COMMENT

Baldwin v. Sisters of Providence: Washington Gives At Will Employees A Gun With No Ammunition To Fight Against Unjust Dismissal

Nelson works in the computer sales department of X Corporation, a computer processing firm. He started out at the company as a delivery boy fifteen years ago, but through hard work and determination he has gradually advanced to his current position. Nelson does not have a formal contract with X Corporation establishing the length or conditions of his service, but he has always assumed that the company would never fire him as long as he continued to do a good job.

Mr. Leith, an executive at X Corporation, knows little about Nelson's long record of exemplary service. Leith does know, however, that he has promised his nephew, Tyler, a good paying job in the company. Although his nephew is unqualified for a computer sales position, Leith fires Nelson and gives Tyler the job.

Nelson is shocked. Although he has done nothing wrong, he finds himself unemployed with no way to support his family. He calls you and asks for legal help in getting his job back. As a legal practitioner in the state of Washington, what do you tell him?

Under current state and federal law,[1] the answer is quite simple: Nelson has no legal means of recourse. He is an "at will" employee and, as such, the employment relationship can

1. Although this Comment focuses primarily on Washington law, federal procedures for wrongful discharge are important for several reasons. First, Washington and other states have traditionally relied on federal courts for guidance in developing their own wrongful discharge procedures. *See, e.g.*, Roberts v. ARCO, 88 Wash. 2d 887, 568 P.2d 764 (1977); *see also infra* Section III. Second, federal courts created the first exceptions to the employment at will doctrine. *See infra* Section I. Third, federal means of recovery exist in addition to state causes of action, so many complaints contain both federal and state claims. *See, e.g.*, Bishop v. Jellef Assoc., 398 F.Supp. 579 (D.D.C. 1974).

be terminated by either party at any time for almost any reason. As will be shown, while the traditional at will doctrine[2] has been weakened by several exceptions, cases similar to the hypothetical above continue to fall through the cracks. The result is an arguably unfair termination that finds no remedy in Washington statutory or common law.

The Washington Supreme Court recently addressed the issues of at will employment and unjust dismissal in *Baldwin v. Sisters of Providence in Washington, Inc.*[3] In its decision, the court took a step forward by granting unjust dismissal plaintiffs greater procedural rights, but then rendered that progress largely meaningless by refusing to recognize substantive rights that would broaden the protections against unjust dismissal. The net result is that only the few unjustly terminated employees who are able to survive a summary judgment motion will benefit from the more equitable procedural burdens during trial. Thus, unfortunately, the courtroom doors remain closed to many other deserving employees whose terminations do not fit the substantive requirements for redress under the at will doctrine.

In *Baldwin*, the court addressed three main issues: one procedural and two substantive. Procedurally, the court wisely adopted a system of shifting evidentiary burdens for use in unjust dismissal suits. The shifting burdens provide an employee with a more realistic chance of reaching trial on the merits.

However, the court denied most at will employees a substantive basis for utilizing this procedural change by refusing to recognize the existence of an implied covenant of good faith and fair dealing in the at will employment relationship. The court's failure to recognize that employment at will is actually an employment contract, under which the parties should be subject to the same obligations of good faith as in ordinary contracts, was based on a flawed logic that used the employment at will doctrine to validate itself.

Although the court's flawed reasoning lead it to reject an implied covenant of good faith and fair dealing, it did expand the substantive rights of employees whose employers have promised that dismissal will be only for "just cause." The

2. The at will doctrine is commonly referred to as "employment at will" and "terminable at will." This Comment will use the terms interchangeably.

3. 112 Wash. 2d 127, 769 P.2d 298 (1989).

court authorized judicial review of an employer's determination that just cause for termination of an employee existed. Unfortunately, this substantive gain was undercut when the court held that an employer's good faith belief that it had just cause to dismiss an employee was sufficient to satisfy the just cause standard.

This Comment will explore the status of the employment at will doctrine and unjust dismissal actions following the supreme court's decision in *Baldwin*. First, Section I will explain the historical background of the employment at will doctrine and its steady erosion in the modern era. Next, Section II will provide an overview of the *Baldwin* case itself, including facts, procedural history, and general holdings. Sections III through V will explore the three major issues decided by the court in *Baldwin*: allocating burdens of proof in wrongful discharge suits; implied covenants of good faith and fair dealing in employment at will contracts; and the standard for determining when an employer has "just cause" for firing an employee. Finally, in Section VI, the author will suggest legislative action to correct the inadequacies of the post-*Baldwin* employment at will doctrine.

I. HISTORICAL BASIS OF EMPLOYMENT AT WILL

Roughly two-thirds of the American workforce are considered terminable at will.[4] The at will doctrine originated in the late 19th Century when American commentator Horace G. Wood stated that "a general or indefinite hiring is prima facie a hiring at will."[5] Although Wood's theory contradicted English common law[6] and was not supported by any American courts,[7] his proposition gradually gained nationwide approval.[8]

4. Estimates vary, but approximately 60 to 65 percent of all employees are hired on an at will basis. *See* Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 nn.1-2, 1827 n.65 (1980); Stieber, *Recent Developments in Employment At Will*, 36 LAB. L.J. 557, 558 (1985) (estimate that 60 million United States employees are subject to employment at will).

5. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 134 (1877).

6. English courts consistently ruled that a general hiring implied a term of one year. Continuation of employment for longer than one year made the employment terminable only at the end of an additional year. Comment, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 (1974).

7. *Id.* at 341; *see* Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891).

8. The Tennessee Supreme Court provided perhaps the earliest cogent definition of an employment at will contract when it wrote that an employer could terminate an employee "for good cause, for no cause, or even for cause morally wrong, without [the

Wood's conception of the at will doctrine synthesized many of the legal and social theories of the late 19th Century: freedom of contract, laissez-faire economics, and mutuality of contract. Mutuality of contract, in which both the employer and employee could terminate the employment relationship at any time, was the argument most often advanced by courts to support the at will doctrine. The United States Supreme Court advocated this theory in *Adair v. United States*,[9] noting "[i]n all such particulars the employer and employe [sic] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[10]

The at will doctrine was ideally suited to the economic conditions extant during its emergence: rapid business expansion westward lured many employees away from their previous jobs, temporary agricultural jobs were still common, and most workers did not spend long periods working for a single employer.[11] By the beginning of the early 20th Century, however, the economic conditions had changed to the extent that employees were clearly disadvantaged by the at will rule.[12] Employees began to remain with the same company for long periods of time. In addition, periods of high unemployment hampered discharged employees from finding other jobs. Most importantly, rapid industrialization shifted power to large corporate employers, an event that virtually invalidated the idea of absolute freedom of contract.[13]

Courts and legislatures, faced with a changed economic setting and an employment principle ill-suited to the new real-

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employer] being thereby guilty of legal wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-520 (1884), *overruled on other grounds sub nom.* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). For a thorough discussion of the development of employment at will, see Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

9. 208 U.S. 161 (1908). Adair challenged a federal law forbidding employers involved in interstate commerce from discharging employees because of union membership. The Court struck down the law as unconstitutional. *Id.* at 175.

10. *Id.* at 175. The Court later retreated from the position that all such legislation would be unlawful, but the Court's earlier statement epitomizes the pattern of thought on the subject. *See also* Coppage v. Kansas, 236 U.S. 1 (1914).

11. *See* Comment, *Employment At Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151, 153 (1987).

12. Earlier commentators and courts were not so much concerned with freedom of the employee, but with the fundamental right of employers to discharge employees as they pleased. *See* Comment, *supra* note 6, at 343 (1974).

13. *See* Blades, *Employment At-Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1418 (1967).

ity, gradually placed limitations on the employment at will doctrine. The first attempts to limit the doctrine were made by the New Deal Congress, largely because the concept of at will employment had become so entrenched in the common law that courts were reluctant to modify or eliminate it. In 1935, Congress passed the National Labor Relations Act,[14] which prohibited certain employers from discharging employees who engaged in such acts as organizing, bargaining collectively, and striking.[15] Since then, Congress has legislated several other exceptions to the at will rule,[16] but all have dealt with particular classes of employees, such as union members, women, and minorities.[17] Conversely, although the courts have been more reluctant to join the fray until recently, the common law exceptions they have created have attacked the at will doctrine across the board without focusing on a particular class of employees.

A. Judicial Exceptions to Employment At Will

Courts, recognizing the severity of the at will doctrine, have created narrow exceptions to the rule that allow terminated employees to seek redress in specific situations. The most widely recognized exceptions are for public policy and implied-in-fact contracts.

1. The Public Policy Exception

A substantial majority of courts recognize an exception to the at will doctrine when the employer's discharge of an

14. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § § 151-162 (1982)).

15. The Supreme Court explicitly supported the position that some limitations were necessary for the at will doctrine, stating that the National Labor Relations Act did not interfere with the "normal" right of discharge but was only intended to prohibit employers from using the right of discharge as a means to "intimidate or coerce employees." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

16. Congress also passed the Child Labor Law, § 12, 52 Stat. 1067 (1938) (codified as amended at 29 U.S.C. § 212 (1982)) and the Railway Labor Act, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. § § 151-64 (1982)). The most far-reaching effort by Congress to limit the at will doctrine was the Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000-e (1982 & Supp. 1986)). The Civil Rights Act prohibits employers from discharging employees because of race, color, national origin, religion, or sex. Congress also passed the Age Discrimination in Employment Act, which prohibits the dismissal of employees due to age. 29 U.S.C. § 623 (1970).

17. The reason why Congress has only acted to protect certain groups from the at will doctrine is not clear. Possible reasons include the state-law nature of contracts, constitutional limitations on the authority of Congress to affect employment relations, and the political pressures affecting the passage of new legislation.

employee violates fundamental principles of public policy.[18] Under this exception, employees have a cause of action in tort for wrongful discharge if they are dismissed for activities that are deemed protected by public policy. This exception to the at will rule was explained in one of the earliest "public policy" cases, *Peterman v. International Brotherhood of Teamsters*.[19] In *Peterman*, an employee was fired following his refusal to commit perjury on behalf of his employer. The court stated that allowing an employer to discharge an employee for refusing to commit a crime would be "obnoxious to the interests of the State and contrary to public policy and sound morality."[20]

However, the *Peterman* court did not adopt an exception for public policy out of concern for the rights of the employee but to protect the state's interest in discouraging perjury. The court believed that allowing employers to fire employees for refusing to commit perjury would discourage truthful testimony. It held, therefore, that public policy requires that every legal obstacle to honest testimony be "struck down when encountered."[21]

The reasoning of the *Peterman* court is representative of one approach courts have used to define public policy. The *Peterman* court, and some later courts,[22] made ad hoc determinations of whether public policy mandated a wrongful discharge action in the particular case before them. In cases like these, courts make a determination that a state or federal interest overrides the employer's right to terminate. Usually, the employees have refused to commit a crime.[23]

Under another approach, courts base public policy exceptions on the legislature's express designation of statutory rights and duties. Many courts have used this method when an employee has been fired for filing a workers' compensation

18. A state by state summary of the status of the at will rule appears in Wald & Wolf, *Recent Developments in the Law of Employment At Will*, 1 LAB. L.J. 533, 555-79 (1985).

19. 174 Cal. App. 2d 184, 344 P.2d 25 (1959), *aff'd on remand*, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963).

20. *Id.* at 186, 344 P.2d at 27.

21. *Id.*

22. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (refusal to participate in price-fixing); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (refusal to violate state statute regulating the labeling of food products).

23. *See* cases cited *supra* note 22. *See also* Trombetta v. Detroit, Toledo & Ironton R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to alter sampling results used for pollution control reports).

claim[24] or serving on a jury.[25] The need for an exception to the at will rule in these cases receives even greater support because the relevant legislature has indicated that public policy allows or requires the conduct.[26]

2. The Implied-in-Fact Contract Exception

A large number of courts have also adopted a contractual exception to the employment at will doctrine. Under this exception, an employer's agreement to terminate only for just cause creates rights enforceable in contract.[27] Such an agreement by employers is often inferred from company handbooks or policy statements that establish procedures or conditions to be followed in termination decisions. Such inferences give rise to the implied-in-fact contract exception. Courts have labeled the inferences from the handbook provisions "implied-in-fact covenants of good faith and fair dealing" because the employer unilaterally submits a guarantee not to dismiss without just cause.[28] Thus, employers can maintain only a traditional at will relationship by refraining from making binding statements.

