

EMPLOYMENT AT WILL IN ALASKA: THE QUESTION OF PUBLIC POLICY TORTS

I. INTRODUCTION

In *Walt v. State*¹ and *ARCO Alaska, Inc. v. Akers*,² the Alaska Supreme Court recently fortified the contractual foundations of employment law. These cases reaffirmed the well-established notion that a wrongful discharge gives rise to a breach of contract action and, without more, will not support a common law tort claim. In *Akers*, for example, the court held that a breach of the implied covenant of good faith and fair dealing sounds in contract rather than tort.³ Similarly, the court upheld the principle that, as with any breach of contract action, punitive damages are not recoverable for wrongful discharge absent the commission of traditional independent torts.⁴

As reaffirming as the holdings in these cases are, however, *Walt* and *Akers* have posed some novel questions for Alaska employment law. Each case has raised the question of whether Alaska should recognize an action in tort for wrongful discharges which violate public policy. In recent years, the same question has been asked in every jurisdiction and been debated among legal scholars.⁵ The issue is particularly controversial in the area of employment at will, where employees are seen as much more vulnerable to the possibility of wrongful termination. To protect at-will employees from abuse, many states have agreed to add "public policy" to the growing list of limitations placed on the employment-at-will doctrine. Other states, however, have refused to recognize the public policy tort on grounds that it entails excessive judicial legislation and unnecessarily cramps managerial discretion. Still other states have attempted to strike a reasonable balance between these extremes by recognizing the public policy doctrine only in limited situations. In Alaska, the issue has yet to be resolved. In the *Akers* case, which dealt specifically with employment at will, the court paid its respects to the public policy debate, but refused to either accept or reject the theory at that time.⁶

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1. 751 P.2d 1345 (Alaska 1988).

2. 753 P.2d 1150 (Alaska 1988).

3. *Id.* at 1154.

4. *Id.*

5. See *infra* notes 70-114 and accompanying text.

6. 753 P.2d at 1153.

This note examines the recent limitations that have been placed on the employment-at-will doctrine and specifically scrutinizes the possibility of recognizing the public policy doctrine in Alaska. Section II briefly recounts the history and traditional justifications behind employment at will. Section III discusses the modern limitations, both legislative and judicial, that have been placed on an employer's right to discharge at-will employees. This section includes a detailed discussion of the various types of public policy limitations and some of the problems associated with the public policy doctrine generally. Section IV focuses on the state of at-will employment in Alaska. The *Walt* and *Akers* decisions are examined as the most recent pronouncements on the proper place of tort claims in wrongful discharge suits. Section V explores three alternative approaches to the public policy question which, it is suggested, would avoid many problems associated with recognizing the public policy limitation. Finally, Section VI concludes that while there may be room for compromise, the Alaska Supreme Court is unlikely to recognize the public policy doctrine as a significant limitation on employer discretion.

II. THE HISTORY OF EMPLOYMENT AT WILL

When the parties to an employment contract fail to specify the term of employment, a void is created. That void, in order to facilitate the resolution of employment disputes, begs to be filled by legal presumption. Where the parties are silent, the silence must be given meaning, and the more uniform that meaning, the better. The law of employment at will is the product of such legal presumptions.

The English common-law approach was typically mechanistic: where no term of employment was specified, a one-year contract was presumed.⁷ If the employment relationship lasted beyond the first year, it was presumed to be renewed for an additional year.⁸ The employee could be discharged only at the end of one of these yearly terms.⁹ Blackstone articulated the rule as follows:

7. 2 W. BLACKSTONE, COMMENTARIES 425 (G. Tucker ed. 1803).

8. *Beeston v. Collyer*, 130 Eng. Rep. 786, 787 (C.P. 1827). The court in *Beeston* declared:

If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so for each succeeding year, as long as it should please the parties: such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another.

9. *Id.* These presumptions were also codified in the Statute of Labourers, 23 Edw. III, ch. 1 (1349); Statute of Labourers, 5 Eliz. I, ch. 4 (1562).

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.¹⁰

Through the greater part of the nineteenth century, American courts generally adopted the English approach,¹¹ though the rule was applied on a more ad hoc, case by case basis.¹² For example, in *Bascom v. Shillito*,¹³ the Ohio Supreme Court considered a wrongful discharge claim by Mr. Bascom, who was employed by the defendants for \$75 per month under a contract which did not specify the duration of employment. Within several months of his hiring, Mr. Bascom was given a raise to \$1,100 per year, to begin on March 1, 1875. In July of that year, Mr. Bascom was discharged. At trial, the lower court refused Bascom's request for instructions that would have allowed the jury to fairly infer from the salary increase that employment was for one year. Instead, the trial judge instructed the jury that if nothing has been said as to duration of the contract, the employee may be discharged "at the end of any month."¹⁴ In reversing the lower court ruling, the Ohio Supreme Court reaffirmed the English "one-year presumption" but made a notable effort to establish that the facts of a given case may displace the presumption:

The rule, that from the mere fact that a servant has been hired, the law will presume an employment for a year, is by no means inflexible even in England, and perhaps a hiring for a shorter period will be more readily inferred in this country than in England. There, as well as here, proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question, is admissible. But in this case the [factual inferences] were in harmony with the presumption, and we entertain no doubt that the plaintiff was entitled to [the requested jury instruction].¹⁵

10. 2 W. BLACKSTONE, *supra* note 7, at 425.

11. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 453-54 (1985); Note, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 208 (1982).

12. Crook, *Employment At Will: The American Rule and its Application in Alaska*, 2 ALASKA L. REV. 23, 24 (1985).

13. 37 Ohio St. 431 (1882).

14. *Id.* at 433.

15. *Id.* at 433-34. See also *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891) (court extensively cites one-year presumption but relies instead on factual inferences to arrive at contract duration); *Douglass v. Merchants' Ins. Co.*, 118 N.Y. 484, 23 N.E. 806 (1890) (despite existence of one-year presumption where duration of contract is not specified, by-laws of corporate defendant permitted discharge within a shorter period); *Davis v. Gorton*, 16 N.Y. 255 (1857) (adoption of one-year presumption where issue was when statute of limitations began to run).

In the latter half of the nineteenth century, however, American employment law began to diverge from the legal presumptions of England and develop its own theories of employment law. Specifically, the American presumption was that where no term of employment is mentioned, either party may terminate the employment relationship at will. The employee was entitled to quit whenever he pleased and, similarly, the employer was permitted to discharge him for any reason whatsoever. The presumption was designed to ensure the maximum amount of freedom of each party to terminate a disadvantageous relationship and put its resources to more efficient use. Those parties who felt exposed or at risk under such arrangements were perfectly free to contract out of the presumption by specifying a definite term of employment.

The origin of the American rule can be traced to a treatise on master and servant law written by Horace Wood.¹⁶ Wood posited the new presumption as follows:

[A] general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.¹⁷

While the cases Wood cited in support of his rule¹⁸ have been roundly criticized as unhelpful and even irrelevant,¹⁹ the American rule quickly became entrenched in American jurisprudence.²⁰ It is likely that the wide and rapid acceptance of the rule had more to do with

16. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 n.4 (1877).

17. *Id.* at 272.

18. *Wilder v. U.S.*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); *De Briar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870). See H. WOOD, *supra* note 16, § 136, at 283 n.5.

19. Crook, *supra* note 12, at 25; Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976); Note, *Guidelines for a Public Policy Exception to the Employment At-Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 618 (1981).

20. See, e.g., *Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (E.D.N.Y. 1908); *Lord v. Goldberg*, 81 Cal. 596, 22 P. 1126 (1889); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. (1 Penne.) 581, 43 A. 609 (Del. Super. Ct. 1899); *Harrod v. Wineman*, 146 Iowa 718, 125 N.W. 812 (1910); *Louisville & N. R. G. v. Harvey*, 99 Ky. 157, 34 S.W. 1069 (1896); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887); *Sullivan v. Detroit, Y. & A.A.*, 135 Mich. 661, 98 N.W. 756 (1904); *Davis v. Pioneer Life Ins. Co.*, 181 Mo. App. 353, 172 S.W. 67 (1914); *Brookfield v. Drury College*, 139 Mo. App. 339, 123 S.W. 86 (1909); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895); *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 P. 127 (1894) (all at least recognizing the dominance of the American rule); Annotation, *Duration of Contract of Hiring Which Specified no Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year*, 11 A.L.R. 469, 470 (1921). See also

timing than with the logical progression of legal precedent. Indeed, it is argued by many that at-will employment was primarily a convenient by-product of American capitalism.²¹ As the industrial revolution gained momentum, popular economic and legal philosophy fell in line. Laissez faire economics and the American rule of at-will employment combined to protect the elbow room of managerial discretion. From the industrialist's perspective, at-will employment made labor a much more controllable resource. Not even effusive notions of "fairness" prevented employers from discharging those who were no longer worth the expense. A common formulation of the rule provided that at-will employees could be discharged for good cause, no cause or even "bad" cause.²²

For example, in a case in which a large railroad company threatened to discharge any employee who purchased supplies at the plaintiff's retail store, the Tennessee Supreme Court declared:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.²³

Aside from its timely introduction, however, the American rule was considered theoretically sound. At-will employment was a doctrine founded on freedom of contract principles. It was believed that employers and employees should be allowed to structure their relationships as they choose, even if that choice meant risking security for flexibility and freedom.²⁴ Moreover, it was commonly reasoned that if

Feinman, *supra* note 19, at 126; Mallor, *supra* note 11, at 454; Note, *supra* note 11, at 206; Note, *supra* note 19, at 618.

21. See, e.g., Crook, *supra* note 12, at 25; Feinman, *supra* note 19, at 131; Blades, *Employment At-Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

22. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Waters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915). The *Hutton* court took issue with the *Payne* court on the proposition that an employer could wield his right to discharge employees solely for the purpose of harming third parties. The *Hutton* decision did not shake the foundations of employment at will. Nevertheless, it was precisely this type of resistance to extreme applications of the American rule that eventually took the shape of legal doctrines like the public policy limitation. See *infra* notes 70-114 and accompanying text. Together *Payne* and *Hutton* present an almost philosophical debate, which continues today, on the appropriate boundaries of employment at will. See Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947, 948 (1984).

23. *Payne*, 81 Tenn. at 518-19.

24. Professor, now Judge, Richard Epstein is one of a dwindling number of scholars who continue to staunchly defend at-will employment on classic contract principles: "[T]he parties should be permitted as of right to adopt this form of contract if

the employee had the right to quit at will, the contract lacked mutuality unless the employer had a corresponding right to discharge at will. The English one-year presumption, it was argued, unfairly restricted the freedom of the employer without imposing a similar hindrance on the employee.²⁵

It was these theoretical underpinnings which, if only for a short time, endeared the American rule to the United States Supreme Court and gave at-will employment a constitutional legitimacy. In *Adair v. United States*,²⁶ the Court invalidated a federal statute which prevented discharges of railway employees on the basis of union affiliation. The Court grounded its ruling in the fifth amendment's guarantees of due process and freedom of contract principles. Justice Harlan's majority opinion stated:

[I]t is not within the functions of government . . . to compel any person in the course of his business and against his will . . . to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe' [sic] to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe' [sic].²⁷

The Court therefore ruled that the employer and the employee had reciprocal rights to terminate the contractual relationship over the union membership issue.²⁸ Similarly, the United States Supreme Court several years later invalidated a Kansas statute which purported to outlaw so-called "yellow-dog" contracts.²⁹ These agreements conditioned employment on the employee's promise that he would not

they so desire. The principle behind this conclusion is that freedom of contract tends both to advance individual autonomy and to promote the efficient operation of the labor markets." Epstein, *supra* note 22, at 951.

25. Many scholars have disputed that mutuality is a problem. Professor Blades, for example, writes:

From the contractual principle of mutuality of obligation, it has been reasoned that if the employee can quit his job at will, then so, too, must the employer have the right to terminate the relationship for any or no reason But . . . mutuality is a high-sounding phrase of little use as an analytical tool. If the employee in addition to his services has given other "good" consideration, such as foregoing a claim against the employer or giving up a business to accept the employment, the agreement will be enforced on behalf of the employee even though he is free to quit at any time. Thus it seems clear that mutuality of obligation is not an inexorable requirement

Blades, *supra* note 21, at 1419 (footnotes omitted).

26. 208 U.S. 161 (1908).

27. *Id.* at 174-75.

28. *Id.* at 175.

29. *Coppage v. Kansas*, 236 U.S. 1 (1915).

join a union. This time relying on the fourteenth amendment, the Court held:

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "It takes two to make a bargain."³⁰

The American rule thus benefitted significantly from the legal and economic climate in which it was conceived. That climate, of course, would change considerably with the Great Depression and the ensuing New Deal. Social welfare legislation and judicial activism were destined to narrow the wide berth that had traditionally been given freedom of contract. The freedom that employers enjoyed in at-will relationships increased the pressures for legislative protection of organized labor. The labor movement, in turn, began the gradual process of limiting and qualifying the scope of the American rule.

III. JUDICIAL LIMITATION OF EMPLOYMENT AT WILL

The first substantive modifications of the American rule began in the 1930s with the passage of the National Labor Relations Act and its subsequent amendments.³¹ The Act made it an unfair labor practice for any employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."³² With this abrupt departure from the principled stance of the *Lochner*³³ era, government regulation of private employment gained momentum, and a host of congressional enactments significantly limited an employer's right to discharge.³⁴

30. *Id.* at 21.

