLUSION

"Unless [the implied covenant of good faith and fair dealing is] limited in its scope, . . . or utilized only when it is consistent with promises actually made by the employer, as in *Gates*,"¹³⁵ the use of the theory will be extraordinarily far-reaching. It "could have the effect of imposing on all private employers an obligation to dismiss only where a jury can be satisfied that cause existed."¹³⁶ Until there is further amplification or clarification by the Legislature or the courts on this subject, an employer in Montana may be subject to liability whenever a jury disagrees with the employer's exercise of a management decision affecting the employment relationship.

Although the Montana Supreme Court has stated that it has not affected the employer's statutory at-will right, it at the very least has imposed on employers a wariness of juries who may not agree with the decisions required in the myriad employment disputes which can result in employment termination. The employee who has been discharged for reasons that violate public policy, in breach of an express or implied agreement of job tenure, or when the employer has acted outrageously, has been given judicial remedies that were overdue. It remains to be seen whether further evolution of the law will devise some protections against a jury

135. *PERRITT*, *supra* note 86, § 4.9.

136. *Id.*

“second guessing” an employer’s decision to terminate employment in circumstances in which the decision, albeit made for legitimate reasons, is open to “managerial debate” by expert witnesses. For that employer, extensive litigation, culminating in a jury’s assessment by a presently undefined standard of “good faith and fair dealing,” is a likely prospect whenever the employee decides to challenge an employment termination.