3. Exceptions to the At Will Doctrine in Washington

For many years Washington adhered to the traditional at will doctrine, recognizing only those exceptions specified by

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24. *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

25. *See* Wiskotoni v. Michigan Nat'l Bank West, 716 F.2d 378 (6th Cir. 1983); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

26. Other courts have argued that since an at will employee may be terminated for any reason, the impropriety of the reason is legally irrelevant. *See* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 875 (Miss. 1980); Andress v. Augusta Nursing Facilities, Inc., 156 Ga. App. 775, 776, 275 S.E.2d 368, 369 (1980).

27. *See* Touissant v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980). Other courts utilizing this principle include Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983); Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); Mobil Coal Prod., Inc. v. Parks, 704 P.2d 702 (Wyo. 1985).

28. Because the exception is grounded in contract, traditional notions of offer, acceptance, and consideration must be fulfilled:

> A promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable.

Cook v. Heck's Inc., 342 S.E.2d 453, 459 (W. Va. 1986).

the Congress or Washington legislature.[29] Along with the federal statutory exceptions previously mentioned,[30] Washington courts recognize wrongful discharge actions by employees fired because of their age, sex, marital status, race, creed, color, national origin, or mental or physical handicap in violation of Washington law.[31]

In addition to the statutory exceptions, in *Roberts v. ARCO*,[32] the Washington Supreme Court discussed the exception for instances when an employee gives additional consideration.[33] The additional consideration exception is similar to the implied-in-fact contract exception discussed in the previous section but is based on actions of the employee instead of the employer. This exception is available only if the employee has provided consideration *in addition* to required services that results in a detriment to the employee and a benefit to the employer.[34] If the employee has given additional consideration, the employer is no longer free to terminate the employment relationship at will. In *Roberts*, the court rejected the plaintiff's assertion that longevity of service, rejection of other job opportunities, and numerous transfers were sufficient additional consideration to satisfy this exception to the at will doctrine but declined to give examples of sufficient acts.[35]

In response to the plaintiff's suggestion that Washington adopt the public policy exception,[36] the *Roberts* court acknowledged that the exception had gained support in other jurisdictions,[37] but noted that it was intended to apply only where

29. *See* Roberts v. ARCO, 88 Wash. 2d 887, 568 P.2d 764 (1977); Webster v. Schauble, 65 Wash. 2d 849, 400 P.2d 292 (1965); Lasser v. Grunbaum Bros. Furniture Co., 46 Wash. 2d 408, 281 P.2d 832 (1955).

30. *See supra* notes 14-17 and accompanying text.

31. WASH. REV. CODE § 49.60.180 (1989) ("Age was added by amendment in 1961).

32. 88 Wash. 2d 887, 568 P.2d 764 (1977). Roberts had worked for ARCO for 16 years when he was dismissed at age 42. Roberts alleged that ARCO discriminated against him because of his age and that the circumstances of his employment created an implied condition that he would not be terminated in bad faith. The supreme court affirmed the trial court's directed verdict for ARCO.

33. Washington courts had long recognized that an employee could make his employment terminable for cause only by giving additional consideration. *See* Heideman v. Tall's Travel Shops, Inc., 192 Wash. 513, 73 P.2d 1323 (1937).

34. *Roberts*, 88 Wash. 2d at 895, 568 P.2d at 769.

35. *Id.* at 895-96, 568 P.2d at 769.

36. Roberts asserted that dismissing an employee because of his age violates public policy. *Id.* at 896, 568 P.2d at 770.

37. *Id.* at 896-97, 568 P.2d at 770 (citing Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) and Peterman v. Int'l Brd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

adherence to the employment at will doctrine would lead to an "outrageous result clearly inconsistent with a stated public policy and the community interest."[38] The court reasoned that because the plaintiff's termination did not result from the exercise of a statutory right or refusal to commit a criminal act, his discharge was not wrongful under the public policy exception.[39] Thus, although the *Roberts* court did not expressly adopt the public policy exception, it indicated that it would do so if faced with the right situation.

That situation arose in *Thompson v. St. Regis Paper Company*,[40] in which the court adopted the public policy and implied-in-fact contract exceptions to the at will doctrine. In *Thompson*, an employee worked for the defendant for seventeen years before he was dismissed for "stepping on somebody's toes."[41] Thompson argued that he gave the employer additional consideration when he assigned any inventions or patents obtained during his employment to the company, but the court disagreed, stating that the consideration was insufficient to change an at will relationship to one terminable only for cause.[42]

The major issue in *Thompson* concerned the legal effect of a "Policy and Procedural Guide" published by the employer which promised that terminations would be handled in a "fair, reasonable, and just" manner.[43] The court recognized that the at will theory allowed for qualification of an employer's right to terminate by statements contained in employee policy manuals[44] and that contractual analysis independently justified such a limitation.[45]

Moreover, the court stated that broader based policy considerations also justified this exception. Because employers

38. *Roberts*, 88 Wash. 2d at 897, 568 P.2d at 770.

39. *Id.*

40. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

41. *Id.* at 221, 685 P.2d at 1083. The plaintiff had advanced to the position of divisional controller and had received regular bonuses and, two months before his dismissal, a merit pay raise. Following termination, he was given a $10,000 bonus for his previous performance. *Id.*

42. *Id.* at 224, 685 P.2d at 1084. The court compared the present case to Parker v. United Airlines, Inc., 32 Wash. App. 722, 649 P.2d 181 (1982), in which the plaintiff had similarly assigned rights to inventions to the defendant company. The *Parker* court stated, "[t]hese terms and conditions merely defined the required services, put Parker on notice, and indicated her common law liability." *Id.* at 726, 649 P.2d at 183.

43. *Thompson*, 102 Wash. 2d at 222, 685 P.2d at 1084.

44. *Id.* at 228, 685 P.2d at 1087.

45. *Id.* at 229, 685 P.2d at 1087.

primarily issue such manuals to create an atmosphere of fair treatment and job security for their employees,[46] and because employers expect employees to abide by the policies expressed in the manuals, employers can create an atmosphere where employees justifiably rely on the express terms of the manual and expect that the employer will adhere to the procedures stated in the manual.[47] Thus, the *Thompson* court held that if an employer creates an atmosphere of job security and fair treatment with "promises of *specific treatment in specific situations*" and the employee relies on the representations, the employer must act in accord with those promises.[48]

In addition to the additional consideration and implied-in-fact contract exceptions, the *Thompson* court also considered whether Washington should adopt the public policy exception to employment at will. Although the court indicated that it would be willing to adopt the exception, the justices were concerned that a broad definition of public policy would not balance the interests of both the employer and employee.[49] To accommodate this concern, the court stated that the employer's conduct violates public policy if it contravenes a constitutional, statutory, or regulatory provision.[50] Prior judicial decisions can also establish public policy, the court added, but without judicial or legislative declarations to guide them, courts should proceed cautiously.[51] With this ruling, the *Thompson* court added Washington to the list of states that allow an action in tort for wrongful discharge when the dismissal violates a clear mandate of public policy.[52]

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46. *Id.* (citing Parker v. United Airlines, Inc., 32 Wash. App. 722, 726-27, 649 P.2d 181, 183-84 (1982)).

47. *Id.* at 230, 685 P.2d at 1088. The court indicated that employees could "reasonably" rely on policies that are specifically announced by the employer and by which the employees are also expected to abide.

48. *Id.* (emphasis in original.) For an excellent analysis of the employment handbook exception with specific emphasis on *Thompson* and subsequent cases, see Wall, *At-Will Employment in Washington: A Review of Thompson v. St. Regis and its Progeny*, 14 UNIV. OF PUGET SOUND L. REV. 71 (1990). Recent cases interpreting and applying *Thompson* include Lawson v. Boeing Co., 58 Wash. App. 261, 792 P.2d 545 (1990); Hatfield v. Columbia Fed. Sav. Bank, 57 Wash. App. 876, 790 P.2d 1258 (1990); Hibbert v. Centennial Villas, Inc., 56 Wash. App. 889, 786 P.2d 309 (1990); and Swanson v. Liquid Air Corp., 55 Wash. App. 917, 781 P.2d 900 (1989).

49. Thompson, 102 Wash. 2d at 232, 685 P.2d at 1089.

50. *Id.* (quoting Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982).

51. *Id.* at 232, 685 P.2d at 1089.

52. The Washington Supreme Court recently clarified its position on the public policy exception in Dicomes v. State, 113 Wash. 2d 612, 782 P.2d 1002 (1989). In

Thus, although the *Thompson* court left the at will doctrine firmly rooted in Washington law, several exceptions had taken hold. These exceptions, including implied-in-fact contracts arising from policy manuals and public policy, opened a narrow window for employees to challenge unjust dismissals. Nevertheless, until *Baldwin v. Sisters of Providence in Washington, Inc.*,[53] procedural barriers continued to slam the window shut on the employee's case.

II. *BALDWIN V. SISTERS OF PROVIDENCE*

In *Baldwin*, the Washington Supreme Court examined the current status of the employment at will doctrine, as well as the procedural and substantive aspects of wrongful discharge actions. In that case, the plaintiff, James Baldwin, began working at St. Peter Hospital, a hospital operated by the Sisters of Providence, in 1981 as a respiratory therapist. Under the terms of an employment manual produced by the hospital, employees could be discharged only for "just cause," defined as "any gross violation of conduct."[54] The manual also provided a four-step grievance procedure for resolving employee complaints.

On January 30, 1985, a patient reported that she had been sexually molested the previous day. The patient, a woman in her mid-fifties, told hospital authorities that a bearded man with a pony tail and wearing a blue jacket entered her room between 5:00 and 6:00 a.m. The man listened to her chest with a stethoscope. He then massaged the patient's sore left shoulder and forced her to massage his genitals.[55]

The patient reported the incident to hospital staff, who immediately recognized the physical description of the assailant as that of Baldwin. Furthermore, Baldwin had been on

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Dicomes, a case involving a state employee allegedly discharged for reporting an unannounced budget surplus, the court held that employees have the burden to show that the discharge contravened a clear mandate of public policy. In addition, the court ruled that defining a "clear mandate of public policy" in each particular situation is a question of law. *Id.* at 617, 782 P.2d at 1006. Factors to be considered are whether the employer's conduct constituted either a violation of the letter or policy of the law, as long as the employee was "seeking to further the public good, and not merely private or proprietary interests, in reporting the alleged wrongdoing." *Id.* at 620, 782 P.2d at 1008.

53. 112 Wash. 2d 127, 769 P.2d 298 (1989).

54. *Id.* at 129, 769 P.2d at 299.

55. Brief for Appellant at 4, Baldwin v. Sisters of Providence in Washington, Inc., 112 Wash. 2d 127, 769 P.2d 298 (1989) (No. 54771-8).

duty that morning, and respiratory therapists were the only hospital staff members allowed to wear blue jackets.[56] The staff member contacted Baldwin's superior, the Director of Respiratory Therapy, who evaluated the complaint and decided that a serious problem existed; accordingly, the director told Baldwin not to come to work that day.

The next morning, Baldwin met with an investigative team formed by the hospital to handle the incident.[57] Baldwin denied any involvement in the occurrence.[58] The team extensively reviewed the patient's medical records and the hospital security records and interviewed other staff members. On February 22, 1985, the hospital terminated Baldwin's employment.[59]

Baldwin filed suit against St. Peter Hospital, Sisters of Providence in Washington, and several hospital administrators (collectively, "the hospital") on March 18, 1985. Baldwin alleged, *inter alia*, that the hospital breached an implied-in-fact contract that arose from the hospital employment manual's just cause provision. The hospital filed motions for summary judgment and directed verdict, arguing that the plaintiff was not entitled to judicial review because he had not exhausted the grievance procedure specified in the employment manual, and therefore had not exhausted his administrative remedies.[60] The trial court denied the defendant's

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56. *Id.* at 5.