31. 29 U.S.C. §§ 151-161 (1970 & Supp. 1989).

32. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1975).

33. *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court invalidated a New York law which purported to regulate the working hours of bakers. The opinion was couched in constitutional terms of safeguarding individual freedom to contract from governmental intrusion. The *Lochner* decision has come to typify an era of American jurisprudence in which "liberty to contract" was given heightened constitutional protection.

34. *See, e.g.*, Consumer Credit Protection Act § 304(a), 15 U.S.C. § 1674(a) (1982) (protecting from discharge those who have wages garnished); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1975) (prohibiting the discharge of employees who file complaints against the employer for violations of the Act); Age Discrimination in Employment Act § 4(a), 29 U.S.C. § 623(a) (1982) (prohibiting discharge or other discrimination on the basis of age); Occupational Health and Safety Act § 11(c), 29 U.S.C. § 660(c) (1982) (prohibiting discharge of employees who file complaints in exercise of their rights to a safe working environment and other rights conferred under the Act); Rehabilitation Act § 504, 29 U.S.C. § 794 (1982 & Supp. I 1988) (protecting

By the early 1970s, the court system, which had for so long refused to disturb the laissez faire nature of at-will employment, began to follow the congressional lead. This judicial intervention was encouraged by a torrent of academic criticism decrying the American rule as antiquated, unfair and philosophically passé.³⁵ Though the criticisms varied, most of the commentators emphasized the changing face of the modern employment relationship. It was argued that the employment scene which had nurtured the American rule in the nineteenth century had an intimate, personal flavor that had long since disappeared. Employment, it was urged, had become less of a transaction between individuals and more of a commodity to be sold by powerful corporate entities and purchased by individual laborers. The worker no longer had the bargaining power to "sell" his labor on his own terms, and thus used it to "purchase" employment on terms that were rarely subject to negotiation. By casting American economic growth in this light, the critics of the American rule have shaded modern private employment with the same overtones of paternalism that have spearheaded both the organized labor³⁶ and the consumer protection movements.³⁷ Grudgingly at first, then with increasing fervor, courts have responded to this scholarly criticism of the American rule through piecemeal regulation.

Judicial regulation of at-will employment has taken three major approaches. First, some courts have found implied contractual promises that the employee was hired for a definite duration or would be discharged only for good cause. A second approach has been to

the employment rights of the physically handicapped); Employment Retirement Income Security Act § 510, 29 U.S.C. § 1140 (1976) (prohibiting retaliatory discharge of those who notify officials of violations of the Act); Civil Rights Act of 1964 § 703(a), 42 U.S.C. §§ 2000e-2(a) (1989) (Title VII) (prohibiting discharge on the basis of race, color, religion, sex or national origin); Railway Labor Act, 45 U.S.C. § 152 (1981) (protecting union activity).

35. See Blades, *supra* note 21; Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279 (1971); Blumrosen, *Employment Discipline: United States Report*, 18 RUTGERS L. REV. 428 (1964); Feinman, *supra* note 19; Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979).

36. It is difficult to overemphasize the effect organized labor has had on at-will employment. As unionized workers have become increasingly secure, at-will employees have become increasingly vulnerable by comparison. In reaction to this disparity, courts and commentators have searched for a philosophy by which at-will employees may benefit from the same rising tide of security enjoyed by unionized labor. One of the most popular theories has been to give the at-will employee a property right in his employment which cannot be arbitrarily deprived. See Peck, *supra* note 35. Despite the obvious limitations of this and similar theories, the overall effect of the labor movement has been to mutate the at-will philosophy in such a way as to keep the nonunionized employee in step with the times. See Note, *supra* note 19, at 621.

37. See Blades, *supra* note 21, at 1420; Note, *supra* note 19, at 620-21.

imply a covenant of good faith and fair dealing in every at-will employment contract. The final, and most controversial, type of regulation has been to permit tort actions by employees discharged in violation of public policy.

A. Implied Contract

One judicial limitation on employment at will is the implied-in-fact contract. In resolving wrongful discharge claims, approximately twenty-five jurisdictions³⁸ scrutinize the employment relationship for express or implied assurances of job security and limit the employer's discretion to discharge accordingly. These assurances are of two general types: (1) that the employee has been hired for a definite tenure or (2) that the employee cannot be discharged except for good cause.

38. *Mursch v. Van Dorn Co.*, 627 F. Supp. 1310 (W.D. Wis. 1986), *aff'd*, 851 F.2d 990 (1987) (applying Wisconsin law); *Thompson v. American Motor Inns, Inc.*, 623 F. Supp. 409 (W.D. Va. 1985); *Brooks v. Trans World Airlines*, 574 F. Supp. 805 (D. Colo. 1983) (applying Colorado law); *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982) (applying Illinois law); *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd*, 624 F.2d 1092 (1980) (applying Pennsylvania law); *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987); *Rutledge v. Alyeska Pipeline Serv. Co.*, 727 P.2d 1050 (Alaska 1986) (recognizing the principle but holding against employee on particular facts); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, 429 A.2d 492 (Super. Ct. 1980); *Haney v. Laub*, 312 A.2d 330 (Del. 1973); *Washington Welfare Assoc. v. Wheeler*, 496 A.2d 613 (D.C. 1985); *but see Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982). *See Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659, 684 P.2d 1031 (Ct. App. 1984); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Staggs v. Blue Cross*, 61 Md. App. 381, 486 A.2d 798 (Ct. Spec. App. 1985); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. Ct. App. 1983); *Dare v. Montana Petroleum Mktg. Co.*, 212 Mont. 274, 687 P.2d 1015 (1984); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 666 P.2d 261 (1983); *Wooley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985); *Vigil v. Arzola*, 101 N.M. 687, 687 P.2d 1038 (1984); *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982); *Hammond v. North Dakota State Personnel Bd.*, 345 N.W.2d 359 (N.D. 1984); *Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1977); *Domingo v. Copeland Lumber Yards*, 81 Or. App. 52, 724 P.2d 841 (Ct. App. 1986); *Osterkamp v. Alkota Mfg.*, 332 N.W.2d 275 (S.D. 1983); *Hamby v. Genesco, Inc.*, 627 S.W.2d 373 (Tenn. Ct. App. 1982); *Piacitelli v. Southern Utah State College*, 636 P.2d 1063 (Utah 1981); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985). *See also Note, Employment-At-Will: Defining the Parameters*, 16 CUMB. L. REV. 377, 380 (1986).

Such implicit contractual promises have typically been found in personnel manuals, employee handbooks³⁹ and even oral statements⁴⁰ by the employer at the time of hiring. For example, in *Toussaint v. Blue Cross & Blue Shield*,⁴¹ the defendant employer had stated to the plaintiff that he would be with the company as long as he did his job.⁴² After being fired five years later for no apparent reason, the plaintiff sued for wrongful discharge. The defendant argued that employment contracts for an indefinite term may be terminated at will by either party and for any reason. In holding for the plaintiff, the Michigan Supreme Court stated:

We see no reason why an employment contract which does not have a definite term . . . cannot legally provide job security. When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for [good or just] cause. The result is that the employee, if discharged without good or just cause, may maintain an action for wrongful discharge.⁴³

The implied contract approach represents the least intrusive limitation on at-will employment for two reasons. First, when courts allow recovery on this theory, they essentially rule that a true at-will relationship never existed and that the contract is not as it appears. The implied contract doctrine does nothing more than protect the parties' manifest expectations. Insofar as these expectations are influenced by oral or written assurances, courts do not substantially deviate from basic contract principles by incorporating those assurances into the employment agreement. Thus, to rule that there is more to a contract than meets the eye does not significantly alter the employment-at-will doctrine, which has always operated in the shadow of the law of contracts.⁴⁴

39. See, e.g., *Osterkamp v. Alkota Mfg.*, 332 N.W.2d 275 (S.D. 1983).

40. See, e.g., *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833 (S.D. 1988).

41. 408 Mich. 579, 292 N.W.2d 880 (1980).

42. *Id.* at 597, 292 N.W.2d at 884.

43. *Id.* at 610, 292 N.W.2d at 890.

44. The California Supreme Court has recently reaffirmed the notion that finding implied-in-fact contracts, at least theoretically, does not erode the American rule:

The presumption that an employment relationship of indefinite duration is intended to be terminable at will is . . . "subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that . . . the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some 'cause' for termination . . ." Permitting proof of and reliance on implied-in-fact contract terms does not nullify the at-will rule, it merely treats such contracts in a manner in keeping

Second, to the extent that the implied contract approach threatens to undermine the expectations of at-will employers, it is a threat which can be easily avoided. Personnel manuals and employee handbooks can be revised to eliminate any hidden or unintentional assurances that employees will be discharged only for good cause. Hiring managers can be instructed to guard against casual comments which may later be construed as contractual promises. Finally, employers can minimize the threat by including specific language in the contract declaring that employment and discharge is at will. In *Toussaint*,⁴⁵ for example, the court insisted that its ruling does not leave employers vulnerable. The court reasoned that “[w]here the employer has not agreed to job security, it can protect itself by entering into a written contract which explicitly provides that the employee serves at the pleasure or at the will of the employer or as long as his services are satisfactory to the employer.”⁴⁶

B. Implied Covenants of Good Faith and Fair Dealing

A much more substantial modification of the American rule has come with the implied covenant of good faith and fair dealing. The theory holds that every employment contract, even at will, contains an implied covenant that the employer will deal with each employee fairly and will discharge an employee only on a good faith belief that the discharge is warranted. The modern implied covenant has largely developed within the commercial law context where legislative bodies have imposed duties on parties to deal fairly and in good faith in all commercial transactions.⁴⁷ In employment law, however, the implied covenant of fair dealing can be traced to the employee commission cases of the 1940s.⁴⁸ These cases imposed liability on employers where

with general contract law . . . We see no sound reason to exempt the employment relationship from the ordinary rules of contract interpretation which permit proof of implied terms.

Foley v. Interactive Data Corp., 47 Cal. 3d 654, 681, 765 P.2d 373, 387, 254 Cal. Rptr. 211, 225-26 (1988) (citing *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 917, 923-25 (Ct. App. 1981)).

45. 408 Mich. 579, 292 N.W.2d 880 (1980).

46. *Id.* at 613 n.24, 292 N.W.2d at 891 n.24. See also *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980).

47. See U.C.C. § 1-203 (1989) (“Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.”); *Crook, supra* note 12, at 33.

48. See, e.g., *Kollman v. McGregor*, 240 Iowa 1331, 39 N.W.2d 302 (1949), cited in *Daughtrey, Another Exception Under the Employment At-Will Doctrine: Bowman v. State Bank*, 24 AM. BUS. L.J. 243, 250 (1986). Other scholars, however, trace the doctrine to the duties of good faith and fair dealing imposed by the courts on insurance companies in the 1960s. See *Foley*, 47 Cal. 3d at 689-93, 765 P.2d at 393-96, 254 Cal. Rptr. at 231-34; *Mallor, supra* note 11, at 468; Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 161 (1981).

the sole motive for the discharge was to escape having to pay employee commissions or bonuses. While many of these cases involved undeniable at-will contracts, courts nevertheless justified their rulings on general grounds of fairness. Today, in those few jurisdictions which recognize this implied covenant in the employment context,⁴⁹ an employee who believes he has been discharged in "bad faith" may maintain a cause of action for breach of contract. Typical applications of the implied covenant theory are found in suits by employees who were discharged for apparently no reason after many years of flawless performance⁵⁰ and in cases involving discharges designed to avoid payment of commissions, bonuses or other benefits.⁵¹

In *Fortune v. National Cash Register Co.*⁵² the Supreme Judicial Court of Massachusetts restricted an at-will employer's absolute right to discharge by implying a covenant of good faith and fair dealing in

49. See, e.g., *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109 (2d Cir. 1985) (applying New Jersey law and recognizing that a covenant may be implied where necessary to enable one party to receive the benefits promised for performance); *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383 (6th Cir. 1975) (applying Ohio law); *Rees v. Bank Bldg. and Equip. Corp.*, 332 F.2d 548 (7th Cir. 1964), cert. denied, 379 U.S. 932 (1964) (applying Missouri law); *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (but limiting recovery for breach of implied covenant to contract damages); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, 429 A.2d 492 (Super. Ct. 1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 1251 (1977) (modified by *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981) (termination in the absence of good cause does not establish bad faith and is only a factor in determining whether there was a fair dealing)); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Monge v. Beebe Rubber Co.*, 113 N.H. 139, 316 A.2d 549 (1974) (significantly limited by *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981)); *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Okla. 1985). See also *de Treville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971) (applying South Carolina law); *Peterson v. First Federal Sav. & Loan Ass'n of P.R.*, 617 F. Supp. 1039 (D.V.I. 1985).