57. The team consisted of two codirectors of nursing services, the director of Personnel, and an assistant to the hospital administrator. *Baldwin*, 112 Wash. 2d at 129, 769 P.2d at 299.

58. Baldwin again met with the investigatory team on February 6, five days after the initial complaint was reported, at which time the investigative team informed Baldwin of what it had learned. Baldwin provided some additional details about his activities that night and the identities of other staff members who might have seen him. The team also offered Baldwin the opportunity to take a polygraph test, but Baldwin refused. Brief for Appellant at 12-13, Baldwin v. Sisters of Providence in Washington, Inc., 112 Wash. 2d 127, 769 P.2d 298 (1989) (No. 54771-8).

59. The parties disagreed on the specifics of the dismissal. A meeting was held on February 22, 1985, to discuss with Baldwin the investigatory team's conclusions. Baldwin contended that the hospital had already decided to fire him, so he abruptly left the meeting. The hospital contended that it had not yet made the decision to fire Baldwin but did so only after Baldwin left the meeting. *Id.* at 12-13.

60. The hospital argued that Baldwin's claim was not ripe for judicial review because he had not used the procedures outlined in the employment manual. The exhaustion of contractual remedies doctrine in the employment setting operates on the administrative law principle that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

motions.[61]

At trial on the merits, both parties submitted proposed jury instructions on the breach of an implied-in-fact contract issue,[62] but the trial court drafted its own instruction. The court's instruction advised the jury that the hospital was free to terminate Baldwin's employment at any time and for any reason unless Baldwin had shown that the hospital had "created an atmosphere of job security and fair treatment with promises, found in employment manuals or policies," that promised certain treatment and induced the employee not to actively seek other employment.[63]

The trial court explained that if Baldwin met his burden of proof by showing that the hospital had created an atmosphere of job security, the burden would shift to the hospital to prove by a preponderance of the evidence that Baldwin was terminated for just cause. The trial court adopted an objective definition of just cause, defining it to mean that, at the time of the decision, the employer had a "good, substantial and legitimate business reason" for firing the employee.[64]

The jury found that Baldwin was excused from resorting to the grievance procedure because it was futile;[65] that the employment manual contained a requirement of just cause for dismissal; and that the hospital did not meet its burden of proving it dismissed Baldwin for just cause.[66] The trial court denied a defense motion for judgment notwithstanding the verdict and entered judgment in favor of Baldwin. The hospital appealed the trial court's decision directly to the Washington Supreme Court.[67]

The supreme court first addressed the hospital's argument

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61. Superior Court for Thurston County, Robert J. Dornan presiding.

62. Defendants submitted two instructions: the first defined "just cause" as a good faith, fair, and honest reason supported by substantial evidence. The second added the objective requirement that the "just cause" determination be reasonable. *Baldwin*, 112 Wash. 2d at 130, 769 P.2d at 300.

63. *Id.*

64. *Id.* at 130-31.

65. *Id.* at 131. The exhaustion of remedies requirement will often be waived if the plaintiff could not possibly obtain relief through the prescribed procedures. *See* Bowen v. City of New York, 106 S.Ct. 2022 (1986) (Social Security claimants could not discover why their claims were rejected because the administrative policy was secret); Wolff v. Selective Serv. Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) (students whose draft deferments had been revoked were excused from exhausting remedies because the head of the S.S.S. publicly ruled out any reversals).

66. *Baldwin*, 112 Wash. 2d at 131, 769 P.2d at 300.

67. *Id.*

on the issue of the futility of the grievance procedure.[68] The court found that Baldwin had raised a genuine issue of bias on the part of the hospital, and, accordingly, he had demonstrated that recourse to the grievance procedure was futile.[69] As a result, the supreme court, affirming the trial court, found that Baldwin was entitled to judicial review.[70]

After finding that Baldwin was entitled to judicial review, the court reviewed the trial court's jury instructions on the burdens of proof. The supreme court held that the trial court erroneously placed the burden on the hospital to prove that Baldwin was dismissed for just cause.[71] The court held that the ultimate burden of persuasion always rests with the employee in wrongful discharge cases and that shifting burdens of proof should be applied.[72] Specifically, the employee must establish a prima facie case of a breach of the implied-in-fact contract. Once the employee makes such a showing, the burden of producing evidence shifts to the employer to show that the employee's dismissal was for just cause. If the employer offers evidence showing just cause, the burden shifts back to the employee to refute the employer's claim that the dismissal was for just cause.[73]

The court then reviewed the trial court's definition of "just cause."[74] The court concluded that the trial court's objective definition of just cause was erroneous, finding instead that just cause means "a fair and honest cause or reason regulated by good faith on the part of the party exercising the power."[75] Thus, the court continued to reject an implied covenant of good faith and fair dealing in every employment contract,[76] which would overturn the at will doctrine by making every employment relationship terminable only for cause. However, the court required an element of good faith when an employer volunteers a "just cause" requirement.

The court's decision in *Baldwin* presents three major

68. Baldwin contended that the first three steps of the grievance procedure were unfair because each of the administrators he was required to consult were involved in the investigation. *Id.*

69. *Id.* at 133, 769 P.2d at 301.

70. *Id.*

71. *Id.*

72. *Id.* at 134, 769 P.2d at 302.

73. *Id.* at 133-36, 769 P.2d at 301-03.

74. *See* text accompanying note 62.

75. *Baldwin*, 112 Wash. 2d at 139, 769 P.2d at 304.

76. *Id.* at 138, 769 P.2d at 304.

issues for consideration: the proper allocation of burdens of proof in wrongful discharge suits; the need for an implied covenant of good faith and fair dealing in employment contracts; and the appropriate definition of "just cause" when an employer's right to terminate has been so limited.

III. BURDENS OF PROOF IN WRONGFUL DISCHARGE SUITS

Procedural requirements play a vital role in trial strategy and often determine the outcome of a case. Plaintiffs subject to demanding procedural requirements frequently are defeated by a summary judgment or directed verdict because the burdens of production and persuasion make it very difficult to establish a prima facie case. Any time the burdens upon a plaintiff are lessened—especially when intermediate burdens shift to the defendant—the plaintiff's chances of reaching a full trial on the merits are enhanced. For this reason, the adoption of shifting burdens in *Baldwin* is very important: wrongful discharge plaintiffs are now more likely to reach a full trial on the merits.

Wrongful discharge cases are a relatively recent phenomenon, and the proper allocation of the evidentiary burdens is still developing. However, employment discrimination suits, a form of wrongful discharge action, provide a useful vehicle for examining burdens of proof because the United States Supreme Court has adopted explicit rules on the subject.[77] Although technically binding only on federal statutory discrimination claims, the Court's analysis and conclusions have compelled many jurisdictions to adopt the same standards for wrongful discharge and discrimination claims of all types.[78]

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77. Cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1990), have proven to be a breeding ground for the development of shifting burdens of proof in employment cases. Title VII cases are usually categorized into two primary models, carrying different burdens of proof: disparate treatment or disparate impact. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2784-85 (1988). Courts employ the disparate treatment analysis when an individual charges that his employer consciously treated certain protected *individuals* in a less favorable manner than other employees. Disparate impact analysis applies when a plaintiff alleges that a particular employment practice, although facially neutral, systematically disadvantages a certain protected *group* without any particular intention to do so. *Id.* Because state wrongful discharge claims usually involve individuals instead of groups, this discussion will be limited to the disparate treatment analysis. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986); Batson v. Kentucky, 476 U.S. 79 (1986); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1980); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

78. *See* Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97, 570 A.2d 903, 906-

The seminal Title VII employment discrimination case, *McDonnell Douglas Corp. v. Green*,[79] established the principles of burden-shifting most commonly applied in the employment discrimination context. The court outlined the burdens of proof appropriate for a private, non-class action Title VII suit for employment discrimination: first, the plaintiff must establish a prima facie case of discrimination;[80] once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate non-discriminatory reason for the employee's termination;[81] finally, the burden shifts back to the plaintiff to show that the proffered reason is merely a pretext for discrimination.[82] A small number of jurisdictions have expressly adopted the allocation of burdens used in employment discrimination cases for use in wrongful discharge actions.[83] These courts have cited much of

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07 (1990) (applying Title VII burdens of proof in state Law Against Discrimination action); Hamilton v. Department of Ind., Labor & Human Rel., 94 Wis. 2d 611, 621 n.4, 288 N.W.2d 857, 861 n.4 (1980) (applying Title VII burdens of proof in action under the Wisconsin Fair Employment Act); Cisneros v. Sears, Roebuck & Co., 135 Ariz. 301, 302, 660 P.2d 1228, 1229 (1982) (adopting Title VII burdens of proof in Arizona Civil Rights Act claim); Matras v. Amoco Oil Co., 424 Mich. 675, 683, 385 N.W.2d 586, 589 (1986) (applying Title VII burdens of proof in age discrimination suit under The Fair Employment Practices Act). *Cf.* Callan v. Confederation of Oregon School Adm'rs, 79 Or. App. 73, 76, 717 P.2d 1252, 1253-54 (1986) (rejecting application of Title VII burdens of proof to Oregon anti-discrimination actions).

79. 411 U.S. 792 (1973). In *McDonnell Douglas*, the plaintiff had engaged in disruptive and illegal tactics to protest his recent discharge by the defendant. The plaintiff, a black civil rights activist, believed his termination and the employer's hiring practices were racially motivated. Later, the defendant advertised for qualified personnel, and the plaintiff submitted an application. When the defendant rejected his application because of the earlier conduct, the plaintiff sued for violation of Title VII. *Id.* at 793-94.

80. "The burden of establishing a prima facie case of [discrimination] is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253.

81. The defendant's burden is only an intermediate evidentiary burden; the burden of persuasion remains at all times with the plaintiff. The defendant simply must set forth reasons for the plaintiff's termination that create a genuine issue as to whether the employer intended to discriminate. *Id.* at 254. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (requiring employer to prove that hiring decision was based on legitimate considerations.)

82. *McDonnell Douglas*, 411 U.S. at 801-03. The Court suggested that compelling evidence of pretext would include proof that the employer retained or rehired white employees who were involved in acts of "comparable seriousness." *Id.* at 804.

83. Schmidly v. Perry Motor Freight, Inc., 735 F.2d 1086 (8th Cir. 1984); Duke v. Pfizer, Inc., 668 F. Supp. 1031, 1040 (E.D. Mich. 1987); Daubert Coated Products, Inc. v. Twilley, 536 So. 2d 1364 (Ala. 1988); Crossier v. United Parcel Serv. Inc., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171

the same reasoning as the Supreme Court did in its Title VII discrimination cases.[84]

A. Burdens of Proof in Washington

The first Washington case to establish burdens of proof in a wrongful discharge lawsuit was *Roberts v. ARCO*.[85] The plaintiff in *Roberts* charged the defendant-employer with age discrimination in violation of Washington law.[86] The Washington Supreme Court, citing federal age discrimination cases,[87] delineated the burdens of proof and the evidence required to establish a prima facie case of age discrimination. The plaintiff has the initial burden of presenting a prima facie case of age discrimination.[88] The burden of proof then shifts to the defendant-employer to show that the employee was discharged

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Cal. Rptr. 917 (1981); Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987); Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988).

84. *See* Johnson v. Kreiser's Inc., 433 N.W.2d 225 (S.D. 1988), in which the court applied shifting burdens under the public policy exception to employment at will. *Johnson* involved an accountant employed at will by the defendant company. For several months the accountant noticed that a corporate officer was misappropriating company funds. The employee was discharged after he criticized the officer's activities.

The South Dakota Supreme Court acknowledged that the plaintiff had been fired for his refusal to commit a criminal or unlawful act and adopted a narrow public policy exception to the at will rule. *Id.* at 227. The court also noted, however, that employers have a justifiable concern that legitimately discharged employees will use the public policy exception to file frivolous lawsuits. To safeguard against such abuse, the court adopted shifting burdens:

> the employee has the burden of proving that the dismissal violates a clear mandate of public policy. Once the employee shows this, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee. To prevail, the employee must prove by a preponderance of the evidence that the discharge was for an impermissible reason.

Id. at 227-28 (citing Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987)).

Thus, the common law burdens imposed by courts like *Johnson* are very similar to statutory discrimination claims, with the exception of an express requirement to show that the employer's reason was a mere pretext for an impermissible reason.

85. 88 Wash. 2d 887, 568 P.2d 764 (1977).

86. *Id.* at 891, 568 P.2d at 767. WASH. REV. CODE § 49.60.180(2) states: "It is an unfair practice for any employer . . . to discharge or bar any person from employment because of age. . . ."

87. *Roberts*, 88 Wash. 2d 887, 891, 568 P.2d 764, 767-68 (citing Hodgson v. First Fed. Sav. & Loan Assoc., 455 F.2d 818 (5th Cir. 1972); Bishop v. Jellef Assoc., 398 F. Supp. 579, 593 (D.D.C. 1974); Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974)).

88. *Roberts*, 88 Wash. 2d at 892, 568 P.2d at 767.

for reasons other than age.[89] To present a prima facie case of age discrimination the plaintiff must show the following: that he is within the protected age group, that he has been satisfactorily performing his work, and that he has been replaced by a younger person.[90]

The court rejected the plaintiff's claim because he did not meet the initial burden.[91] Although the court never reached the stage of shifting the burden of proof to the defendant, the *Roberts* formula has been followed and expanded in subsequent discrimination and wrongful discharge cases.[92]

The Washington Supreme Court applied the shifting burdens of proof principles set forth in *Roberts* to a common law wrongful discharge claim in *Thompson v. St. Regis Paper Company*.[93] The *Thompson* court adopted the public policy exception to employment at will,[94] but the court emphasized the need to balance the interests of both the employer and employee.[95] To help courts identify "frivolous lawsuits" and weed out cases that do not involve any public policy concerns, the court applied the system of shifting burdens.[96] First, the

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89. *Id.* at 892-93, 568 P.2d at 767-68.

90. *Id.* at 892, 568 P.2d at 767.

91. *Id.* at 897, 568 P.2d at 770. The court refused to allow the plaintiff's evidence that other older employees had been replaced by younger workers, calling the offers irrelevant and too remote to be of significant value. *Id.* at 893, 568 P.2d at 768.

92. *See* Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 753 P.2d 517 (1988). In *Grimwood*, the plaintiff had worked for the defendant for 16 years when he was fired from his position of Director of Food Services at age 61. Defendants maintained that plaintiff's job performance had been unsatisfactory and offered as proof internal memoranda warning of work deficiencies. Plaintiff filed suit alleging age discrimination, breach of contract, and wrongful discharge.

The *Grimwood* court, in addressing the discrimination issue, quoted extensively from *McDonnell Douglas*, 411 U.S. 792 (1973), as well as a case interpreting it, Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979):

> While we conclude that *McDonnell Douglas* provides an appropriate and workable formula for the trial of age discrimination cases, it should not be used inflexibly as a vehicle for organizing evidence or presenting a case to a jury . . . . *McDonnell Douglas* was intended to be neither 'rigid, mechanized, or ritualistic [citations omitted] nor the exclusive method for proving a claim of discrimination.' "

Loeb, 600 F.2d at 1014-15; *quoted in Grimwood*, 110 Wash. 2d at 363, 753 P.2d at 521.

See also Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Adler v. Ryder Truck Rental, Inc., 53 Wash. App. 33, 765 P.2d 910 (1988).

93. 102 Wash. 2d 219, 685 P.2d 1081 (1984). *See supra* text accompany notes 40-43 for a factual summary of the case.

94. *See supra* text accompanying notes 49-52.

95. *Thompson*, 102 Wash. 2d at 232, 685 P.2d at 1089.

96. *Id.* at 232-33, 685 P.2d at 1089.

employee must prove his dismissal violated a clear mandate of public policy, one that is recognized legislatively or judicially.[97] Placing this initial burden on employees allows employers to make legitimate personnel decisions without fear of incurring liability.[98] Once the employee has shown that the dismissal was motivated by reasons inconsistent with a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons "other than those alleged by the employee."[99]

While the court in *Thompson* applied a system of shifting burdens of proof to Thompson's wrongful discharge case, it did not articulate which burdens shift. Specifically, the court did not clarify the proper allocation of the burdens of persuasion and production. Instead, the *Thompson* court used ambiguous language regarding the allocation of burdens as to the public policy exception, and it did not reach the implied-in-fact contract exception.[100] Because the *Thompson* court was not sufficiently clear, the court in *Baldwin* was faced with the task of determining the proper allocation of evidentiary burdens in a wrongful discharge action.[101]

B. Baldwin's Shifting Burdens of Proof

The court's treatment of evidentiary burdens in *Baldwin* addressed two distinct issues: burdens of proof and burdens of persuasion. The court reiterated that in statutory discrimination claims the initial burden is with the employee to show a prima facie case of discrimination.[102] If the employee is successful, the burden of production shifts to the employer to demonstrate that a legal excuse exists for the termination.[103]

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97. *Id.* at 233, 685 P.2d at 1089.

98. *Id.* at 232, 685 P.2d at 1089.

99. *Id.* at 232-33, 685 P.2d at 1089. The *Thompson* court did not require the employer to show that it had a legitimate reason for the dismissal, only that the reason was not the one charged by the plaintiff. *Id.* Thus, in theory an employer should be able to satisfy its burden by proving that the reason, although it may be unjustifiable, was not in contravention of a "constitutional, statutory, or regulatory provision or scheme." Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982), *quoted in Thompson*, 102 Wash. 2d at 232, 685 P.2d at 1089.

100. *Thompson*, 102 Wash. 2d at 232, 685 P.2d at 1089.

101. The *Baldwin* court specifically noted that the allocation of the burdens of persuasion and production in breach of employment contract cases was one of first impression in Washington. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wash. 2d 127, 133-34, 769 P.2d 298, 301 (1989).

102. *Id.* at 134, 769 P.2d at 302.

103. *Id.*

However, although the burden of production shifts to the employer, the court stated that, in employment discrimination claims, "the burden of *persuasion* remains at all times with the employee."[104] This analysis is consistent with the statutory employment discrimination cases that place the ultimate burden of persuasion on the plaintiff to show that the employer intentionally discriminated against the employee.[105]

The *Baldwin* court reasoned that the allocation of the burdens of proof and persuasion used in discrimination actions are suitable for use in breach of contract claims.[106] The court based this conclusion on two propositions. First, "[i]t would be 'counterintuitive' to place a lighter burden on employers faced with wrongful termination claims than on employers charged with violating statutory discrimination laws."[107] Conversely, it would be inconsistent with "the greater protections the law attempts to provide alleged victims of discrimination" if employers were subjected to a greater burden in breach of contract claims.[108] This second reason, however, is of questionable validity because the court inaccurately cited language from another case, *Duke v. Pfizer, Inc.*,[109] to support the two different propositions. The *Duke* court actually stated that placing a *lighter* burden on employers accused of discrimination is "counterintuitive and makes little sense in light of the relatively greater protections" for victims of discrimination,[110] a statement which is consistent with the *Baldwin* court's first proposition. However, the *Duke* court never referred to the proper burdens upon employers in breach of contract claims. Therefore, the *Baldwin* court's basis for refusing to impose a lighter burden on employees in breach of contract claims is confusing and without support.[111]

Nevertheless, the *Baldwin* court further attempted to

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104. *Id.* (emphasis added) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 363, 753 P.2d 517, 521 (1988); Hollingsworth v. Washington Mut. Sav. Bank, 37 Wash. App. 386, 390-91, 681 P.2d 845, 848-49 (1984)).

105. *Id.* at 136, 769 P.2d at 303. *See* text accompanying notes 80-82.

106. *Baldwin*, 112 Wash. 2d at 136, 769 P.2d at 302.

107. *Id.* at 134, 769 P.2d at 302 (citing Duke v. Pfizer, Inc., 668 F. Supp. 1031, 1040 (E.D. Mich. 1987)).

108. *Id.* at 135, 769 P.2d at 302.

109. 668 F. Supp. 1031, 1040 (E.D. Mich. 1987).

110. *Id.*

111. Comparing breach of employment contract suits with Title VII discrimination claims can also be perilous because of the inherent differences between the claims.

explain its reasoning, stating that placing the ultimate burden of persuasion on the party asserting breach will maintain the balance between the employer's legitimate interest in controlling its own business and the employee's interest in retaining his or her job.[112] The court feared that shifting the burden of persuasion to the employer to show a proper excuse for the discharge might encourage employers to remove all language that could be construed as implying a contract from employee handbooks.[113] Thus, while an employer must meet its burden of production to avoid a directed verdict, the conclusive burden of persuading the factfinder at all times remains with the employee.[114]

After determining that the burden of production, not persuasion, shifts to the employer, the *Baldwin* court adopted the system of shifting burdens set forth in *Grimwood v. University of Puget Sound*[115] for use in breach of employment contract cases:

> Once a plaintiff has made out a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for termination. The employer's burden at this stage is not one of persuasion, but rather a burden of production. To go forward, the employer need only articulate reasons sufficient to meet the prima facie case. Once the employer fulfills his burden of production, to create a genuine issue of material fact the plaintiff must satisfy his ultimate burden of persuasion and show that the employer's articulated reasons are a mere pretext for what is in fact, a discriminatory purpose.[116]

Although the *Baldwin* court did not specifically explain how these burdens would translate from the discrimination context to a wrongful discharge context, at least one subsequent court[117] provides the following translation. First, the employee must show by a preponderance of the evidence that the discharge was wrongful. To show the discharge was wrongful, the employee must either demonstrate that 1) the employer had promised the employee that terminations would

112. *Baldwin*, 112 Wash. 2d at 135, 769 P.2d at 302.

113. *Id.* at 135-36, 769 P.2d at 302-03.

114. *Id.* at 136, 769 P.2d at 303.

115. 110 Wash. 2d 355, 753 P.2d 517 (1988).

116. *Id.* at 363-64, 753 P.2d at 521 (citation omitted), *quoted in Baldwin*, 112 Wash. 2d at 136, 769 P.2d at 303.

117. *See* Hibbert v. Centennial Villas, Inc., 56 Wash. App. 889, 786 P.2d 309 (1990).

be only for just cause (the implied-in-fact contract exception); 2) the employee had given additional consideration in return for a promise of just cause (the additional consideration exception); or 3) the employer terminated the employee for a reason that violates the public policy of the state of Washington (the public policy exception).

Once the employee has shown that the discharge was wrongful, the burden of production shifts to the employer, requiring the employer to show a legitimate reason for the dismissal. The legitimacy of the excuse depends upon the exception relied upon by the employee. Under the implied-in-fact contract exception or the additional consideration exception, the employer would need to articulate a legitimate business reason giving rise to "just cause" for firing the employee.[118] Under the public policy exception, the employer would simply need to show that the employee was fired for a reason other than the one alleged by the employee.[119] The proffered reason would not have to be "legitimate" in the sense that it would satisfy a "just cause" requirement for the termination; rather, it need only be a reason that does not violate public policy.[120] If the employer fulfills its burden of production, the burden shifts again, back to the employee to satisfy his or her ultimate burden of persuasion by convincing the factfinder that the employer's stated reasons are merely an excuse for an illegitimate purpose.[121]

Although the *Baldwin* court misinterpreted its authority,[122] *Baldwin*'s imposition of employment discrimination shifting burdens on common law wrongful discharge claims is

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118. Washington courts have not reached the issue of what dictates just cause in an "additional consideration" situation. However, logic dictates that in the future, employers who are obligated under that theory to terminate only for just cause must fulfill the standard set forth in *Baldwin*. *See Baldwin*, 112 Wash. 2d at 138-39, 769 P.2d at 304.

119. *See* Thompson v. St. Regis Paper Co., 102 Wash. 2d at 232-33, 685 P.2d at 1081.

120. For example, in *Hibbert*, a night nurse at a nursing home was fired after committing four work-related infractions. The nurse claimed that her dismissal was in violation of public policy because she had reported conditions of abuse and neglect. The nurse stated that she had found a piece of glass in a patient's medical ointment and had reported it to other nurses and the nursing home director.