Several jurisdictions have explicitly rejected the implied covenant of good faith and fair dealing. See, e.g., *Minihan v. American Pharmaceutical Ass'n*, 812 F.2d 726 (D.C. Cir. 1987); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986); *Frichter v. National Life & Accident Ins. Co.*, 620 F. Supp. 252 (D. Md. 1986); *Salazar v. Furr's Inc.*, 629 F. Supp. 1403 (D.N.M. 1986); *Hostettler v. Pioneer Hibred Int'l, Inc.*, 624 F. Supp. 169 (S.D. Ind. 1985); *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379 (Colo. Ct. App. 1986); *Morris v. Coleman Co.*, 738 P.2d 841 (Kan. 1987); *Hillesland v. Federal Land Bank Ass'n*, 407 N.W.2d 206 (N.D. 1981); *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Jeffers v. Bishop Clarkson Mem. Hosp.*, 387 N.W.2d 692 (Neb. 1986).

50. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Ct. App. 1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

51. See, e.g., *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

52. 373 Mass. 96, 364 N.E.2d 1251 (1977).

the company's employment contracts. The plaintiff was a salesman who brought suit to recover unpaid commissions. He alleged that the employer had fired him to avoid paying the commissions due. Relying heavily on the covenant as it commonly operates in the commercial law field,⁵³ the court held that "NCR's written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of contract [W]e believe that where, as here, commissions are to be paid for work performed by the employee, the employer's decision to terminate its at-will employee should be made in good faith."⁵⁴ While the court refused to speculate whether every employment contract contained this covenant,⁵⁵ its reliance on such widely adopted commercial law principles clearly points in that direction.⁵⁶

The implied covenant of good faith and fair dealing does give employees greater security from discharge. Nevertheless, this security does not come without substantial drawbacks for both employers and employees. Unlike the implied contract theory, the implied covenant cuts straight to the heart of the at-will employment relationship and substantially limits what has traditionally been a matter of employer discretion. While the covenant in no way limits the employee's right to quit at any time or for any reason, it does limit the employer's right to discharge.⁵⁷

In fact, some jurisdictions which recognize the theory have been especially mindful that the implied covenant works against the employer. In *Magnan v. Anaconda Industries, Inc.*,⁵⁸ the Superior Court of Connecticut was faced with a plaintiff who had been employed by the defendant for thirteen years under an oral contract of unlimited

53. *Id.* at 102, 364 N.E.2d at 1256 (the court cited U.C.C. § 1-203).

54. *Id.* at 101-02, 364 N.E.2d at 1255-56.

55. *Id.* at 104, 364 N.E.2d at 1257. The Alaska Supreme Court has made the very leap that Massachusetts avoided in *Fortune*. In *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983), the court held that the discharge of an employee to avoid paying commissions was a violation of the duty of good faith and fair dealing and constituted a breach of contract. The court has subsequently interpreted the decision in *Mitford* as extending the implied covenant to *all* at-will employment contracts. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1153 (Alaska 1988). Both *Mitford* and *Akers* are discussed in detail *infra* notes 141-50 and 184-201 and accompanying text.

56. Note, *Employment at Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787 (1983). *But see* *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981).

57. For this reason, several courts have refused to recognize the implied covenant limitation. *See, e.g.*, *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Murphy v. American Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

58. 37 Conn. Supp. 38, 429 A.2d 492 (Super. Ct. 1980).

duration. The plaintiff was discharged after refusing to sign an admission of theft. Though ultimately denying the defendant's motion for summary judgment, the court restricted the scope of the implied covenant in an effort to protect employer discretion, stating:

The application of this doctrine must . . . be balanced with the right of an employer to serve his own legitimate business interests. Accordingly, not every discharge made without cause constitutes a breach of the implied covenant [T]o constitute a breach of the implied covenant of good faith, the conduct of the employer must constitute an aspect of fraud, deceit, or misrepresentation.⁵⁹

Limiting an employer's right to discharge may not be unreasonably onerous if employers have a clear and predictable standard by which to gauge future conduct. Clarity and predictability will at least allow employers to avoid wrongful discharge suits by conforming their behavior to the standard. However, the good faith and fair dealing standard is neither clear nor predictable.⁶⁰ The standard not only calls for a highly subjective analysis that defies generalization, but also is so laden with amorphous connotations of "fair play" that it becomes dangerously confused with a "good cause" requirement.⁶¹ In *Cleary v. American Airlines*,⁶² for example, the California Court of Appeal held the defendant employer liable for breaching the implied covenant of good faith and fair dealing. The plaintiff was discharged without

59. *Id.* at 41, 429 A.2d at 494 (quoting *A. John Cohen Ins. Co. v. Middlesex Ins. Co.*, 392 N.E.2d 862 (Mass. App. Ct. 1979)).

60. *See, e.g.*, *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Murphy v. American Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *Madison, The Employee's Emerging Rights to Sue for Arbitrary or Unfair Discharge*, 6 EMPLOYEE REL. L.J. 422, 432 (1981).

It was partly for this reason that the California Supreme Court recently refused to allow tort damages for breach of the implied covenant which that state has long recognized. In *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 695-97, 765 P.2d 373, 398-99, 254 Cal. Rptr. 211, 236-37 (1988), the court stated:

Initially, predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers not be unduly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case.

Id.

61. The two concepts are vastly different. The good faith standard does not require that a discharge be supported by valid reasons; the only requirement is an absence of bad faith. In sharp contrast, the just cause standard contemplates employer liability without any showing of bad faith; a finding by a jury that the discharge was "unfair" or "unreasonable" may suffice. *See Note, supra* note 38, at 383.

62. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

cause⁶³ after eighteen years of continuous employment. Seemingly unconcerned about whether bad faith was involved, the court held that "[t]ermination of employment without legal cause after . . . [eighteen years of service] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts."⁶⁴ Since juries are typically sympathetic to discharged employees from the outset,⁶⁵ the use of a malleable and potentially confusing standard falls short of protecting employers from unwarranted recoveries.⁶⁶ Moreover, the vagueness of the "good faith" standard, as with any imprecise theory of recovery, actually foments litigation by those with otherwise frivolous claims.⁶⁷

The implied covenant of good faith and fair dealing may also hurt the employee. In an effort to protect themselves from wrongful discharge suits, employers faced with a good faith standard will likely establish formal grievance and discipline procedures through which all

63. Cleary alleged he had been discharged for union-related activities.

64. 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729. The California Supreme Court has recently cautioned against the approach taken in *Cleary*. In *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 698 n.39, 765 P.2d 373, 400 n.39, 254 Cal. Rptr. 211, 238 n.39 (1988), the court warned that "with regard to an at-will employment relationship, breach of the implied covenant cannot logically be based on a claim that a discharge was made without good cause. If such an interpretation applied, then all at-will contracts would be transmuted into contracts requiring good cause for termination." *Id.*

65. See Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404, 406 (1987).

66. Epstein, *supra* note 22, at 953. Professor Epstein writes:

[T]here is good reason for skepticism about the power of juries to divine motive and purpose from the evidence that is presented to them. A single case easily can be regarded either as employer oppression or employer benevolence, and there is every reason to expect that very different interpretations of similar fact patterns will proliferate under any version of the for-cause standard.

Id. at 971.

67. *Id.* at 953. See *Foley*, 47 Cal. 3d at 697, 765 P.2d at 399, 254 Cal. Rptr. at 237; Gould, *supra* note 65, at 405. On the proliferation of such suits, Professor Gould writes:

Scarcely a day goes by during which some employee does not file suit in a state or federal court against his or her employer, protesting a dismissal — the basis for it, the way in which it was done, or the circumstances surrounding it. Although there are no precise statistics available, it is clear that wrongful discharge litigation, which was hardly known in the 1970's, is increasing geometrically, causing most major law firms to spend at least one half of their billable hours on them The cost of lawsuits that respond to a discharge, as measured by jury awards and settlements, has also increased geometrically and is beginning to draw concern from the business community.

Gould, *Id.* at 405.

employee problems are channelled.⁶⁸ While these procedures may be desirable, the employer will inevitably incur costs in terms of both time and money. These costs may be passed on to the employee by reducing wages, benefits or the number of employees hired.⁶⁹

C. The Public Policy Exception

The third major judicial limitation of the American rule is the public policy exception. This doctrine prohibits an employer from discharging an employee, regardless of at-will status, for reasons contrary to public policy.⁷⁰ Unlike the breach of an implied contract or covenant, a discharge that violates public policy gives rise to an action

68. See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 369 (1974) (also suggesting, however, that another possible result may be the development of "contractual disclaimers . . . and other corporate boilerplate aimed at preserving the power of employers to discharge employees at will"). *Id.* at 369 n.18.

69. See Epstein, *supra* note 22, at 972; Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U.L.J. 881, 892 (1983); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1829 (1980); Note, *Employment at Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787, 800 (1983).

Nevertheless, it is at least arguable that from the employee's perspective, the additional security afforded by the good faith standard may be worth these relatively modest reductions.

70. The public policy exception has been adopted in thirty-five jurisdictions. See, e.g., *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law); *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535 (D.D.C. 1986); *Merkel v. Scovill, Inc.*, 570 F. Supp. 133 (S.D. Ohio 1983) (applying Ohio law); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 427 A.2d 385 (1980); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (but see *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933 (Ind. 1986) (limiting the public policy doctrine to cases where employee is discharged for filing workers' compensation claim)); *Springer v. Weeks and Leo Co.*, 429 N.W.2d 558 (Iowa 1988); *Murphy v. Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (Ct. App. 1981); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983); *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981); *Hobson v. McClean Hosp. Corp.*, 402 Mass. 413, 522 N.E.2d 975 (1982); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (Ct. App. 1976); *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986); MONT. CODE ANN. § 39-2-904 (1987); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985); *Ambroz v. Cornhusker Square, Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1130 (1981); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (1983); *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818 (Ct. App. 1985); *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 689 P.2d 1292 (1984); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (Super. Ct. 1978); *Ludwick v. This Minute of*

sounding in tort rather than contract.⁷¹ The nature of the employee's claim thus turns more on the employer's overarching duty not to subvert public policy, rather than implied rights and obligations contained in the employment contract.

The cases decided on the premise that an employer may not discharge an employee for reasons contrary to public policy fall into four general categories: (1) discharges for refusing to engage in illegal activity; (2) discharges for exercising a statutory right or legal privilege; (3) discharges for fulfilling a statutory duty or public obligation; and (4) discharges in violation of "general public policy."⁷²

1. *Discharges for Refusing to Engage in Illegal Activity.* The public policy doctrine is most alluring in situations where an employee has been discharged for refusing to engage in illegal conduct. Employers should not be permitted to threaten job security as an inducement to violate the law. To the extent that employers have relied on the at-will

Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225 (S.D. 1988); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978); *Bushko v. Miller Brewing Co.*, 134 Wis. 2d 136, 396 N.W.2d 167 (1986).

Seven jurisdictions have refused to recognize the public policy exception: *Amos v. Corporation of Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984), *rev'd on other grounds*, 483 U.S. 327 (1987); *Brainard v. Imperial Mfg. Co.*, 571 F. Supp. 37 (D.R.I. 1983) (applying Rhode Island law); *Hinrichs v. Tranquillarie Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. Dist. Ct. App. 1985); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. Ct. App.), *cert. denied*, 414 So. 2d 379 (La. 1982); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

Six jurisdictions have yet to adopt the exception, but indicate a willingness to do so in the future: *Laws v. Aetna Finance Co.*, 667 F. Supp. 342 (N.D. Miss. 1987); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (Ct. App. 1978); *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97 (Me. 1984); *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Allen v. Safeway Stores, Inc.*, 699 P.2d 277 (Wyo. 1985).

Two jurisdictions remain completely undecided on the issue: *Hansrote v. Amer Indus. Technologies, Inc.*, 586 F. Supp. 113 (W.D. Pa. 1984) (interpreting Delaware law); *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150 (Alaska 1988).

71. *But see* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Bushko v. Miller Brewing Co.*, 134 Wis. 2d 136, 396 N.W.2d 167 (1986).

72. *See* Comment, *Wrongful Discharge of Employees Terminable At Will — A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729, 730 (1981); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936-37 (1983) [hereinafter Note, *Protecting Employees At Will*]; Note, *supra* note 38, at 380.

doctrine to make such inducements, many courts have allowed the discharged employee to bring a suit on public policy grounds.

The first public policy exception to the at-will doctrine was introduced by the California Court of Appeal in *Petermann v. Local 396, International Brotherhood of Teamsters*.⁷³ The case involved an employee who was discharged from his job when he refused to give perjured testimony at a legislative hearing. While the court paid due respect to the time-honored American rule, it ultimately reasoned that "the right to discharge an employee under [the at-will doctrine] may be limited by statute or by considerations of public policy."⁷⁴ The court concluded that it would be obnoxious to state and public interests to allow an employer to discharge any employee for refusing to engage in conduct specifically enjoined by statute.⁷⁵

While the perjury scenario in *Petermann* has proved to be the most typical,⁷⁶ courts have recognized the public policy exception in a variety of situations where an employee has been discharged for refusing to violate the law.⁷⁷ Despite the factual diversity, however, these cases contain a common element: the public policy which has been abused, and which serves as the foundation of the employee's recovery, has in every case been specifically identified by the legislature and embodied in a statute. Thus, while these decisions compromise the absolute power to discharge to some degree, they do so only in narrow and well-defined circumstances. The role of the court in these cases

73. 174 Cal. App. 2d 184, 344 P.2d 25 (Dist. Ct. App. 1959).

74. *Id.* at 188, 344 P.2d at 27.

75. The court reasoned:

[I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law This [would be] patently contrary to the public welfare.

Id. at 189, 344 P.2d at 27.

76. Note, *Protecting Employees At Will*, *supra* note 72, at 1937.

77. See, e.g., *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (discharge for refusal to sleep with foreman contrary to Arkansas prostitution laws); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge for refusal to participate in price-fixing scheme); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (discharge of quality control inspector for refusal to violate the Connecticut Uniform Food, Drug and Cosmetic Act); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (Ct. App. 1978) (discharge for refusal to falsify pollution control records); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Super. Ct. App. Div. 1978) (discharge for refusal to perform unauthorized catheterizations); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (Super. Ct. App. Div. 1982) (pharmacist discharged for refusing to violate a state pharmacy board regulation); *Hauck v. Sabine Pilots, Inc.*, 672 S.W.2d 322 (Tex. Ct. App. 1984), *aff'd*, 687 S.W.2d 733 (Tex. 1985) (discharge for refusal to pollute navigable waters).

has not been to whimsically regulate at-will employment, but rather to enforce clear and specific legislative declarations of public policy.

2. *Discharges for Exercising a Statutory Right.* Some jurisdictions have also resorted to the public policy exception where an employee is discharged for exercising a legally protected right. The vast majority of these cases involve employees who have been discharged for filing workers' compensation claims. Since most workers' compensation schemes provide that restitution of denied benefits is the exclusive remedy, courts have traditionally prohibited separate civil suits against the employer for damages.⁷⁸ However, with the growth of the public policy exception in the 1970s, courts began to supplement the statutory relief by allowing private tort actions against offending employers.

The first case to take this step was *Frampton v. Central Indiana Gas Co.*⁷⁹ Frampton was discharged after filing for disability benefits as provided under his employer's workers' compensation policy. The Indiana Supreme Court recognized the general rule that employers have great discretion to discharge at-will employees. Nevertheless, the court allowed an exception to the at-will doctrine in those cases where the discharge was designed to prevent the employee from pursuing his legally protected right to compensation. In allowing Frampton's wrongful discharge suit, the court stressed the importance of effectuating the public policy goals behind the Indiana Workers' Compensation Act.⁸⁰

[I]n order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right . . . without being subject to reprisal. If the employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.⁸¹

Many jurisdictions have adopted the *Frampton* reasoning and allowed private damage suits by at-will employees discharged for filing workers' compensation claims.⁸² While permitting recovery in such

78. See, e.g., *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981).

79. 260 Ind. 249, 297 N.E.2d 425 (1973).

80. IND. CODE ANN. §§ 22-3-2-1, 2-2, 2-6 (Burns 1986 & Supp. 1988).

81. *Frampton*, 260 Ind. at 251-52, 297 N.E.2d at 427.

82. See, e.g., *Smith v. Piezo Tech. & Professional Adm'rs*, 427 So. 2d 182 (Fla. 1983); *Murphy v. City of Topeka-Shawnee Dept. of Labor Serv.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983);

suits does limit the traditional employer discretion, the overall effect on at-will employment is minimal. The courts have generally reasoned that all workers' compensation schemes are themselves legislative declarations of a public policy that work-related injuries should be compensated.⁸³ Judicial enforcement of this implicit, but obvious, policy is not significantly different from prohibiting discharges designed to frustrate the criminal laws. In both situations, courts are limiting employer discretion only to the extent permitted by specific legislative policy goals.

3. *Discharges for Fulfilling a Legal Duty or Public Obligation.* Several courts that have recognized the public policy exception have done so where an employee was discharged for fulfilling a statutory duty or non-statutory "public obligation." The most common case involves an employee who is discharged for taking time off from work to serve on a jury.⁸⁴ Other examples involve "whistle-blowing" on illegal employer conduct⁸⁵ and refusing to violate professional ethical standards.⁸⁶

To some extent, there is little difference between the statutory duty cases and the illegal activity, or statutory prohibition, cases. In

Wiley v. Missouri Pacific R.R., 430 So. 2d 1016 (La. Ct. App. 1982); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. 1984) (en banc); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. Civ. App. 1976). *But see* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981) (holding that any changes of the employment-at-will doctrine are better left to the state legislature).

83. *See, e.g.*, Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983).

84. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978).

85. *See, e.g.*, Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1374 (9th Cir.), *cert. denied*, 471 U.S. 1099 (1984) (applying California law). *But see* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 670-71, 765 P.2d 373, 380, 254 Cal. Rptr. 211, 218 (1988) (denying whistle-blowing employee relief on public policy theory where public policy, though statutorily based, was not substantial). *See also* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 478-80, 427 A.2d 385, 388 (1980) (holding that a discharge is in violation of public policy when retaliatory for reporting criminal conduct — "an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."); Brown v. Physicians Mutual Ins. Co., 679 S.W.2d 836, 838 (Ky. Ct. App. 1984); McQuary v. Bel Air Convalescent Home, Inc., 69 Or. App. 107, 110, 684 P.2d 348, 350 (1984) (stating that an employer may not discharge an employee for fulfilling a societal obligation of reporting a statutory violation); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (1978).

86. *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71-72, 417 A.2d 505, 512 (1980).

both situations, courts have imposed an exception to at-will employment only where the discharge in question contravenes an explicit statutory declaration of public policy. Where no public policy can be found, many courts have disallowed recovery.⁸⁷ *Mallard v. Boring*,⁸⁸ for example, concerned an employee who was discharged for serving on a jury. Emphasizing that the legislature had never expressly declared jury duty as a public policy to be safeguarded, the California Court of Appeal refused to legislate from the bench by allowing the employee to recover on public policy grounds.⁸⁹ There are some courts, however, that have allowed this exception to have a force of its own outside of legislative pronouncements.⁹⁰ In *Nees v. Hocks*,⁹¹ the Oregon Supreme Court allowed recovery by a secretary who was discharged for jury service. Unlike the California court's approach in *Mallard*, the *Nees* court did not allow legislative silence to foreclose a wrongful discharge suit based on public policy grounds. The court relied on constitutional guarantees to a trial by jury to assert that jury duty was a civil obligation imposed on all Oregon citizens. The court concluded that discharging employees for fulfilling this obligation both subverts the jury system and "thwarts the will of the community."⁹² The *Nees* approach represents a much deeper intrusion into the traditional at-will doctrine. When courts, rather than legislatures, determine the reach and breadth of the public policy exception, at-will employment becomes subject to regulation on a case by case basis. Such judicial regulation brings with it uncertainty as to the exact boundaries of employer discretion.

4. *Discharges in Violation of General Public Policy.* The fourth, and most controversial, application of the public policy exception involves discharges considered contrary to the general public policy of

87. See, e.g., *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535, 539 (D.D.C. 1986); *Percival v. General Motors Corp.*, 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126, 1130 (8th Cir. 1976); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 468, 590 P.2d 513, 515-16 (Ct. App. 1978); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 194, 251 S.E.2d 51, 52 (Ct. App. 1978); *Martin v. Platt*, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979); *Geary v. United States Steel Corp.*, 456 Pa. 171, 184-85, 319 A.2d 174, 180 (1974).

88. 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (Ct. App. 1960).

89. In response to this decision, the California Legislature enacted a labor statute in 1968 prohibiting the discharge of employees for serving on a jury. CAL. LABOR CODE § 230 (Deering 1971 & Supp. 1989).

90. See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 132-33, 421 N.E.2d 876, 880 (1981); *Reuther v. Fowler & Williams*, 255 Pa. Super. 28, 31, 386 A.2d 119, 120 (Super. Ct. 1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W.Va. 1978). These cases allow recovery despite lack of specifically legislated public policy.

91. 272 Or. 210, 536 P.2d 512 (1978).

92. *Id.* at 219, 536 P.2d at 516.

the state. While the cases decided on these grounds cannot be typified by any particular factual scenario, they are nonetheless related in two respects. First, in each case, there is a distinct absence of any specific legislative public policy which might be used to invalidate the discharge. Second, without concrete legislative support, each decision is founded upon a judicial declaration of general public policy.

The general public policy limitation was first adopted by the New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*⁹³ The case involved a female employee who was discharged for allegedly refusing to date her foreman. Unable to find any preexisting public policy for support, the court created its own, stating:

[A] termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract Such a rule affords the employee a certain stability of employment⁹⁴

In a strong dissent, Justice Grimes objected to a rule which essentially held employers to a good cause standard for all discharges:

I cannot subscribe to the broad new unprecedented law laid down in this case Not a single case has been found which supports the broad rule laid down by the court In fact, the law everywhere uniformly supported by scores of cases is that an employment contract for an indefinite period is one "at will and is terminable at any time by either party" regardless of motive for "good cause, bad cause or no cause" and for "any reason or no reason."⁹⁵

Illinois followed the *Monge* approach in *Palmateer v. International Harvester Co.*⁹⁶ *Palmateer*, an at-will employee, was discharged for encouraging a police investigation of his employer's operations, which *Palmateer* suspected violated several criminal statutes. *Palmateer* had not only assisted in the investigation, but also agreed to testify against fellow employees. The Illinois Supreme Court recognized that there is no statutory duty or legal obligation on citizens to become "whistle-blowers" whenever criminal activity is suspected. Nevertheless, the plaintiff's suit for retaliatory discharge was permitted on the grounds that "public policy . . . favors citizen crime-fighters."⁹⁷ The public policy which the employer had purportedly contravened was broadly defined by the court as "what is right and just and what affects the citizens of the State collectively. [Public policy] . . . is to be found in the State's constitution and statutes and, when they are silent, in its

93. 114 N.H. 130, 316 A.2d 549 (1974).

94. *Id.* at 133, 316 A.2d at 551-52.

95. *Id.* at 135-36, 316 A.2d at 553 (Grimes, J., dissenting) (quoting *Payne v. Webster & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Waters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915)).

96. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

97. *Id.* at 130, 421 N.E.2d at 878.

judicial decisions.”⁹⁸ The court held that “[p]ublic policy favors Palmateer’s conduct in volunteering information to the law-enforcement agency . . . [and assisting] in the investigation and prosecution of the suspected crime.”⁹⁹

Most jurisdictions have refused to follow the broad path blazed by New Hampshire and Illinois. In fact, the New Hampshire Supreme Court has since softened its decision in *Monge*.¹⁰⁰ Most courts continue to require a distinct, unambiguous, legislative declaration of relevant public policy before limiting the at-will doctrine.¹⁰¹ This general reticence to embrace such a broad exception can be traced to several well-founded concerns.

First, the general public policy exception is likely to encourage frivolous suits.¹⁰² The public policy as declared by legislative bodies is usually directed at furthering the purposes of some specific statutory scheme. Thus, an exception to at-will employment based on such declarations has a definable scope and context. By sharp contrast, judicially declared, or “general” public policy, defies the limits and quicky

98. *Id.*

99. *Id.* at 133, 421 N.E.2d at 880. The *Palmateer* decision also spurred a strong dissent. Justice Ryan objected:

I cannot agree to extend the cause of action for retaliatory discharge . . . into the nebulous area of judicially created public policy, as has been done . . . in this case. I fear that the result of this opinion will indeed fulfill the prophecy of Mr. Justice Underwood’s dissent in *Kelsay*. “Henceforth, no matter how indolent, insubordinate or obnoxious an employee may be, . . . [the] employer may thereafter discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages.”

Id. at 136, 421 N.E.2d at 881 (Ryan, J., dissenting) (quoting *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (Underwood, J., dissenting)).

100. *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980) (both cases restrict the *Monge* principle to situations where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn).

101. *See, e.g., Adler v. American Standard Corp.*, 291 Md. 31, 47, 432 A.2d 464, 473 (1981); *Glaz v. Ralston Purina Co.*, 24 Mass. App. Ct. 386, 389-90, 509 N.E.2d 297, 300 (App. Ct. 1987); *Geary v. United States Steel Corp.*, 456 Pa. 171, 184-85, 319 A.2d 174, 180 (1974).

102. *See, e.g., Rozier v. St. Mary’s Hosp.*, 88 Ill. App. 3d 994, 998-99, 411 N.E.2d 50, 53-54 (App. Ct. 1980). In *Rozier*, the Illinois Court of Appeals refused to adopt a general exception, stating:

The . . . insidious danger, . . . is that an employer may justly discharge an employee only at the risk of being compelled to defend a suit for retaliatory discharge. If such a cause of action generally could be maintained, employers, particularly those in small businesses, would be thrust into economic dilemma by every employment decision.

Id. *See also* Note, *supra* note 11, at 228-29.

devolves into an amorphous principle of equity. This comfortable imprecision provides an alluring theory of recovery for discharged employees who otherwise would not have thought of filing suit.¹⁰³ The public policy announced in *Palmateer*, that "what is right and just and what affects the citizens of the State collectively,"¹⁰⁴ could arguably protect even the most frivolous suit from dismissal.¹⁰⁵ Such an approach leads to an unfortunate waste of employer and judicial resources.¹⁰⁶ Second, adopting such a broad basis for recovery is likely to chill employers from fully exercising their discretion over the work place.¹⁰⁷

Employers will, of course, be sensitive to the cost and trouble of defending frivolous tort suits. While such concerns may not seem particularly "chilling," there is more cause for apprehension. An employer who discharges an at-will employee and is found to have transgressed the meandering boundaries of general public policy will be liable in tort rather than contract. Recoveries are therefore likely to

103. Mallor, *supra* note 11, at 461-62; Note, *supra* note 11, at 229; Blades, *supra* note 21, at 1428; Note, Pierce v. Ortho Pharmaceutical Corp.: *Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L.J. 1187, 1197 (1981) [hereinafter Note, Pierce v. Ortho Pharmaceutical Corp.].