Applying *Baldwin*, the *Hibbert* court stated that the burden was on the plaintiff to demonstrate that the reason proffered by the employer for the plaintiff's discharge was a mere pretext. *Id.* at 894, 786 P.2d at 311. The *Hibbert* court held that the plaintiff had failed to meet her burden because she did not prove that her employer's reason was pretextual. *Id.*

121. *Baldwin*, 112 Wash. 2d at 136, 769 P.2d at 303.

122. *See supra* note 109 and accompanying text.

a much needed alteration of Washington law. The newly enunciated burdens make proving that a discharge was wrongful easier for employees, while not being unduly prejudicial against employers. Certainly, the court could have placed the burden of persuasion on the employer to prove that the dismissal was for just cause when the employer has created an implied-in-fact contract through an employee handbook.[123] However, the court correctly determined that it would be anomalous to place a greater burden on employers in wrongful discharge cases than in discrimination actions.[124]

Moreover, the arguments supporting the *Baldwin* prescription are compelling. Shifting burdens make the employment law system more predictable by imposing the same requirements in discrimination and wrongful discharge actions. Having different standards is especially complicated in employment cases because claims often will simultaneously charge a violation of statute and breach of contract.[125] Under *Baldwin*, the plaintiff and defendant have a clear statement of the burdens for each claim.[126] The *Baldwin* formulation, while leaving the ultimate burden of persuasion on the plaintiff, furthers societal goals by creating a more level playing field with regard to the available evidence, but it does not contradict established common law principles that plaintiffs must prove all elements of a cause of action.[127]

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123. *See* Love, *Retaliatory Discharge for Filing a Worker's Compensation Claim: The Development of a Modern Tort Action*, 37 HAST. L.J. 551, 575 (1986). In retaliatory discharge claims, the burden of persuasion can shift to the defendant-employer because "the defendant has greater access to the evidence or the defendant is a wrongdoer and should bear the risk of nonpersuasion." *Id.* At trial, Baldwin argued that the burden of persuasion should be on the employer, citing several courts that have so ruled. *Baldwin*, 112 Wash. 2d at 135, 769 P.2d at 302 (citing Bosche v. Lear Petroleum Exploration, Inc., 816 F.2d 1460 (10th Cir. 1987); Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); Patton v. J.C. Penney Co., 75 Or. App. 638, 707 P.2d 1256 (1985), *rev'd on other grounds*, 301 Or. 117, 719 P.2d 854 (1986); Advance Ross Elec. Corp. v. Green, 624 S.W.2d 316 (Tex. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982)).

124. *Id.* at 136, 769 P.2d at 302. *See also* Duke v. Pfizer, Inc., 668 F.Supp. 1031, 1040 (E.D. Mich. 1987).

125. *See, e.g.*, Bishop v. Jellef Assoc., 398 F.Supp. 579, 584 (D.D.C. 1974).

126. *Baldwin*, 112 Wash. 2d 127, 769 P.2d 298. *Compare* Note, *The Development of Exceptions To At-Will Employment: A Review of the Case Law From Management's Viewpoint*, 51 U. CIN. L. REV. 616, 631 (1982). "[I]ndefinite guidelines will seriously hamper the employer in his efforts to comply with legal requirements. In the area of day-to-day decision making, knowing the law in advance is crucial to the smooth function of business." *Id.*

127. *See* Belton, *Causation and Burden Shifting Doctrines In Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL.

But perhaps the most important factor in favor of *Baldwin* is that these shifting burdens eliminate some of the harshness inherent in the employment at will doctrine. After *Baldwin*, employees can more readily establish a prima facie case of wrongful discharge. Shifting the burden of production to the employer is reasonable in that the employer usually has greater access to pertinent information regarding the reason for dismissal.[128] In addition, the adoption of the burdens used in discrimination claims implies that the courts are concerned with protecting employees that have been unjustly terminated by employers. While breaches of contract are not as socially reprehensible as discrimination forbidden by statute, it is encouraging that courts have concluded that an employee's expectation in continued employment merits special consideration.

Although the *Baldwin* system of shifting burdens will not be welcomed by employers, the system does not completely turn the tables on businesses. Requiring an employer to present a justifiable reason for discharging an employee will not unreasonably effect the ability of companies to make employment decisions. Procedurally, although *Baldwin* made proving unlawful discharge easier for plaintiffs, employers are still in a very strong position because the substantive law does not allow most employees to seek legal redress for wrongful terminations.[129]

IV. IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING

A plaintiff cannot use *Baldwin*'s favorable evidentiary burdens unless he or she has a substantive claim for legal redress. Procedural improvements are meaningless unless substantive rights first allow plaintiffs to use them. For this reason, the

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L. REV. 1359, 1405 (1990) (observing that altering employment discrimination burdens in favor of employers is "devastating" to a national policy against discrimination).

128. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-60 n.45 (1977) (noting that the employer was in a better position to explain denial of employment); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 115 (1985) (recognizing that placing the burden of proving business necessity on the defendant is traditionally justified because employers have superior access to employment information); Briggs v. City of Madison, 536 F. Supp. 435, 443 (W.D. Wis. 1982) (noting that, in disparate treatment cases, the employer has superior access to proof).

129. Even under the *Baldwin* court's more accommodating standard, fired employees still have a difficult time meeting their burden of proof. *See* Hibbert v. Centennial Villas, Inc., 56 Wash. App. 889, 786 P.2d 309 (1990).

Baldwin court's adoption of shifting burdens is a hollow victory for wrongfully discharged employees. While the court took a major step toward balancing the procedural rights and obligations of employer and employee, its refusal to imply a covenant of good faith and fair dealing continues to bar wrongful discharge claimants from the courtroom.

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.[130] An at will employment relationship is, in fact, an employment contract, albeit one that may be terminated at will by either party.[131] Remarkably, however, the employment relationship is excepted from the traditional good faith and fair dealing requirements of ordinary contracts, in large part because of the at will doctrine. While parties in most contracts are obligated to act in furtherance of the common purpose of the agreement and to deal honestly and fairly with each other,[132] the at will doctrine has allowed either party in an employment relationship to terminate the relationship freely. Despite the modern exceptions to the at will doctrine that limit the reasons for which employers can terminate employees,[133] the parties are still allowed to terminate the employment relationship for virtually any reason, whether justifiable or not.[134]

However, some courts, following the trend toward limiting the at will doctrine, have restricted an employer's right to terminate an at will employee where the discharge was fundamentally unfair and occurred under egregious

130. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1982); Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash. 2d 425, 723 P.2d 1093 (1986); Lonsdale v. Chesterfield, 99 Wash. 2d 353, 662 P.2d 385 (1983).

131. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 132, 316 A.2d 549, 551 (1974).

132. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1982): "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness, or reasonableness."

133. For a proposal that *employees* who abuse special positions of trust should be liable for a tortious breach of the covenant of good faith and fair dealing, see Comment, *The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties*, 39 HAST. L.J. 483 (1988).

134. The most obvious question raised by this anomaly is "why are employment contracts treated differently?" Although the at will doctrine satisfied the economic needs of its day, it has stubbornly remained the status quo of American employment law, but not because of persuasive logic or valid policy choices; instead, it owes its continued existence to the refusal of judges and legislators to limit the ability of employers to freely terminate employees.

circumstances.[135] The first court to imply a covenant of good faith and fair dealing to employment at will was a 1974 New Hampshire case, *Monge v. Beebe Rubber Co.*[136] *Monge* involved a machine operator who alleged that she was fired because she refused to date a project foreman. Under the traditional at will doctrine, the plaintiff would not have a cause of action because the employment was for an indefinite period.[137] The court noted, however, that economic conditions were changing rapidly and the at will rule did not adequately address the needs of employees.[138]

The *Monge* court advocated a balancing of the employer and the employee's legitimate concerns: the employer's interest in "running his business as he sees fit" must be balanced against the employee's interest in "maintaining employment."[139] Accordingly, the court held that a termination of an at will employee by an employer "motivated by bad faith or malice," including retaliation, constitutes a breach of the employment contract.[140] The *Monge* court justified the rule on the basis that it afforded the employee a "certain stability of employment" without interfering with the employer's necessary right to discharge.[141]

Unlike *Monge*, most courts have refused to impose a covenant of good faith and fair dealing on employment at will.[142] However, some courts have followed the lead of New Hampshire and have judicially adopted the implied covenant. In *Fortune v. National Cash Register Company*,[143] the court granted

135. *See, e.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). *See also* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), *overruled in part*, Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), *overruled in part*, Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988) (remedy for breach of implied covenant of good faith and fair dealing lies only in contract, not tort.)

136. 114 N.H. 130, 316 A.2d 549 (1974).

137. *Id.* at 132, 316 A.2d at 551.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 134, 316 A.2d at 552. The *Monge* court based the action in contract as a breach of an implied covenant. As a result, the plaintiff was not allowed an award of damages for mental suffering because such damages are not generally recoverable in contract actions. *Id.*

142. *See, e.g.*, Darlington v. General Electric, Inc., 350 Pa. Super. 183, 504 A.2d 306 (1986); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

143. 364 N.E.2d 1251 (Mass. 1977).

relief for a salesman who was denied commission payments and then terminated. Although the *Fortune* court refused to imply a covenant of good faith in every employment relationship,[144] it did find that the employer acted in bad faith by depriving the employee of his earned commission, and thus breached the employment contract.[145] However, the *Fortune* court, like the *Monge* court, expressly limited the action to a contract theory of recovery.[146]

While the courts in New Hampshire and Massachusetts have fashioned a remedy in contract for breach of an implied covenant of good faith and fair dealing, Montana and California have taken exceptional steps to provide redress for terminated employees.[147] The treatment of this issue in Montana and California is important for several reasons: 1) other jurisdictions have engaged in extensive internal debates over the propriety of implying a good faith covenant in employment at will; 2) other states' courts and legislatures have taken an active role in dismantling the employment at will doctrine thereby enhancing the job security of at will employees; 3) the court opinions provide some of the more compelling arguments for and against the implied covenant; and 4) the current status of the implied covenant in those states provide possible models for a future covenant in Washington.

A. The Montana Wrongful Discharge Statute

Even before the Montana legislature adopted the state's recent Wrongful Discharge Act,[148] Montana's common law provided discharged employees with significant protections from the harshness of employment at will. In *Gates v. Life of Montana Insurance Co.*,[149] the Montana Supreme Court recognized a covenant of good faith and fair dealing in at will employment contracts. The *Gates* court reasoned that, while employers must have wide latitude to decide whom to employ, the law should provide employees with some protection against injus-

144. *Id.* at 1257.

145. *Id.*

146. "On occasion some courts have avoided the rigidity of the 'at will' rule by fashioning a remedy in tort. We believe, however, that in this case there is remedy on the express contract." *Id.* at 1256.

147. *See* MONT. CODE ANN. § 39-2-901 to -914 and Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

148. MONT. CODE ANN. § § 39-2-901 to -914 (1987).

149. 196 Mont. 178, 638 P.2d 1063 (1982).

tice.[150] In *Gates*, the employer had unilaterally established certain procedures for termination that fostered in the employee "the peace of mind associated with job security."[151] If the employer fails to abide by its own policies then, the court stated, "the peace of mind of its employees is shattered and an injustice done."[152]

In a subsequent appeal, the Montana Supreme Court again addressed the *Gates* case.[153] The court decided that breach of the implied covenant of good faith and fair dealing gives rise to an action in tort, rather than in contract.[154] The court reasoned that a breach of the implied covenant is a tort action because the duty to use good faith arose as an "operation of law . . . ."[155]

Montana's implied-in-law covenant of good faith and fair dealing operates upon objective indications by the employer that give the employee a reasonable expectation of fair treatment.[156] Even if an employee handbook contains a statement that the employee may be terminated "with or without cause," as long as the employee has a reasonable belief that termination will only be for cause, the implied covenant overrides the terms of the handbook.[157]

Although the common law implied in law covenant provided employees with some protections, the Montana state legislature fundamentally changed the rights of Montana employees by repealing the Montana at will employment statute in 1987.[158] The Montana Wrongful Discharge From

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

151. *Id.*

152. *Id.*

153. Gates v. Life of Montana Ins. Co., 205 Mont. 304, 668 P.2d 2133 (1983).

154. *Id.* at 307, 668 P.2d at 215. The Montana statute governing punitive damages states: "In any action for breach of an obligation *not arising from contract* where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury (in addition to actual damages) may give damages for the sake of example and by way of punishing the defendant." *Id.* at 307, 668 P.2d at 214-15 (quoting MONT. CODE ANN. § 27-1-221 (1989)). Thus, according to the *Gates* court, punitive damages would be available in cases that meet the statutory requirement of malice, oppression, or fraud.