104. 85 Ill. 2d at 130, 421 N.E.2d at 878.

105. A good example of a typical frivolous suit encouraged by a broad public policy exception is *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977). In *Scrogan*, the Kentucky Court of Appeals affirmed the dismissal of the plaintiff's claim that his discharge for attending night school violated a public policy in favor of higher education. See also *Prussing v. General Motors Corp.*, 403 Mich. 366, 269 N.W.2d 181 (1978) (plaintiff claimed that his discharge for refusal to accept a transfer to Brazil was merely a pretext and violated public policy); *Ward v. Frito-Lay Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980) (plaintiff, discharged after relationship with fellow worker caused dissention among employees, claimed discharge violated Wisconsin public policy in favor of peaceful labor relations).

106. See *Palmateer*, 85 Ill. 2d at 142-44, 421 N.E.2d at 884-85 (Ryan, J., dissenting).

107. In his seminal article on the subject, Professor Blades has cautioned:

[T]here is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained. And while as a matter of constitutional law the right of discharge is no longer absolute and inviolable, the employer's prerogative to make independent, good faith judgements about employees is important in our free enterprise system.

Blades, *supra* note 21, at 1428. See also Note, *supra* note 11, at 226-28 (arguing that jurisdictions adopting the public policy doctrine have created an "atmosphere of uncertainty in the workplace").

far exceed the cost of back pay and may even include punitive damages and damages for emotional distress.¹⁰⁸ While it may be intuitively argued that the honest employer has no cause to fear wrongful discharge recoveries, such arguments are unrealistic. Many times employees may be discharged for legitimate, but nevertheless subjective, reasons. This is especially true with managerial or upper level employees,¹⁰⁹ for example, where the employee's demeanor or personality is ill-suited for the job or deteriorates an otherwise cohesive management team. To the extent that these subjective reasons cannot be fully articulated, even the most innocent employers have cause for concern. Moreover, that concern is compounded by the stark realization that as between a profit-maximizing employer and a jobless ex-employee, most juries will instinctively sympathize with the latter.¹¹⁰ Thus, for an employer who is wary of accidentally offending "general public policy," it may in fact appear less costly to retain an indolent or inefficient employee than to risk a wrongful discharge suit.¹¹¹ In the event a suit is filed, employers will be more disposed to settle out of court than to defend their decision to discharge.

Finally, there is concern that by allowing recoveries on the basis of general public policy, the courts risk warding off new industry and thereby retarding business development and economic growth. Given the choice between (1) a state that limits at-will discharges only to the

108. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (Super. Ct. App. Div. 1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). Notably, however, most courts adopting the public policy exception have required punitive damages to be based on a showing of malicious, fraudulent or oppressive misconduct. See, e.g., *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978). See also *Mallor*, *supra* note 11, at 481.

109. Professor Blades makes the following distinction:

The higher ranking the employee, the more important to the success of the business is his effective performance. Compounding the potential for undue inhibition of the employer's judgment at the higher echelons of employment is the greater difficulty of articulating the basis for a discharge at that level. Compared to the wage earner, whose routine duties can generally be measured against a mechanical standard, the value of the salaried employee is more likely to be measured in such intangible qualities as imagination, initiative, drive, and personality. The employer's evaluation of the higher ranking employee is usually a highly personalized, intuitive judgment, and, as such, is more difficult to translate into concrete reasons which someone else — a juror — can readily understand and appreciate.

Blades, *supra* note 21, at 1428. See also *Gould*, *supra* note 65, at 414; Note, *Pierce v. Ortho Pharmaceutical Corp.*, *supra* note 103, at 1196.

110. See *Mallor*, *supra* note 11, at 491; *Blades*, *supra* note 21, at 1428.

111. As Professor Gould states the dilemma: "There are many cases where employers have been fearful to dismiss a marginal or unproductive employee as they look down the barrel of a jury gun about to cock." *Gould*, *supra* note 65, at 411.

extent that they contravene statutory policy and (2) a state which imposes a general policy developed on a case by case basis, new industry will likely choose the former. In an often cited dissent to the *Palmateer* ruling,¹¹² Justice Ryan raised the new business issue:

The deteriorating business climate in this State is a topic of substantial interest It must be acknowledged . . . that Illinois is not attracting a great amount of new industry and business and that industries are leaving the State at a troublesome rate. I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy which will permit an employer to discharge an unwanted employee, one who could be completely disruptive of labor management relations . . . only at the risk of being sued in tort not only for compensatory damages, but also for punitive damages.¹¹³

Such concerns should be particularly weighty in developing states, such as Alaska, whose long term economic prosperity hinge on economic diversification.¹¹⁴

IV. THE STATE OF AT-WILL EMPLOYMENT IN ALASKA

Alaska's recognition of the American rule can be traced back to the Alaska Supreme Court's decision in *Long v. Newby*.¹¹⁵ While the court did not explicitly pronounce its acceptance of the doctrine, Justice Erwin declared that "[t]he circumstances in the case . . . demonstrate[d] a contract terminable at will."¹¹⁶ Thus, where the duration of employment is indeterminate, the court implied that the American rule is to govern.¹¹⁷ Since the *Newby* decision, the at-will doctrine has been gradually modified by both the Alaska Legislature and the courts. For the most part, these piecemeal modifications have kept pace with the national trend toward greater employee protection from abusive discharge or, put differently, toward a greater limitation of employer discretion over at-will employees. Although the legislative efforts have been measured and relatively scant, the Alaska courts have been more forceful. The Alaska Supreme Court has shown little hesitation in limiting the at-will doctrine through both the implied

112. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 136-45, 421 N.E.2d 876, 881-86 (1981) (Ryan, J., dissenting).

113. *Id.* at 143, 421 N.E.2d at 885 (Ryan, J., dissenting).

114. See Note, *Employment at Will: An Analysis and Critique of the Judicial Role*, *supra* note 69, at 805.

115. 488 P.2d 719 (Alaska 1971).

116. *Id.* at 724.

117. Crook, *supra* note 12, at 34.

contract¹¹⁸ and implied covenant of good faith and fair dealing theories.¹¹⁹ Notably, however, the court's efforts to protect at-will employees have stayed within the boundaries of contract law. While a majority of states continue to broaden the scope of wrongful discharge suits to include tort claims, Alaska has so far refrained from making this leap.¹²⁰

A. Legislative Action

While most of the legislative protection enjoyed by employees in Alaska is in the form of federal statutes,¹²¹ the state legislature has also taken some modest steps toward discouraging wrongful discharge.¹²² The Alaska Human Rights Law¹²³ prohibits discharges on the basis of race, religion, sex, national origin or other typical discriminatory motivations.¹²⁴ Retaliatory discharge of employees who assist in enforcing the Act is also prohibited.¹²⁵ Similarly, the Alaska Wage and Hour Act¹²⁶ prohibits the discharge of an employee who "has filed a complaint, or has instituted or caused to be instituted any proceeding . . . or has testified or is about to testify in . . . a proceeding" concerning the employer's violation of the Act.¹²⁷ Recent legislation prohibits the discharge of employees who answer a call to jury service.¹²⁸ Other legislative modifications of the at-will doctrine include enactments which protect employees who refuse to submit to a lie detector test,¹²⁹ and whose income has been subjected to an assignment order for child support.¹³⁰

118. See *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983). For a general discussion, see *supra* notes 38-46 and accompanying text.

119. See *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983). See also *supra* notes 48-69 and accompanying text.

120. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150 (Alaska 1988) (holding that breach of the covenant of good faith and fair dealing which is implied in all at-will contracts, does not constitute a tort).

121. See *supra* notes 31-34 and accompanying text.

122. See generally *Crook*, *supra* note 12, at 35.

123. ALASKA STAT. §§ 18.80.010-300 (1986).

124. ALASKA STAT. § 18.80.220(1) (1986). The Human Rights Law, however, does allow discharges for age, disability, pregnancy or other personal characteristics which reasonably impair job performance.

125. ALASKA STAT. § 18.80.220(4) (1986).

126. ALASKA STAT. §§ 23.10.050-150 (1984).

127. ALASKA STAT. § 23.10.135 (1984).

128. ALASKA STAT. § 09.20.037 (Supp. 1988).

129. ALASKA STAT. § 23.10.037 (1984).

130. ALASKA STAT. § 09.65.132(f) (1983).

Despite these statutory protections, the Alaska Legislature has stopped short of addressing many typical motivations for abusive discharge.¹³¹ At-will employees who are discharged for filing workers' compensation claims remain unprotected by any particular legislative effort. Similarly, Alaska has not enacted any laws that prohibit employers from influencing the political activities or opinions of employees,¹³² or that protect employees who "blow the whistle" on illegal employer conduct of any type.¹³³

B. Implied Contract

Alaska courts have been more forceful than the legislature in limiting an employer's discretion to discharge at will. In particular, the Alaska Supreme Court has shown a willingness to scrutinize the employment relationship for implied assurances of job security and to give such assurances contractual force.¹³⁴ For example, in *Eales v. Tanana Valley Medical-Surgical Group, Inc.*,¹³⁵ the court used the implied contract approach to find that an employee who had been promised a job until retirement could not be fired without cause after only six years. Dismissing the traditional notion that added consideration is necessary to support a promise for permanent employment,¹³⁶ the court reasoned:

Evidence was presented that it was represented to Eales that so long as he was properly performing his duties he would not be discharged. This representation may be found to be part of Eales' employment contract, even if the employment contract was for an indefinite period of time If so, the Clinic would be precluded from discharging Eales except for cause.¹³⁷

131. See Crook, *supra* note 12, at 35.

132. See, e.g., CAL. LABOR CODE §§ 1101-1102 (West 1971).

133. See, e.g., CAL. LABOR CODE § 1102.5(b) (West Supp. 1989); CONN. GEN. STAT. ANN. § 31-51m(b) (Supp. 1989). For a list of other such state laws, see Lab. L. Rep. (CCH) ¶¶ 43,035-43,055.

134. See discussion *supra* notes 38-46 and accompanying text.

135. 663 P.2d 958 (Alaska 1983).

136. The court relied heavily on Professor Corbin's treatise:

[I]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him "at will" after the employee has begun or rendered some of the requested service or has given any other consideration (or has acted in reliance on the promise in such a manner as to make applicable the rule in Restatement, Contracts, § 90).

Id. at 960 (quoting A. CORBIN, CONTRACTS § 152 at 14 (1963)). Eales claimed that he would not have given up his old job had it not been for the Clinic's assurances of job security. The court implied that even if consideration were necessary, this reliance by Eales would suffice to disengage the normal at-will rule. *Id.* at 959.

137. *Id.* at 959 (citing Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980)).

Ultimately, therefore, the court allowed the employer's oral assurances of job security to modify what was in all other respects an at-will relationship.¹³⁸

The court has applied the same implied contract analysis to cases in which the employer's "promises" of security were written rather than oral. In *Rutledge v. Alyeska Pipeline Service Co.*,¹³⁹ the plaintiff was discharged for fighting on company premises. Although the plaintiff was an at-will employee, he alleged that he could be discharged only for good cause since this "promise" had been made to every employee in the company handbook. While the court ruled that fighting does constitute just cause for discharge, it nevertheless agreed with the proposition that at-will employment may be modified by employer promises. The court noted: "[The] handbook is important because, while courts have held that there is not a uniform right to just cause for termination, . . . it is well recognized that where employers indicate that termination will only occur for cause, they must comply or be liable for damages."¹⁴⁰

C. Implied Covenant of Good Faith and Fair Dealing

The Alaska Supreme Court has also relied on the implied covenant of good faith and fair dealing to blunt employer discretion and soften the effects of the at-will doctrine. The leading case on the implied covenant theory is *Mitford v. de Lasala*.¹⁴¹ Mitford was employed as the treasurer of two corporations owned or controlled by the de Lasala family. At the time of his hiring, Mitford received a letter confirming the terms of his employment. The letter provided that Mitford was to be employed "at a remuneration in lieu of a fixed salary based on 10% of profits . . . but with a minimum guaranteed drawing allowance of U.S.\$850.[00]-per month."¹⁴² The letter further declared: "The period of your employment is for an indefinite period subject to determination by either side giving three months notice."¹⁴³ Fifteen years later, Mitford was discharged after claiming he was entitled to collect on the 10% profit-sharing arrangement.

138. The court has recently noted, however, that such assurances must include some unambiguous, specific mention of employment duration before an implied contract will be found. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1131 (Alaska 1989).

139. 727 P.2d 1050 (Alaska 1986).

140. *Id.* at 1056 (citing *Gram v. Liberty Mutual Ins.*, 384 Mass. 659, 429 N.E.2d 21 (1981); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980)).

141. 666 P.2d 1000 (Alaska 1983).

142. *Id.* at 1002.