155. *Id.*

156. Dare v. Montana Petroleum Marketing Co., 212 Mont. 274, 687 P.2d 1015 (1984).

157. Stark v. Circle K Corp., 230 Mont. 468, 751 P.2d 162 (1988).

158. MONT. CODE ANN. § 10 ch. 641 (1987). The employment at will statute had previously provided in pertinent part: "An employment having no specified term may be terminated at the will of either party on notice to the other, except where

Employment Act[159] furnishes the exclusive remedy and procedures for actions formerly governed by common law requirements. It provides a statutorily defined cause of action for wrongful discharge which allows employees to sue for: (1) discharge in retaliation for an employee's refusal to violate public policy; (2) discharge in violation of the express provisions of the employer's written personnel policies; and (3) discharge for reasons other than good cause as defined in the Act.[160] In exchange for increased protections for employees, the Act also limits an employer's liability to lost wages and fringe benefits up to four years after discharge, unless the employee can prove by "clear and convincing evidence that the employer engaged in actual fraud or actual malice" in discharging the employee.[161]

In essence, the Montana legislature has attempted, through the Wrongful Discharge Act, to balance an employee's rights and an employer's liability. The Act codifies certain common law protections granted to employees, thereby guaranteeing employees a cause of action in the specified circumstances. At the same time, the Act restricts many of the rights and remedies afforded employees by earlier Montana court decisions: punitive damages are harder to attain, only four years of lost wages are recoverable, and the employee is required to offset earnings acquired after termination.[162]

The Wrongful Discharge Act recently withstood a challenge to its constitutionality under the Montana constitution. In *Meech v. Hillhaven West, Inc.*,[163] the plaintiff argued that the Wrongful Discharge Act unlawfully deprived employees of

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otherwise provided by [statute]." MONT. CODE ANN. § 39-2-505 (1985) (repealed by Montana Wrongful Discharge From Employment Act of 1987, ch. 641, § 10).

The last case decided under the former At Will statute was Prout v. Sears, Roebuck, & Co., 236 Mont. 152, 772 P.2d 288 (1989). The court in *Prout* observed that courts had created several exceptions to the at will rule, including an implied covenant of good faith and fair dealing, to avoid the "harshness" of the statute. *Id.* at 156, 772 P.2d 290.

159. MONT. CODE ANN. § § 39-2-901 to -914 (1987).

160. MONT. CODE ANN. § 39-2-904 (1987). "Good cause" is defined under the Act as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." MONT. CODE ANN. § 39-2-903 (1987).

161. MONT. CODE ANN. § 39-2-905 (1987). "Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages." *Id.*

162. Under the earlier cases, the tort basis of recovery was not restricted by these requirements and limitations.

163. 238 Mont. 21, 776 P.2d 488 (1989).

the "full legal redress" provided by common law.[164] Deprivation of a common law right of recovery, the plaintiff contended, is interference with a fundamental right protected by the Montana Constitution.[165] The *Meech* court disagreed, holding that the common law recovery rights for employees are not "fundamental rights" protected by the Montana Constitution.[166] Although the Act arguably "took away any possible right of meaningful recovery" for employees,[167] it has been affirmed as the exclusive means for a wrongfully discharged employee to gain legal redress in Montana.[168] Furthermore, despite these limitations on an employee's right to enforce the implied covenant of good faith and fair dealing, Montana still remains a national leader in protecting employees from unjust dismissal.

B. Wrongful Discharge Law in California

In 1980, the California Supreme Court created a tort cause of action for wrongful discharge in violation of public policy,[169] but refused to decide whether a tort recovery should be available under an implied covenant of good faith and fair dealing.[170] The issue was decided, however, by a California Court of Appeals in *Cleary v. American Airlines*.[171] The *Cleary* court held that an employee arbitrarily discharged after eighteen years of satisfactory service had a cause of action for wrongful discharge sounding both in tort *and* in contract.[172]

A subsequent ruling by the California Supreme Court provided further support for imposing an implied covenant of good faith and fair dealing on employment at will. In *Seamans Direct Buying Service v. Standard Oil Co.*,[173] the California Supreme Court created a tort action for breach of a commercial contract when the breaching party in bad faith denied the existence of the contract. The court also intimated that the breach of the covenant of good faith and fair dealing in the

164. *Id.* at 26, 776 P.2d at 491.

165. *Id.*

166. *Id.* at 42, 776 P.2d at 501.

167. *Id.* at 57, 776 P.2d at 510 (Sheehy, J., dissenting).

168. *Id.* at 24-25, 776 P.2d at 490.

169. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).

170. *Id.* at 179, 164 Cal. Rptr. at 846, 610 P.2d at 1337.

171. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

172. *Id.* at 456, 168 Cal. Rptr. at 729.

173. 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984).

employment relationship might give rise to tort remedies.[174]

Following the *Seamans* ruling, several California appellate courts awarded tort damages to employees discharged in bad faith.[175] In all, eight unanimous court of appeals decisions permitted a tort action for bad faith discharge.[176] However, although the lower courts and commentators accepted the existence of a wrongful discharge tort, the California Supreme Court still had not ruled on the issue[177] until it decided *Foley v. Interactive Data Corp.*[178] in 1988. The *Foley* case involved a products manager who was fired from his position after raising questions about a potential employee's past criminal record. The plaintiff did not claim to have been guaranteed employment for a specified duration, but he argued that the conduct of the defendant company led him to reasonably believe he would not be fired without just cause.[179] The plaintiff filed suit, alleging both a tortious breach of the implied covenant of good faith and fair dealing and a contractual breach. A 6-3 majority held that tort remedies are not available for breach of the implied covenant of good faith and fair dealing.[180]

On the contract claim, the majority found that the implied covenant of good faith and fair dealing is contractual in nature, and accordingly, remedies for a breach of the covenant have traditionally been limited to contract remedies.[181] The *Foley* court rejected the *Cleary* court's comparison of insurance contracts to employment contracts and found that the authority relied on in *Cleary* was inopposite.[182] Furthermore, the *Foley*

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174. *Id.* at 768 n.6, 206 Cal. Rptr. at 362 n.6, 686 P.2d at 1330 n.6.

175. *See, e.g.*, Gray v. Superior Court, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (1986) (employee fired on basis of false performance report); Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985) (refusal to pay commission and subsequent dismissal); Rulon-Miller v. IBM Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (employee fired for allegedly dating the manager of a rival firm).

176. Foley v. Interactive Data Corp. 47 Cal.3d 654, 705, 254 Cal. Rptr. 211, 243, 765 P.2d 373, 405 (1988) (Broussard, J., dissenting).

177. *See* Brandon, *From Tameny to Foley: Time for Constitutional Limitations on California's Employment At Will Doctrine?*, 15 HASTINGS CONST. L.Q. 359, 371-72; Brody, *Wrongful Termination as Labor Law*, 17 SW. U.L. REV. 434, 442 (1988); Comment, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HAST. L.J. 1229 (1988).

178. 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

179. *Id.* at 663-64, 254 Cal. Rptr. at 213, 765 P.2d at 376.

180. *Id.* at 700, 254 Cal. Rptr. at 239, 765 P.2d at 401.

181. *Id.* at 696, 254 Cal. Rptr. at 236-37, 765 P.2d at 389.

182. First, the majority distinguished employment contracts from insurance contracts, which had been interpreted to have a tort base for breach of the implied covenant of good faith and fair dealing. Second, the majority noted that the previous

court acknowledged that most jurisdictions refuse to recognize a tort-based action for breach of an implied covenant of good faith and fair dealing.[183]

In addition to these arguments based on precedent, the court argued that breach of the implied covenant of good faith and fair dealing is actually a breach of a contract obligation rather than a tort. According to the court, the good faith requirement is designed to protect the integrity of the contract, not "some general public policy interest not directly tied to the contract's purpose."[184] Thus, the majority refused to alter the "fundamentally contractual" nature of employment relations.[185] While the majority recognized that existing remedy are insufficient to compensate an employee for the effects of an unlawful discharge,[186] the court justified its restrictive holding by claiming that a scheme to reward only deserving cases would be impossible and that any attempt would most likely lead to "potentially enormous consequences for the stability of the business community."[187]

The three judges writing in dissent,[188] although not agreeing on all points, criticized the majority on several grounds. First, they claimed that a tort remedy for bad faith discharge was the status quo in California before the *Foley* decision.[189] Second, they argued that the earlier courts' comparisons of insurance and employment contracts were legitimate.[190] Third, the dissenting judges thought that tort and contractual remedies could coexist.[191] Fourth, they criticized the majority for implying that the legislature should enact a tort remedy for wrongful discharge when current law already allowed it.[192]

Under *Foley*, terminated employees can still sue for breach

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decisions relied upon by *Cleary* and its progeny did not allow tort recoveries. *Id.* at 685, 254 Cal. Rptr. at 229, 765 P.2d at 391.

183. *Id.* The court stated that "the clear majority of jurisdictions have either expressly rejected the notion of tort damages for the breach of the implied covenant in employment cases or had impliedly done so by rejecting any application of the covenant in such a context."

184. *Id.* at 690, 254 Cal. Rptr. at 232, 765 P.2d at 394.

185. *Id.* at 694, 254 Cal. Rptr. at 235, 765 P.2d at 398.

186. *Id.* at 694, 254 Cal. Rptr. at 235, 765 P.2d at 397.

187. *Id.* at 699, 254 Cal. Rptr. at 239, 765 P.2d at 401.

188. Judges Broussard, Kaufman and Mosk wrote separate dissenting opinions.

189. *Foley*, 47 Cal. 3d at 703, 254 Cal. Rptr. at 242, 765 P.2d at 403 (Broussard, J., dissenting).

190. *Id.* at 707, 254 Cal. Rptr. at 244-45, 765 P.2d at 406.

191. *Id.* at 710, 254 Cal. Rptr. at 247, 765 P.2d at 410.

192. *Id.* at 713, 254 Cal. Rptr. at 248-49, 765 P.2d at 410.

of the implied covenant of good faith and fair dealing, but their damage awards are strictly limited by the contract nature of the claim. As Montana has done, California courts will likely limit damages to foreseeable lost wages minus mitigation. Punitive damages, which are sometimes available in Montana,[193] probably will not be allowed in California.[194] Thus, although California has recently rolled back some of its common law protections for employees, the workers of that state are still granted the ability to combat unfair dismissals in court.

C. Baldwin*'s Rejection of An Implied Covenant of Good Faith and Fair Dealing*

The Washington Supreme Court first addressed the implied covenant of good faith and fair dealing in employment contracts in *Thompson v. St. Regis Paper Company.*[195] The *Thompson* court acknowledged that other courts had adopted a "bad faith" exception for employment contracts, but refused to follow suit.[196] The court reasoned that such an exception does not strike the proper balance between "an employer's interest in running his business as he sees fit" and the "interest of the employee in maintaining his employment . . . ."[197] Moreover, the court believed that implying a covenant of good faith in every employment contract would subject each discharge to "judicial incursions into the amorphous concept of bad faith."[198] Although an employer may expressly agree to restrict its right to discharge an employee, the court stated that "to imply such a restriction on that right from the existence of a contractual right, which by its terms has no restrictions, is internally inconsistent."[199] The court also viewed an implied-in-law bad faith exception as judicial overreaching into an area best left to the parties or the legislature.[200]

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193. *See* MONT. CODE ANN. § 39-2-905 (1987).

194. *See Foley*, 47 Cal. 3d at 700, 254 Cal. Rptr. at 239-40, 765 P.2d at 401.

195. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

196. *Id.* at 227, 685 P.2d at 1086.

197. *Id.* at 227, 685 P.2d at 1086.

198. *Id.* (quoting Parnar v. Americana Hotels, Inc., 65 Haw. 370, 377, 652 P.2d 625, 629 (1982)).

199. *Id.* at 228, 685 P.2d at 1087.

200. The court stated that finding a good faith covenant would be "an intrusion into the employment relationship . . . [and] merely a judicial substitute for collective bargaining which is more appropriately left to the legislative process." *Id.* at 228, 685 P.2d at 1087.

Unlike the *Thompson* court, the *Baldwin* court was not asked to imply a covenant of good faith and fair dealing from Baldwin's employment relationship with the hospital; however, the court raised the issue on its own.[201] The superior court had rejected a proposed jury instruction that referred to "good faith" in defining "just cause" because the judge believed such an instruction would be inconsistent with *Thompson*'s rejection of an implied covenant of good faith and fair dealing.[202] The *Baldwin* court distinguished an employer who voluntarily chooses "good faith" as a standard of review for just cause from the situation in which a court implies a covenant of good faith into every employment relationship.[203] The *Baldwin* court restated the reasoning of the *Thompson* court in rejecting such an implied covenant as "inherently inconsistent" with the contractual right to discharge an employee, which has no restriction.[204]

The Washington Supreme Court's rationale in *Thompson* and *Baldwin* to reject an implied covenant of good faith and fair dealing in the employment relationship is both insufficient and unsupportable. It is insufficient in light of the extensive treatment afforded this issue in other jurisdictions, most notably California and Montana. The implied covenant of good faith and fair dealing is a potential vehicle for better protecting the employment security of thousands of employees who do not have the bargaining power to insist on express guarantees.[205] As such, the covenant deserved more discussion and deliberation than afforded it by the Supreme Court in *Thompson* and *Baldwin*.

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201. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wash. 2d 127, 137, 769 P.2d 298, 303 (1989). The Washington Supreme Court earlier had reiterated its position that employment at will contracts do not contain implied covenants of good faith and fair dealing. Willis v. Champlain Cable Corp., 109 Wash. 2d 747, 748 P.2d 621 (1988). In *Willis*, the Ninth Circuit Court of Appeals certified to the supreme court the question of whether there is an implied covenant of good faith in a terminable at will contract. Relying on *Thompson*, the court answered in the negative. *Id.* at 752, 748 P.2d at 624.

202. *Baldwin*, 112 Wash. 2d at 137, 769 P.2d at 303 (1989). *See infra* section V for a discussion of the "just cause" issue.

203. *Baldwin*, 112 Wash. 2d at 137, 769 P.2d at 303.

204. *Id.* at 148, 769 P.2d at 304.

205. Determining the exact number of unjust dismissals in a given year is impossible. However, one commentary estimates that in 1981, nationwide approximately 140,000 nonunionized workers with more than six months' service were terminated without just cause. Steiber and Murray, *Protection Against Unjust Discharge: The Need For A Federal Statute*, 16 U. MICH. J.L. REF. 319, 324 (1983).

In effect, the Washington Supreme Court has given three reasons for not adopting a covenant of good faith and fair dealing: (1) a need to control judicial activism in the employment context; (2) maintaining the balance between employer and employee; and (3) the inherent inconsistency of implying a contractual right in an otherwise unrestricted contract. These three reasons, however, are by-products of the same base argument: that the at will doctrine is still, if it ever was, good policy. The court's reasoning is therefore insufficient because it dresses up *one* argument three different ways to argue the same point. What makes the court's treatment of the issue so troubling, however, is not that it relies on only three arguments borne from the same theory, but that its entire rationale is self-validating, and thus, unsupportable.

Simply put, the court operates from the premise that the employment relationship is fundamentally different from other contracts because it is freely terminable by either party. This is the traditional 19th Century view of the at will doctrine as developed by Horace Wood.[206] Implying a covenant of good faith and fair dealing in at will employment would abrogate the at will doctrine. Faced with this prospect, the court attacked the implied covenant of good faith and fair dealing by using three legal truths that have resulted *from* the at will doctrine but were not reasons *for* the doctrine in the beginning.

First, the court feared that an implied covenant would encourage judicial activism in the employment context, which is better left to the legislature.[207] This is true. Judicial involvement in questions of "bad faith" would necessarily increase. But it is only in *employment* relationships that courts have not been active in identifying the terms and fulfillment of contracts.[208] The judiciary removed itself from the employment relationship in response to the at will doctrine, but that gives no explanation as to why the doctrine should continue.

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206. *See supra* note 5-11 and accompanying text.

207. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 227, 685 P.2d 1081, 1087 (1984).

208. For example, courts have long been willing to examine the meaning of collective bargaining agreement and specific written employment contracts. *See, e.g.*, Hegeberg v. New England Fish Co., 7 Wash. 2d 509, 110 P.2d 182 (1942) (collective bargaining agreement); O'Donnell v. Sipprell, 163 Wash. 369, 1 P.2d 322 (1931) (specific duration contract).

The second rationale used by the court fails for the same reason. The court reasoned that an implied-in-law covenant would upset the balance between employer and employee because determining good faith in every discharge would interfere with the employer's ability to run his business as he saw fit.[209] This conclusion also rises from the traditional at will rule and the economic circumstances that created it. The at will doctrine was initially advocated because workers were more likely to switch occupations during the latter stages of westward expansion and industrialization.[210] Times have changed. Employees now depend in most cases on their job for financial security.[211] Courts and legislatures have recognized the necessity to limit the authority of employers to freely terminate employees by adopting numerous exceptions to the at will rule.[212] These exceptions protect employees from unjust termination when the reasons for dismissal are deemed sufficiently "unfair," such as when the firing is discriminatory or against public policy. Adopting a good faith covenant would merely extend this protection to other "unfair" terminations.

This second argument also relies on the at will doctrine for its validity. Over one hundred years ago courts decided that an employer should be free to make employment decisions about at will employees without restriction. In effect, the "balance" between employers and employees was arbitrarily created by the at will rule and was based on conceptual notions of mutuality. But in the modern world, the "balance" actually weighs in favor of the employer because employees and employers rarely occupy equal bargaining positions. The realities of our current economic system require a more responsive approach to unfair dismissals.

Third, the court's statements in *Thompson* and *Baldwin* that restricting the employer's right to discharge is "internally inconsistent" simply does not make sense. It is a general principle that all contracts include an implied covenant of good faith and fair dealing.[213] The at will employment relationship is actually an employment contract that is freely terminable by

209. *Id.* at 227, 685 P.2d at 1086.

210. *See* Blades, *supra* note 13.

211. *Id.*

212. *See supra* notes 14-28 and accompanying text.

213. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1982); Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash. 2d 425, 723 P.2d 1093 (1986); Lonsdale v. Chesterfield, 99 Wash. 2d 353, 662 P.2d 385 (1983).

either party.[214] Because of the at will doctrine, employment contracts have been excepted from this rule. While it is not "internally inconsistent" to imply good faith in other contracts, the court stated that such an implication is inconsistent in the employment context. Again, the at will doctrine validates itself. The hollowness of the argument is exposed when all the logical steps are laid out: the at will doctrine allows both parties to an employment contract to terminate freely the relationship. Limiting the rights of an employer to dismiss its employees would create restrictions on the rights of the parties. Therefore, the employment at will doctrine and any restrictions upon the rights of the parties are incompatible. However, this argument blindly assumes that employment at will is an unassailable truth. The question that needs to be asked is whether the at will doctrine continues to makes sense.

Employment at will is no longer a viable employment law doctrine.[215] Year by year, more states create exceptions to it. Commentators call for statutory provisions that would allow wrongfully terminated employees legal redress.[216] The nature of the modern employment relationship imports a special duty on behalf of the employer.[217] While historically employees may have had a more equal bargaining position, today's economic structure often requires employees to rely on his or her current job for financial security and peace of mind.[218] Furthermore, an employee fired from the job is no longer free to enter the marketplace in many instances. For example, what kind of market is there for a factory worker who has worked twenty years at the same plant?[219]

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214. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 132, 316 A.2d 549, 551 (1974).

215. *See* Steiber and Murray, *supra* note 205, at 321.

216. *Id.*; Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481 (1976); Minda & Raab, *Time For An Unjust Dismissal Statute in New York*, 54 BROOKLYN L. REV. 1137 (1989).

217. "I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse the other, than the relationship between employer and employee." Foley v. Interactive Data Corp., 47 Cal. 3d 654, 718, 254 Cal. Rptr. 211, 253, 765 P.2d 373, 414-15 (Kaufman, J., concurring and dissenting).

218. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981) ("With the rise of large corporations conducting specialized operation and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.")

219. *See* 29 U.S.C. § 621(a)(1) (1982), prohibiting age discrimination in employment: "[I]n the face of rising productivity and affluence, older workers find

An implied covenant of good faith and fair dealing does raise the specter of making every termination subject to judicial scrutiny. However, as in any field where courts become involved, safeguards can be erected against abuse.[220] The same argument was made against adoption of anti-discrimination laws, but the only remaining debate now is over the definition of discrimination, not the need for courts to protect against it.[221] Even if employment termination decisions are scrutinized more often, the objective is worth the added inconvenience and expense.[222] Every day, hard-working employees lose their jobs for unfair reasons. Protecting the reasonable job security of our citizens may cause some inconvenience for employers, but that is a price we ought to pay.

V. THE MEANING OF JUST CAUSE

As noted in Section I, sometimes an employer unilaterally agrees to terminate an employee only for just cause. This is

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themselves disadvantaged in their efforts . . . to regain employment when displaced from jobs."

220. *See infra* text accompanyng note 246-47.

221. Pro-management commentators have used the increase in civil rights litigation as support for a continuation of employment at will. *See* Comment, *The Development of Exceptions To At Will Employment: A Review of the Case Law From Management's Viewpoint*, 51 U. CIN. L. REV. 616 (1982) (stating that calls for restrictions on civil rights actions indicate that similar calls would be made if all employment terminations were also litigable). While one might argue that current civil rights legislation has allowed abuses of the system and excessive litigation, civil rights remedies are valuable and necessary. Similarly, protection against wrongful termination may create areas for abuse and an increase of lawsuits, but that possibility speaks to future restrictions on the cause of action, not a complete rejection of the remedy itself.

222. *Cf.* Comment, *Employer Opportunism And the Need for a Just Cause Standard*, 103 HARV. L. REV. 510 (1989). The author questioned the need for a general good cause standard under a law and economics approach. While the author acknowledged that employers may find it profitable to discharge productive workers to recapture bonuses, he nevertheless criticized the efficiency of a general good cause standard. Specifically, "in the general case where the employer's motive is only implicit, information problems for the fact finder make the remedy much more costly." *Id.* at 528.

The author also argued that any gains resulting from a good cause standard would likely be offset by unpleasant side effects for employees, such as a potential decrease in employment due to the higher costs associated with a just cause standard. *Id.* at 529. This argument asks terminable at will employees to suffer a Pyrrhic victory: employees should be content with an employment doctrine that allows the employers to terminate them without good cause because doing so allows that employer to hire more people. Perhaps wrongfully terminated employees should take solace in the fact that they will have an easier time finding another job as a result of the doctrine that allowed them to be fired in the first place.

usually done through employee handbooks or oral promises. In *Baldwin*, for example, a promise to discharge only for just cause was made in an extensive employee handbook provided by the employer.[223] Although the hospital's handbook defined just cause as "any gross violation of conduct,"[224] the supreme court considered a two-fold issue of first impression in Washington: first, the court considered how "just cause" in employment terminations is defined; and second, the court addressed the issue of who should decide, factually, whether "just cause" has been satisfied.[225]

The parties in *Baldwin* stipulated that sexual abuse of a patient is just cause for termination; nevertheless, the court reviewed the instructions on "just cause" that were given to the jury. The superior court defined just cause as "a good, substantial and legitimate business reason for terminating the employment of a particular employee."[226] The hospital objected to this instruction because it allowed the jury to make an independent assessment of just cause. The supreme court agreed, stating that "an employer's agreement to restrict discharges to those supported by just cause should not be followed by a further judicial implication which takes the determination of just cause away from the employer."[227]

However, the court noted that, although "just cause" provisions on their face have no restriction, the employer should not be allowed to make "arbitrary determinations of just cause."[228] The court instead held that a standard that "checks the subjective good faith of the employer with an objective reasonable belief standard strikes a balance between the employer's interest in making needed personnel decisions and the employee's interest in continued employment."[229] The court feared that a purely objective standard would encourage

223. Baldwin v. Sisters v. Providence in Washington, Inc., 112 Wash. 2d 127, 129, 769 P.2d 298, 299 (1989).

224. *Id.* at 129, 769 P.2d at 299.