143. *Id.*

In his suit against Ernest de Lasala and a host of corporations,¹⁴⁴ Mitford alleged that his discharge was motivated by a desire to keep him from collecting his share of the profits earned during his employment.¹⁴⁵ After integrating the de Lasala letter into the employment contract, Justice Matthews addressed the question of whether an implied covenant of good faith and fair dealing may be enforced in an employment context. Looking to Massachusetts for guidance, the court reviewed in detail the reasoning of *Fortune v. National Cash Register Co.*¹⁴⁶ and its progeny.¹⁴⁷ Persuaded by the reasoning of these cases, the court held that Mitford's contract contained an implied covenant of good faith and fair dealing.¹⁴⁸ The court ruled that the covenant prohibited "firing Mitford for the purpose of preventing him from sharing in future profits."¹⁴⁹ While the *Mitford* court did not explicitly apply its reasoning beyond the immediate facts of the case, the court has subsequently interpreted the decision to extend the implied covenant of good faith and fair dealing to all at-will employment contracts.¹⁵⁰

In a recent decision on the issue, the court has expanded the implied covenant theory to encompass discharges that breach public policy. *Luedtke v. Nabors Alaska Drilling, Inc.*¹⁵¹ involved the discharge

144. Mitford's suit named twenty-three defendants including Robert de Lasala's son, Ernest, who had succeeded to his father's corporate throne, and twenty-two corporations. The original complaint named only three corporations (Australaska, Cosmopolitan and Alaska Enterprises) as defendants alleging breach of contract and entitlement to 10% of the corporate profits as agreed. The complaint was amended to add eighteen affiliated corporations alleged to be part of the profit-making chain. *Id.* at 1003.

145. *Id.*

146. 373 Mass. 96, 364 N.E.2d 1251 (1977). See *supra* note 52 and accompanying text.

147. *Maddaloni v. Western Mass. Bus Lines*, 386 Mass. 877, 438 N.E.2d 351 (1982) (holding that a discharge to avoid payment of commissions is a discharge in bad faith and constitutes a breach of contract).

148. Notably, the court also relied on the Restatement (Second) of Contracts which provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance or its enforcement." *Mitford*, 666 P.2d at 1006 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)). Another source of support came from the court's earlier decision in *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979), in which it ruled that "in every contract, including contracts of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Mitford*, 666 P.2d at 1006 (emphasis added, footnote omitted) (citing *Guin*, 591 P.2d at 1291).

149. *Mitford*, 666 P.2d at 1007. The court, however, remanded the case to allow the defendants an opportunity to offer evidence to rebut the presumption of bad faith created by the facts. *Id.*

150. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1153 (Alaska 1988).

151. 768 P.2d 1123 (Alaska 1989).

of two at-will employees who refused to submit to company drug tests. The plaintiffs alleged that the drug tests violated employee rights to privacy and that, consequently, the discharges breached the implied covenant of good faith and fair dealing. Writing for the majority, Justice Compton declared that the state public policy protects an employee's right to privacy:

Thus, the citizens' right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska. The constitution protects against governmental intrusion, statutes protect against employer intrusion, and the common law protects against intrusions by other private persons. As a result, there is sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude.¹⁵²

The court ultimately determined that the public policy favoring privacy is outweighed by the countervailing policy supporting worker health and safety.¹⁵³ The court concluded that the drug tests were permissible as long as they were "conducted at a time reasonably contemporaneous with the employee's work time"¹⁵⁴ and the employee received sufficient notice of the drug testing policy.¹⁵⁵ Significantly, however, the court made a point of noting that discharges against public policy may constitute a breach of the implied covenant of good faith and fair dealing.¹⁵⁶ Moreover, the court endorsed the Illinois Supreme Court's definition of public policy as "what is right and just and . . . affects the citizens of the State collectively."¹⁵⁷ Thus, the *Luedtke* opinion suggests a construction of the implied covenant which, though sounding in contract, is as broad as the general public policy exception.

D. The Public Policy Tort: *Walt* and *Akers*

Alaska court decisions prior to 1988 have nurtured an interesting tension in wrongful discharge law. The court has shown a willingness to modify an entrenched employment doctrine with relatively new contract theories in cases such as *Eales*¹⁵⁸ and *Mitford*.¹⁵⁹ The court

152. *Id.* at 1133.

153. *Id.* at 1136.

154. *Id.*

155. *Id.* at 1137.

156. *Id.*

157. *Id.* at 1132 (citing *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (Alaska 1983)). See *supra* notes 96-99 and accompanying text.

158. 663 P.2d 958 (Alaska 1983). See *supra* note 135 and accompanying text.

159. 666 P.2d 1000 (Alaska 1983). See *supra* note 141 and accompanying text.

has not hesitated to look for unilateral contracts and implied covenants to provide added security against abusive discharge. Nevertheless, the court appears wary of moving beyond contract law and tapping into more expansive tort theories of recovery.¹⁶⁰ While other jurisdictions are allowing recoveries in tort for discharges contrary to public policy,¹⁶¹ the Alaska Supreme Court has yet to squarely confront the issue. The recent decisions of *Walt v. State*¹⁶² and *ARCO Alaska, Inc. v. Akers*¹⁶³ underscore this preference for contract theories of wrongful discharge. *Walt* and *Akers* highlight the question which has yet to be answered: Should Alaska adopt the public policy tort exception to at-will employment?¹⁶⁴

1. *Walt v. State*.¹⁶⁵ Ron Walt was employed by the state as a development specialist for the Department of Commerce and Economic Development ("DCED"). Walt was not an at-will employee. His employment was governed by a collective bargaining agreement negotiated on his behalf by the Alaska Public Employees Association ("APEA"). Part of Walt's job was to make public presentations on various economic development projects. In 1984, Walt attended a public conference on the development of a large-scale mining project in Kotzebue known as the Red Dog Mine. When asked how likely it was that the mine would succeed, Walt was skeptical and cautionary. He advised the business community "not to base their personal or economic decisions on the existence of the Red Dog Mine."¹⁶⁶ Walt's remarks were printed in a local paper which was eventually brought to the attention of the DCED Commissioner. After a short meeting at

160. See *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 793 (Alaska 1986) (no cause of action for tortious interference with employment contract); *State v. Haley*, 687 P.2d 305 (Alaska 1984) (unconstitutional discharge by state gives rise to an action in contract); *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983) (choosing to make good faith and fair dealing an implied obligation sounding in contract).

161. See *supra* note 70.

162. 751 P.2d 1345 (Alaska 1988).

163. 753 P.2d 1150 (Alaska 1988).

164. The court mentioned the public policy doctrine only once before *Walt* and *Akers*. In *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788 (Alaska 1986), the plaintiff alleged that he had been wrongfully discharged for reporting drug and alcohol abuse by coemployees. The complaint included a claim that the discharge was contrary to public policy. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. On appeal, the Alaska Supreme Court acknowledged that the public policy theory has been adopted in many states but refused to consider applying it to the case at hand because a full record was not available. *Id.* at 792. Nevertheless, the court reversed dismissal, asserting that a complaint which states a novel theory does not automatically disqualify the suit. *Id.* Like *Akers*, the *Knight* case introduced, but left undecided, the public policy question.

165. 751 P.2d 1345 (Alaska 1988).

166. *Walt*, 751 P.2d at 1346.

which Walt was questioned about the incident and his knowledge of the mining operations, Walt was discharged. The Commissioner claimed that Walt's comments had "damaged the State's position on the project" and were made "without proper knowledge of the project or authorization to provide such information."¹⁶⁷

After filing a grievance with the APEA, Walt was reinstated with back pay by order of the Department of Administration which also required that an official letter of reprimand be placed in Walt's personnel file. Walt sought to reverse the reprimand decision through arbitration but the arbitrator upheld the order. In 1986, Walt's position was eliminated by the state legislature for budgetary reasons.

Having exhausted the grievance procedure, Walt filed suit against the state, alleging, among other claims:¹⁶⁸ (1) negligent failure to investigate the reasons for his dismissal; (2) tortious violation of state statutory and personnel rules governing public employee discharges;¹⁶⁹ and (3) wrongful discharge for reasons contrary to general public policy. Walt further claimed that the state's conduct entitled him to recover damages for negligent and intentional infliction of emotional distress as well as punitive damages.¹⁷⁰ The superior court agreed with the state's argument that "Walt's employment rights [were] protected by a collective bargaining agreement between the state and [the] APEA . . . [Therefore] Walt's causes of actions based on tort and contract claims [were] barred."¹⁷¹

The Alaska Supreme Court found that the state had waived its right to have Walt's tort claims arbitrated and therefore concluded that the grievance procedure was not an exclusive remedy or an automatic bar to Walt's claims. Despite this holding, however, the court struck down all of Walt's tort claims as unfounded. First, addressing itself to the claim that the state had negligently failed to investigate the grounds of Walt's discharge, the court denied that any such common law tort exists and reaffirmed an earlier holding that "the state does not owe its citizens a duty of care" in these matters.¹⁷² More pointedly, the court concluded that this particular claim was a vain attempt by Walt to change a breach of contract into a common law tort. Refusing to broaden the wrongful discharge recovery basis, the court stated: "To the extent that Walt has attempted to allege a tort based

167. *Id.*

168. Walt's other claims consisted of allegations that his rights to free speech and substantive due process had been denied in violation of the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1989). 751 P.2d at 1347.

169. ALASKA STAT. § 39.25.160(f) (1987).

170. *Walt*, 751 P.2d at 1347. *See also id.* at 1354.

171. *Id.* at 1350.

172. *Id.* at 1351 (quoting *Stevens v. State*, 746 P.2d 908, 912 n.5 (Alaska 1987)).

on a bad faith, unfair discharge we similarly conclude that such allegations give rise to a breach of contract action but not to a common law tort action."¹⁷³

Second, the court addressed the claim that the state was liable in tort for violating a statute¹⁷⁴ which required all official action affecting public employment to be based on merit. The court denied the claim by holding that the statute in question had been superseded by the Public Employment Relations Act¹⁷⁵ and the collective bargaining agreement, which together imposed a just cause standard on employee discipline.¹⁷⁶ Importantly, however, the court noted that even if the statute was applicable to Walt's case, the legislature had not manifested any intent to create a separate cause of action in tort whenever the statute is violated.

Finally, the court addressed Walt's claim that he had been discharged for reasons contrary to public policy.¹⁷⁷ In denying this final tort claim, the court reviewed several decisions by other jurisdictions¹⁷⁸ and the United States Supreme Court¹⁷⁹ which have held that implied tort actions based on violations of public policy are precluded where a comprehensive remedial scheme is already safeguarding public employee rights.¹⁸⁰ Agreeing with the reasoning of these opinions, the court found that Walt was well protected by the collective bargaining agreement, the Public Employment Relations Act and the Alaska

173. *Id.*

174. ALASKA STAT. § 39.25.160(f) (1987) (providing that "action affecting the employment status of employee classified service including appointment, promotion, demotion, suspension, or removal, may not be taken or withheld for a reason not related to merit").

175. ALASKA STAT. §§ 23.40.070-.260 (1984).

176. *Walt*, 751 P.2d at 1351.

177. Walt alleged that he was discharged for candidly informing the public about the Red Dog Mine. Walt claimed that he had a duty to provide "accurate and sound advice to small business" and that a discharge for fulfilling that duty violated public policy. *Id.* at 1352 n.14.

178. *Cox v. United Technologies, Essex Group, Inc.*, 240 Kan. 95, 727 P.2d 456 (1986); *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36 (Super. Ct. 1986), *appeal denied*, 514 Pa. 618, 521 A.2d 933 (1987).

179. *Bush v. Lucas*, 462 U.S. 367 (1983).

180. Significantly, the court also relied on a Massachusetts decision, *Melley v. Gillette Corp.*, 19 Mass. App. 511, 475 N.E.2d 1227 (App. Ct. 1985), *aff'd*, 397 Mass. 1004, 491 N.E.2d 252 (1986), which refused to imply a tort claim for age discrimination in a private, at-will context. The Massachusetts court ruled that tort claims based on public policy violations cannot coexist with a comprehensive remedial statute. In Massachusetts, the public policy against discrimination is protected by a legislative scheme which provides for administrative remedies by the Massachusetts Commission Against Discrimination. *Id.* at 512, 475 N.E.2d at 1228.

State Personnel Act, and therefore concluded that, in the factual context of *Walt*, "it would be inappropriate to imply or recognize an intentional tort . . . based on a violation of public policy."¹⁸¹ Because none of *Walt's* tort claims survived, the court denied recovery of damages for emotional distress¹⁸² and punitive damages.¹⁸³

Although the *Walt* case specifically addressed public sector employment, the court's opinion holds several possible implications for private employment at will. First, the court makes it clear that, by itself, a suit brought for wrongful discharge sounds in contract rather than tort. Moreover, the court shows that attempts to disguise breach of contract actions as tort claims are destined to fail. Second, the opinion reveals that even where a discharge violates a particular statute, the court will not allow a tort cause of action on that basis alone unless the legislature has specifically provided for such additional remedies. Finally, in holding that comprehensive remedial schemes preclude public policy tort actions, the court intimates that where the employee has adequate protection through other means, creating additional tort remedies is unnecessary. The specific holding in *Walt* is thus drawn from two more general judicial leanings: (1) a basic preference for contract solutions in wrongful discharge suits and (2) a reticence to make far-reaching tort theories and large awards available to discharged employees who would not otherwise be able to recover.

2. *ARCO Alaska, Inc. v. Akers*. One month after the Alaska Supreme Court issued its opinion in *Walt*, *ARCO Alaska, Inc. v. Akers*¹⁸⁴ was decided. Unlike *Walt*, *Akers* directly concerned the rights of an at-will employee. For almost seven years Paul Akers worked at Prudhoe Bay as a mechanical technician for ARCO. Over the course of his employment, Akers's performance was questioned on several occasions by ARCO management. At one point, Akers was called into a counseling session by his supervisors and was told to improve his attitude, which the supervisor described as obstinate and uncooperative. Two years later, Akers filed an application for permanent assignment as a vibration technician. His supervisor denied the application because of Akers's uncooperative behavior and inability to work productively with fellow employees. Later, the supervisor told Akers that he was required to attend several employee communication meetings. When Akers missed one of these meetings, the supervisor

181. *Walt*, 751 P.2d at 1353.

182. *Walt* alleged that as a result of his discharge, his entire family suffered extreme emotional distress for which compensation was owed. *Id.* at 1350.

183. *Id.* at 1354.

184. 753 P.2d 1150 (Alaska 1988).

placed an official letter of reprimand in Akers's personnel file.¹⁸⁵ On another occasion, Akers directly disobeyed an order given by the lead technician at a central compressor plant. As a result of these and similar incidents, Akers was discharged for uncooperative behavior and an inability to get along with co-workers.¹⁸⁶ When Akers applied for unemployment compensation, ARCO sent a letter to the Department of Labor characterizing Akers's discharge as "insubordination in willful disregard of the employer's interest."¹⁸⁷ Although discharges of this nature normally preclude the collection of unemployment compensation, Akers was nevertheless given the benefits.

Akers brought suit against ARCO, alleging breach of contract and improper opposition to his application for unemployment compensation.¹⁸⁸ The trial court directed a verdict in ARCO's favor on the improper opposition claim. On the surviving claims, however, the jury found that ARCO had breached an implied covenant of good faith and fair dealing and awarded Akers more than \$175,000 in compensatory and punitive damages.¹⁸⁹

In addressing the issues, the Alaska Supreme Court began by stating that "[t]he purpose of awarding contract damages is to compensate the injured party . . . [not] to punish the party in breach."¹⁹⁰ In so doing, the court reaffirmed an earlier holding¹⁹¹ that punitive damages may not be recovered in a breach of contract action unless the breaching conduct rises to the level of an independent tort.

Having reestablished this principle, the court turned to the main issue of whether the breach of an implied covenant of good faith and fair dealing constitutes a tort which can support a claim for punitive damages. The court's first concern was the possibility that the discharge had violated some public policy. Along these lines, the court considered the trial court's conclusion that the "bad faith breach of employment contracts should . . . be deemed violative of state public

185. Akers objected to this action on the grounds that (1) he missed the meeting because the medication he was taking for an injury made him pass out; (2) other employees who had missed meetings were not reprimanded; and (3) the employee handbook stated that a counseling session must be held before any disciplinary action. *Id.* at 1151.

186. *Id.* at 1152.

187. *Id.*

188. Akers also named as defendants two of his former supervisors and the employee relations director, all of whom allegedly interfered with Akers's contractual relationship with ARCO. This claim did not survive a directed verdict. *Id.* at 1152-53.

189. Compensatory damages totalled \$51,390, and punitive damages totalled \$125,000. *Id.* at 1153.

190. *Id.* (quoting *Wein Air Alaska v. Bubbel*, 723 P.2d 627, 631 (Alaska 1986) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 355, comment a (1981))).

191. *Wein Air Alaska v. Bubbel*, 723 P.2d 627 (Alaska 1986).

policy.”¹⁹² In a footnote, the court rejected this contention outright, declaring that under such a theory “any breach of the covenant of good faith and fair dealing would . . . [become a tort] under the public policy exception.”¹⁹³ The court refused, therefore, to hold that a bad faith discharge automatically gave rise to a public policy tort claim.

The court also examined the general theory recognized in other jurisdictions that where the discharge of at-will employees violates fundamental principles of public policy, employers may be held liable in tort.¹⁹⁴ In summarizing this case law, the court identified four typical discharge situations resulting in tort liability: (1) discharges for refusing to participate in a price-fixing scheme; (2) discharges for union activities; (3) discharges for serving on a jury; and (4) discharges for filing workers’ compensation claims.¹⁹⁵ Having recognized these narrow applications, however, the court expressly declined to accept or reject the public policy exception.¹⁹⁶ Akers, the court reasoned, “does not allege that his termination violated an *explicit* public policy. Instead, Akers claims that . . . the mere violation of the covenant constitutes a tort which will support punitive damages.”¹⁹⁷

Leaving the public policy issue completely undecided, the court proceeded to consider whether there were any other circumstances under which a breach of the implied covenant may result in tort liability. The court reaffirmed that absent the commission of a “traditionally recognized tort,”¹⁹⁸ only contract damages may be awarded in wrongful discharge suits. It ultimately concluded that “[m]ere breach of the implied covenant of good faith and fair dealing . . . does not constitute [such] a [traditionally recognized] tort,”¹⁹⁹ and therefore reversed the award of punitive damages to Akers.²⁰⁰

192. *Akers*, 753 P.2d at 1153 n.1.

193. *Id.*

194. *See supra* note 70 and accompanying text.

195. 753 P.2d at 1153.

196. *Id.*

197. *Id.* (emphasis added). It is likely that Akers’s complaint was a tailored interpretation of an earlier decision by the court which hinted that an employer’s respect for public policy was part of the good faith requirement. In *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788 (Alaska 1986), the court stated in dicta that “it seems that the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing.” *Id.* at 792. Dismissing Akers’s public policy claim on the grounds that it was based on the “mere violation of the covenant” indicates that the court is actually more wary of the public policy concept than a casual reading of *Knight* might suggest. *Akers*, 753 P.2d at 1153.

198. *Id.* at 1154.

199. *Id.*

200. *Id.* The compensatory damage award was affirmed. *Id.* at 1158.

As in *Walt v. State*,²⁰¹ the court's opinion in *Akers* highlights a preference to analyze wrongful discharge suits under contract principles. Indeed, *Akers* goes a step further than *Walt* by restricting the role of tort law in wrongful discharge cases to the commission of "traditional" independent torts. Both opinions betray a sensitivity to the possibility of frivolous lawsuits and call for caution in any future expansion of wrongful discharge recovery. In keeping with this apprehension, the court has remained equivocal about recognizing a public policy exception to at-will employment.

V. THREE ALTERNATIVE PROPOSALS

Together, *Walt* and *Akers* have ushered Alaska jurisprudence to the brink of two important, interrelated and, as yet, unanswered questions. First, there is the fundamental quandary of whether the court should countenance a public policy exception to at-will employment. Second, if the public policy exception is adopted, what limitations, if any, will the court impose to restrict its reach? Ultimately, the resolution of these issues will turn on several well-founded concerns about the efficacy of expanding the nature and scope of wrongful discharge liability.²⁰²

One such concern is the significant increase in litigation that inevitably accompanies the broadening of recovery theories.²⁰³ Since a substantial percentage of these new claims are likely to be opportunistic, questions are raised about the efficient use of judicial resources and the integrity of the judicial system generally.

A second concern is the effect that expanded liability may have on legitimate employer discretion in the workplace. To the extent that increased litigation and large recoveries inhibit the full exercise of employer rights,²⁰⁴ the public policy exception may not be worth the added employee protection it offers.

Finally, the public policy exception raises issues affecting state economic growth. Like other faltering oil-based economies, Alaska's long-term prosperity hinges on industrial diversification, which, in turn, depends partly upon the influx of new business. Insofar as greater liability inhibits employer discretion and increases labor costs, recognizing a broad public policy exception may work to slow the diversification process.

201. 751 P.2d 1345 (Alaska 1988).

202. See discussion *supra* notes 102-14 and accompanying text.

203. Blades, *supra* note 21, at 1428; Mallor, *supra* note 11, at 461; Note, *supra* note 11, at 229; Note, *Pierce v. Ortho Pharmaceutical Corp.*, *supra* note 103, at 1197.

204. See Blades, *supra* note 21, at 1428; Mallor, *supra* note 11, at 461; Note, *supra* note 11, at 229; Note, *Pierce v. Ortho Pharmaceutical Corp.*, *supra* note 103, at 1197.

These and similar concerns suggest that an expansion of employer liability for wrongful discharge will exact a price. Indeed, the infusion of tort remedies into the employment relationship is laden with unseen costs. These costs are paid by the employer, the industrial economy, the judicial system and, at least indirectly, the employees themselves.²⁰⁵ Thus, any modifications to the at-will doctrine along public policy lines should be made with hesitation and only when absolutely necessary to protect employee rights from abuse. The following alternative proposals are offered as illustrations to suggest that protecting employee rights in Alaska does not require a complete undermining of the American rule. Collectively, the proposals counsel against the adoption of a general, judicially created public policy exception to at-will employment.

A. No Public Policy Exception

The most unencumbered resolution of the issue is simply to refuse to recognize any public policy exception at all. Seven states have declined to give wrongful discharge claimants the right to recover on public policy grounds.²⁰⁶ The collective rationale for such a position is threefold. First, the courts in these states have expressed concerns that opening up the employment relationship to public policy claims would entail unacceptable judicial legislation. They have decided that the character of private employment is enough of a public concern that legislatures rather than courts should be responsible for altering traditional legal relationships between employer and employee.²⁰⁷ In determining general public policy claims, many of these courts have quoted at length the observations of the New York Court of Appeals in *Murphy v. American Home Products Corp.*:²⁰⁸

In addition to the fundamental question whether such [public policy] liability should be recognized . . . , of no less practical importance is the definition of its configuration if it is to be recognized.

Both of these aspects of the issue, involving perception and declaration of relevant public policy . . . are best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and

205. See Epstein, *supra* note 22, at 972-73; Gould, *supra* note 65, at 412-13; Note, *supra* note 38, at 388.

206. See *supra* note 70.

207. *Contra* Springer v. Weeks and Leo Co., 429 N.W.2d 558, 561 (Iowa 1988) ("The issue is, we believe, a generic one more nearly related to the common law tort which has been recognized for improper interference with existing business relationships than with any single substantive topic with which the legislature might deal.").

208. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). In *Murphy*, the plaintiff alleged that he had been discharged for disclosing to company officials his suspicions of corruption in the accounting department. The court refused to recognize a general cause of action for retaliatory discharge based on public policy.

procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected . . . and to investigate and anticipate the impact of imposition of such liability. If the rule of nonavailability for termination of at will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.²⁰⁹

A second reason these states have refused to adopt the public policy exception is that the very notion of "public policy" is so vague and omnipresent that it evades any attempts at standardization. Without the development of reasoned standards of conduct, courts find it difficult to connect their decisions logically, and consequently, employers find it difficult to anticipate exactly what they can and cannot do. The standard that the Illinois Supreme Court arrived at in *Palmateer v. International Harvester Co.*²¹⁰ is a good example. There, public policy was defined as that which is "right and just" and which "affects citizens of the State collectively."²¹¹ This standard does not provide the employer in *Palmateer*, or any other Illinois employer, with a useful guide for measuring the point at which legal and protected conduct turns tortious.

The third rationale for rejecting the public policy exception is that for all of the problems it introduces into the law and workplace, the added protection it offers employees is unnecessary. This is not to say that wrongful discharges do not occur, or that the employee will always secure adequate recovery. The point is that there are other, more bridled legal theories which, when combined, offer the at-will employee a reasonable degree of protection against abusive discharge.²¹² In Alaska, at-will employees may secure a wrongful discharge recovery by one of three different routes. Either individually or in combination with one another, these recovery routes are capable of servicing the entire landscape of wrongful discharge fact patterns.

209. *Id.* at 301, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235-36. See also *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1329-30 (Fla. Dist. Ct. App. 1985) (relying on the rationale in *Murphy* to deny causes of action in Florida for retaliatory discharge based on public policy).

210. 85 Ill. 2d 124, 421 N.E.2d 876 (1981). See *supra* note 96 and accompanying text.

211. *Id.* at 130, 421 N.E.2d at 878.

212. The California Supreme Court has recently agreed. In declining to allow recovery of tort damages for breach of the implied covenant of good faith and fair dealing, Justice Lucas proclaimed: "We believe that focus on available contract remedies offers the most appropriate method of expanding available relief for wrongful terminations. The expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 699, 765 P.2d 373, 401, 254 Cal. Rptr. 211, 239 (1988).