225. *Id.* at 137, 769 P.2d at 303 (quoting Simpson v. Western Graphics Corp., 293 Or. 96, 100, 643 P.2d 1276, 1278 (1982)).

226. *Id.* at 136, 769 P.2d at 299.

227. *Id.* at 138, 769 P.2d at 304. The court relied on the Oregon case of *Simpson v. Western Graphics Corp.*: "The meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination existed." *Simpson*, 293 Or. 96, 100-01, 643 P.2d 1276, 1279.

228. *Baldwin*, 112 Wash. 2d at 138, 769 P.2d at 304.

229. *Id.* at 139, 769 P.2d at 304 (citing Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984)).

employers to remove such provisions from their handbooks and, thus, frustrate many of the policies advocated in *Thompson v. St. Regis Paper Company*.[230]

The *Baldwin* court then adopted the defendant's proposed instruction on just cause:

> "[j]ust cause" is defined as a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power . . . . based on facts that (1) are supported by substantial evidence and (2) reasonably believed by the employer to be true and also (3) is not for any arbitrary, capricious, or illegal reason.[231]

The *Baldwin* court's definition of just cause is a step forward from the earlier practice of allowing employers to create their own definition *and* make the factual determination of whether that standard has been met.[232] The court wisely concluded that the judicial branch has an obligation to serve as an interpreter of contract provisions between employers and employees when disputes arise. Employers may no longer make promises of fair treatment while reserving the right to unilaterally decide the meaning of fairness. Under the law announced in *Baldwin*, if an employer includes a just cause provision in its firing procedures, it must abide by the "fair and honest cause . . . regulated by good faith" standard.[233]

Unfortunately, this new standard does not go far enough to adequately protect the rights of employees.[234] It is insufficient because the subjective good faith element still allows employers to discharge an employee for no justifiable reason. The result is that an unjustly fired employee can not find legal relief in Washington courts when the employer terminates in good faith. The law should read that an employee wrongfully

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230. *Id.*

231. *Id.* at 137, 769 P.2d at 303.

232. Generally, employers can justify dismissals by proving that the employee committed a wrong and that the wrongdoing justified termination. Comment, *Employment At Will : Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151, 165 (1987). The employee must not only have committed the conduct in question, but the conduct must be prohibited by a work rule or be the type of behavior that a reasonable employee would expect to result in termination. *Id.*

233. *Baldwin*, 112 Wash. 2d at 139, 769 P.2d at 304.

234. The actual impact of the *Baldwin* court's formulation of "just cause" is not yet clear. A recent case refused to apply the *Baldwin* definition because it had previously held "just cause" was not required for the discharge in question. Siekawitch v. Washington Beef Producers, Inc., 58 Wash. App. 454, 793 P.2d 994 (1990).

discharged, no matter what the employer's mindset,[235] is entitled to relief. The court believed that the new standard balances the interests of the employers and employees, but that is true only in the sense that the court took rights away from the former and gave to the latter. The new law still allows employers in some cases to terminate employees for illegitimate reasons. The proper balance would only be met by allowing employees to keep their jobs when no justifiable reason for termination exists.[236]

Further, the *Baldwin* standard allows two injustices to go unremedied. First, it expressly allows an employer to make an improper decision to terminate if the decision is made in good faith. Second, it refuses to compensate a plaintiff who has lost his job for an unjustified reason. A straight objective standard would establish that an employee promised fair treatment will receive absolute protection from unjust dismissal.

The court should have adopted a definition of just cause similar to that adopted in Montana. The Montana Unjust Dismissal statute defines "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reasons."[237] This definition more

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235. Reference to the "employer's mindset" means the employer's state of mind at the time of dismissal, not in the making of workplace rules. Case law has established that management has a fundamental right to establish reasonable workplace rules that are related to a legitimate management objective. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, at 553 (4th ed. 1985).

236. *See* Abrams and Nolan, *Toward A Theory of "Just Cause" In Employee Discipline Cases*, DUKE L.J. 594, 611 (1985). Abrams and Nolan persuasively argue that employers should only be allowed to discipline their employees when they have objective "just cause." "Just cause" exists only when an employee has failed to meet his obligations under the fundamental understanding of the employment relationship. An employee's general obligation to provide satisfactory work has four elements:

1. Regular attendance;
2. Obedience to reasonable work rules;
3. A reasonable quality and quantity of work; and
4. Avoidance of conduct, either at or away from work, which would interfere with the employer's ability to carry on the business effectively.

Id. at 611-12. Adapting this formulation to employee dismissals provides a desirable framework for understanding what "justifies" an employer's decision to terminate. If an employee satisfies each of the four criteria, the interests of the parties—both the employer *and* the employee—are best served by maintaining the employment relationship.

237. MONT. CODE ANN. § 39-2-903(5). MONT. CODE ANN. 39-2-904 further states:

> 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*

clearly states the requirements than the *Baldwin* court's "regulated by good faith" standard. More importantly, it emphasizes the basic right of an employee to fair treatment when he has received assurances from his employer.

The court also could have drawn a definition from the vast body of law involving collective bargaining and arbitration.[238] Perhaps the most practical definition of "just cause" was a two-stage reasonableness standard created by a federal court interpreting the protection given returning war veterans: first, "that it is reasonable to discharge employees because of certain conduct" and second, "that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge."[239]

Obviously, these alternative definitions are objective standards which do not take into account the "good faith" of the employer, unlike the *Baldwin* standard. Thus, under these definitions, the employer's reasonable belief would no longer be "regulated by good faith."[240] Such a definition would remove the ambiguity existing in the current "just cause" standard and give employees a better idea of what to expect from their employer.

VI. THE SOLUTION: AN UNJUST DISMISSAL STATUTE

For the most part, employment at will has been created, developed, and most recently, weakened by the courts. Judicial interpretation and modification of the rule has resulted in an ambiguous and complex body of law that fails to meet the needs of a modern post-industrial society.

Employment at will has survived, albeit in a mutated form, in large part because courts do not like to overturn well-established precedent.[241] For this reason, and not for any ben-

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employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy.
(emphasis added).

238. *See* Summers, *supra* note 216.

239. Carter v. United States, 407 F.2d 1238, 1244 (D.C. Cir. 1968).

240. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wash. 2d 127, 139, 769 P.2d 298, 304 (1989).

241. In the last two decades, courts have taken some steps to limit the harshness of the employment at will, but begrudgingly so. Several factors have pressured courts to overturn established precedent. First, the increasing specialization of modern business has all but eliminated any remaining theory of mutuality between employer and employees. Second, pensions and statutory benefits have created incentives for long-term employment. Third, collective bargaining and other statutory protections

eficial policy interest, employment at will has remained the controlling doctrine of employment law for over 100 years. The solution, therefore, lies with the legislature.[242] Washington should develop and pass a comprehensive Unjust Dismissal Statute designed to protect the legitimate rights of employees. Montana has already done so,[243] and proposals are currently before legislatures in several other states.[244]

An Unjust Dismissal Statute in Washington should include the following elements:

A. *Just Cause Standard*: The statute should mandate a standard that focuses on whether the discharge was fair under the circumstances.[245] A trained arbitrator would be able to examine the facts in each case to determine whether the discharge was reasonable.

B. *Mediation-Arbitration*: The statute should encourage unjust dismissal opponents to settle their cases outside of court.[246] Continual litigation would cost exorbitant amounts of money and further backlog the courts. A well-planned Unjust Dismissal Statute would detail procedures for claimants to submit their disputes to an arbitration or mediation board. The best scheme would involve a mediator-arbitrator who would conduct an informal hearing integrating negotiation and adjudication.[247]

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have forced courts to afford private sector employees similar protections as those in the public sector. *See* Comment, *Employment At Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787 (1983).

242. Many European nations, which are not saddled with the baggage of employment at will, have instituted a just cause requirement through legislative process. *See* STEIBER, PROTECTION AGAINST UNJUST DISMISSAL: A COMPARATIVE VIEW, 169 School of Labor And Industrial Relations Research Reprint Series 231-32 (Mich. St. Univ. 1979-80) (Denmark, Sweden, West Germany, Great Britain, Norway, France, Italy and Ireland have provided for just cause by statute in employment terminations).

243. MONT. CODE ANN. § 39-2-901 (1987).

244. These states include: New York, Pennsylvania, Michigan, and California.

245. Minda and Raab, *supra* note 216, at 1188. Minda and Raab provide an excellent analysis of three different approaches to wrongful dismissal: universal just cause protection; protection only against abusive discharges; and protection only against discharges contravening public policy. They conclude that the universal model based on an objective "just cause" requirement is the best theory for statutory action. For a discussion of this model, see *supra* note 236.

246. The Montana Wrongful Discharge Act offers plaintiffs the option of seeking arbitration. MONT. CODE ANN. § 39-2-914 (1987). Minda and Raab believe that effective legislation must specify arbitration as an exclusive remedy. Minda and Raab, *supra* note 216, at 1195.

247. *See* Comment, *supra* note —. The authors of that Comment provide an excellent model statute. Under their proposal, claims by the parties are presented to

C. *Damages*: In keeping with the fact that unjust dismissal cases arise under varying circumstances, the legislation should provide flexible remedies that can be determined on the facts of each case. Damages should include back pay with interest, reinstatement when appropriate[248] and severance pay when reinstatement is inappropriate,[249] attorney's fees, and costs to prevailing parties.[250]

VII. CONCLUSION

Employment at will has dominated employment for over one hundred years, but its rigid principles have prevented courts from taking necessary steps to protect employees from unjust dismissal. As the court in *Baldwin v. Sisters of Providence* demonstrates, precedent and doctrine have constrained courts to such an extent that they have been unable to create an appropriate body of law regulating indefinite employment.

The *Baldwin* decision, which was constrained by earlier court decisions such as *Thompson v. St. Regis Paper*, demonstrates the courts' willingness to develop a fair system, but also, their inability to break from tradition. For that reason, the legislature should assume responsibility for creating a fair, precise and comprehensive statute that gives Washington

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an individual arbitrator-mediator. Because the proceedings are informal—the rules of evidence are relaxed and attorneys need not be present—the arbitrator-mediator can take a more active role in the proceedings. After the initial presentation of the dispute, the arbitrator-mediator makes a preliminary assessment of the case. The parties then commence mediation on the basis of the initial assessment. If the arbitrator-mediator concludes that settlement is impossible, he must adjourn the proceedings and issue an opinion within 30 days. *Id.* at 430.

248. A common perception is that most wrongfully terminated employees would prefer to take their old jobs back. Nevertheless, half of those employees who eventually obtain an order of reinstatement under the National Labor Relations Act reject the offer. West, *The Case Against Reinstatement In Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 64 (1988).

West also persuasively argues that reinstatement remedies are an ineffective deterrent for future wrongful behavior because it costs the employer nothing extra to hire back the fired employee. *Id.*

249. Another possibility would be a preventative approach. The legislation could discourage illegal discharges by requiring due process hearings prior to any termination. *Id.* Of course, this system would create much higher operating costs for employers, and most critically, would effect every employer's decision to dismiss, even when just cause exists.

250. Minda and Raab, *supra* note 216, at 1196. Consistent with Washington law, punitive damages should not be available because the scope of potential liability would place too great a burden on employers trying to make personnel decisions. *See* Comment, *The Development of Exceptions To At Will Employment: A Review of the Case Law From Management's Viewpoint* 51 U. CIN. L. REV. 616, 632 (1982).

employees what they deserve: reasonable job security and peace of mind.

Michael T. Zoretic