The first route is legislative. The United States Congress and the Alaska Legislature have enacted laws which categorically prohibit an employer from discharging an employee in certain situations or for certain motivations.²¹³ Where the employer has violated one of these laws, the employee is entitled to a remedy. Second, the employee may recover on an implied contract theory.²¹⁴ This theory adequately protects recovery rights wherever the discharge is contrary to express or implied assurances of job security.²¹⁵ Third, the Alaska employee may also recover if the discharge has breached the implied covenant of good faith and fair dealing²¹⁶ said to exist in every Alaska employment contract.²¹⁷ This theory by itself is broad enough to allow recovery for any discharge which a jury finds was "unfair" or in "bad faith." The connotative breadth of these key terms and the flexibility of the implied covenant theory provide ample protection of an employee's recovery rights in a wide range of discharges, including those which violate public policy.²¹⁸

Together, these three recovery routes sufficiently service most wrongful discharge scenarios, including those typically held out to justify the adoption of the public policy theory. Proponents of the theory claim that public policy should provide a basis for recovery since such pressure to violate the law is clearly harmful to society and unfair to the employee. While this may be true, the public policy doctrine is not necessary to ensure recovery. A discharge based on refusal to break the law is inconsistent with the implied covenant of good faith and fair dealing and damages could easily be awarded on such grounds.²¹⁹

213. See *supra* notes 122-30 and accompanying text.

214. See *supra* notes 134-40 and accompanying text.

215. See *Rutledge v. Alyeska Pipeline Service Co.*, 727 P.2d 1050, 1056 (1986) (recognizing implied contract theory but denying recovery on the facts); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959 (Alaska 1983).

216. See *supra* notes 47-69 and accompanying text.

217. See *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983). See also *supra* note 141 and accompanying text.

218. While the Alaska Supreme Court has yet to recognize a special public policy tort exception to at-will employment, it has acknowledged that discharges in violation of public policy can constitute a breach of the implied covenant of good faith and fair dealing. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989). See *supra* notes 151-57 and accompanying text. In fact, *Luedtke* can be read as an indication of the court's as yet unstated belief that public policy interests can be adequately vindicated through contractual remedies. The court's reliance on the implied covenant is at least a seed of support for the proposition that a separate, tort-based public policy theory is unnecessary. If, however, such an interpretation is erroneous and the court does adopt a separate tort theory, *Luedtke's* expansive definition of public policy will make it difficult to impose any limits at all on the amount of recovery.

219. See, e.g., *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984). The Eighth Circuit Court of Appeals recognized that under Arkansas law "it is an implied term of every contract of employment that neither party be required to do

The rejoinder of the public policy advocates is that the best recovery competing theories can secure in any case will be some variation of contract damages. Claims argued on the basis of public policy, however, allow the discharged employee to tap into the enormous reservoir of tort liability.²²⁰ Moreover, since it is well settled that the purpose of contract damages is to compensate rather than punish,²²¹ the public policy theory is touted as the employee's only access to punitive damages.

While it is true that the Alaska Supreme Court has grounded all breach of implied covenant claims in contract,²²² the tortious nature of the public policy theory does not justify its adoption. At-will employment is fundamentally a contractual relationship created by two consenting parties. The discharge of the employee by the employer puts an end to the contractual relationship. If it is found that the contract was wrongfully terminated, then the injured party may be entitled to damages. The remedy, however, like the relationship, is rooted in contract law. To allow a tort recovery for wrongful discharge is to change the character of the entire employment relationship.²²³ It is still possible that one or both parties engaged in tortious conduct in their dealings with one another. The Alaska Supreme Court has stated that where the employer's conduct rises to the level of a traditional independent tort, the employee may recover tort damages.²²⁴ The public policy theory, therefore, is simply not necessary to compensate the employee who, for example, is shown to have suffered extreme emotional distress as the result of an abusive discharge. Nor is the public policy theory needed to punish the employer in such situations since

what the law forbids." *Id.* In addition to the breach of contract, however, the court also recognized a possible claim in tort for breach of public policy. *Id.* While most jurisdictions allow tort recoveries where the discharge is in response to a refusal to violate the law, *see supra* notes 73-77 and accompanying text, there is room for argument that the discharge is a breach of contract and liability on this ground alone is sufficient. The state may, of course, bring criminal charges if the employer's conduct has risen to that level.

220. *See Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694, 765 P.2d 373, 397, 254 Cal. Rptr. 211, 235 (1988) ("The most frequently cited reason for the move to extend tort remedies in this context is the perception that traditional contract remedies are inadequate to compensate for certain breaches.").

221. *Wein Air Alaska v. Bubbel*, 723 P.2d 627, 631 (Alaska 1986).

222. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1154 (Alaska 1988).

223. *See Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840-41 (Wis. 1983) (stating that contractual remedies are the most appropriate for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee whole). *Cf. Foley*, 47 Cal. 3d at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236 (recognizing that "[t]he employment relationship is fundamentally contractual," and thus denying tort damages for breach of the implied covenant of good faith and fair dealing).

224. *Akers*, 753 P.2d at 1154.

punitive damages would also be available.²²⁵ The law of torts operates in the background of every contractual undertaking. Alaska employment law has not changed this maxim. Where a wrongful discharge involves tortious conduct, the public policy theory is superfluous. Where no torts are involved, the public policy theory is a misguided attempt to sever the employment relationship from its contractual roots.

B. A Limited Public Policy Exception

An alternative approach to the issue is to recognize the public policy exception, but restrict its scope in such a way as to minimize the attendant risks. This method has been adopted by many courts²²⁶ which have found at least some value to the theory as a basis of employer liability, but which are nonetheless wary of distorting the employment relationship and chilling managerial discretion. Once again, the primary motivation of the courts is to refrain from unwarranted judicial legislation on issues which have such a significant effect on private employment transactions.²²⁷ Not surprisingly, therefore, these states restrict employer liability to those situations in which the wrongful discharge has violated a well-defined, legislatively declared public policy. The Wisconsin Supreme Court, for example, has defined the public policy exception very narrowly. In *Brockmeyer v. Dun & Bradstreet*,²²⁸ that court ruled:

The public policy must be evidenced by a constitutional or statutory provision We intend to recognize an existing limited public policy exception Courts should proceed cautiously when making public policy determinations. No employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.²²⁹

If the Alaska Supreme Court recognizes the public policy exception at all, there is good reason to believe that it will do so only in this limited form. In *Walt*,²³⁰ Chief Justice Rabinowitz indicated that the court would not recognize tort claims based on the violation of a statute unless so authorized by the statute itself.²³¹ Similarly, in *Akers*,²³²

225. *Id.*

226. *See, e.g.,* *Adler v. American Standard Corp.*, 291 Md. 31, 36, 432 A.2d 464, 469 (1981); *Glaz v. Ralston Purina Co.*, 24 Mass. App. Ct. 386, 509 N.E.2d 297 (App. Ct. 1987); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (all denying recovery where public policy was not specific enough).

227. *See supra* notes 206-09 and accompanying text.

228. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

229. *Id.* at 567, 335 N.W.2d at 840 (citation omitted).

230. 751 P.2d 1345 (Alaska 1988).

231. The court stated that "[e]ven if [ALASKA STAT. §] 39.25.160(f) were applicable here, the legislature has not evinced an intent to create an additional tort remedy

the court refused to decide the public policy issue because "Akers [did] not allege that his termination violated an explicit public policy."²³³ Since Akers was suing on the much more general proposition that breaching the implied covenant of good faith was contrary to public policy, the court dismissed his claim outright. Relying on a similar New York case, the court reasoned:

The trial court held that "[b]ad faith breach of employment contracts should . . . be deemed violative of state public policy." We believe that this approach is unsound. Under this theory, any breach of the covenant of good faith and fair dealing would come under the public policy exception "Allowing such an argument would shift the court's investigation from one of determining a violation of public policy to one of determining the good faith of an employer's decision. The court will not proceed down such a road."²³⁴

It is thus possible that any public policy exception the court may have in mind will be restricted to explicit legislative pronouncements.²³⁵

The value of limiting the public policy exception is twofold. First, it allows the public policy doctrine to serve a type of legislative enforcement function that is ill suited to other theories. Take, for example, the employer who discharges his employee for refusing to violate the Alaska pollution control laws. Such a discharge certainly

for violation of this statute." 751 P.2d at 1351. Interestingly, the court has not exhibited such restraint where contract theories of wrongful discharge are concerned. In *Luedtke*, 768 P.2d 1123 (Alaska 1989), the court reasoned that a public policy violation could serve as a basis for finding a breach of the implied covenant of good faith and fair dealing. The court did not limit "public policy" to legislative declarations, but instead embraced a very broad definition identical to that adopted by the Illinois Supreme Court in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981). Though only dicta, the language in *Luedtke* seems to suggest that a discharge contrary to any public policy, as proclaimed by either the legislature or the judiciary, may breach the implied covenant of good faith and fair dealing which, in turn, will support an award of contract damages. *Luedtke*, 768 P.2d at 1130.

232. 753 P.2d 1150 (Alaska 1988).

233. *Id.* at 1153.

234. *Id.* at 1153 n.1 (citing *Kovalesky v. A.M.C. Associated Merchandising Corp.*, 551 F. Supp. 544, 548-49 n.6 (S.D.N.Y. 1982)).

235. The court's recent decision in *Luedtke*, however, may make such a limited public policy doctrine unlikely. In that case, the court adopted a very broad definition of public policy which encompassed not only state statutes, but also the state constitution and Alaska judicial decisions. 768 P.2d at 1132-33. Significantly, the *Luedtke* analysis was carefully confined to addressing the role that public policy plays in the employer's *contractual* obligation to deal in good faith. Nevertheless, if a separate, tort-based public policy doctrine is recognized, there is reason to believe that the *Luedtke* definition will continue to apply. If this is, in fact, a foregone conclusion, the crucial question is not the definition of public policy, but whether the court will recognize an action in tort for public policy violations by an employer. See *supra* note 218.

contravenes the implied covenant of good faith and fair dealing. Damages may be awarded on this theory, which presumably will compensate the employee for his loss. Assuming that no independent tort has been committed, the employer will not be liable for punitive damages. Moreover, if no pollution law was in fact violated, criminal prosecution may be unlikely. It may be of some value, therefore, to have a legal theory which imposes added liability to deter future attempts to violate the law. The public policy tort can thus serve the useful function of bridging the liability gap between compensatory damages and criminal sanctions.

The second value to the limited approach is that it confines the scope of the public policy theory to manageable proportions. Courts would not be permitted to find that a discharge has offended some general public interest and then use this finding to augment the employee's recovery. Nor are discharged employees seduced into filing frivolous claims in hopes of cashing in on a broad tort theory.²³⁶ Rather, liability for breaching public policy is triggered only where the employer's conduct violates specific legislation. Limiting the public policy exception not only reduces the likelihood that courts will legislate their own public policy but also keeps contract recoveries from becoming tort windfalls.

C. Legislative Intervention

A third approach to the public policy issue requires legislative shaping of wrongful discharge law in Alaska. The most troubling facet of the public policy theory is that its amorphous nature frustrates employer attempts to predict which discharges are "safe" and which discharges will end up in large tort judgments. Over time, individual cases tend to incrementally loosen judicial standards. In turn, this doctrinal relaxation can gradually transform what constitutes a breach of public policy from a narrow class of discharges to a much broader arena defined by general notions of "public interest." Moreover, even if judicial doctrine does not waver, tort liability will continue to be administered by unpredictable lay juries. Legislative attention to wrongful discharge liability can lessen some of these litigation hazards by (1) increasing the certainty of legal standards, (2) reducing the role of the judicial process and (3) reducing frivolous suits by making access to recovery more difficult.

One legislative approach is simply to enact a statute that confines wrongful discharge liability within reasonable boundaries. A statute that defines what constitutes a discharge in violation of public policy has the virtue of certainty. Employers have some reliable standard by

236. See *supra* note 102.

which to identify where permissible discretion becomes wrongful discharge. Moreover, employees may determine with some certainty whether they have a legitimate cause of action for being discharged contrary to public policy. The increased certainty reduces both the incentive to file tenuous claims and the risk in deciding whether to commit the time and money to litigate. Finally, a combination of all of these factors is likely to reduce wrongful discharge litigation by making the employer's decision to discharge and the employee's decision to sue more informed. To this extent, judicial resources are allocated more efficiently.

The exact wording of such a statute is subject to debate. The Montana Legislature has recently enacted the following:

A discharge is wrongful only if:

- (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
- (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or
- (3) the employer violated the express provisions of its own written personnel policy.²³⁷

The legislature specifically defined public policy as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."²³⁸ Significantly, the Montana Legislature also preempted all common law remedies: "Except as otherwise provided in this part, no claim for discharge may arise from tort or express or implied contract."²³⁹ Thus, the Montana statute represents an attempt to define

237. MONT. CODE ANN. § 39-2-904 (1989). Section 39-2-905 of the Montana Code defines available wrongful discharge remedies as follows:

(1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of [§] 39-2-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, or any other form of damages, except as provided for in subsections (1) and (2).

MONT. CODE ANN. § 39-2-905 (1989).

238. *Id.* § 39-2-903(7).

239. *Id.* § 39-2-913.

the scope of wrongful discharge liability through representative decision-making rather than through a judicial sense of approximate justice.

A legislative definition of wrongful discharge does not necessarily end the problems of judicial treatment. The success of the legislative efforts will depend upon the type of statute enacted. The Virgin Islands, for example, has also attempted to codify the scope of wrongful discharge liability.²⁴⁰ Unlike Montana, the Virgin Islands statute lists nine permissible reasons for discharging an employee and declares all other discharges wrongful unless the employment contract explicitly provides otherwise.²⁴¹ The statute specifically allows "any wrongfully discharged employee . . . [to] bring an action for compensatory and punitive damages . . . against any employer who has violated [the statute]."²⁴² Unfortunately, the Virgin Islands statute curtails judicial discretion without making many improvements; employers are still subject to tremendous liability for a universe of discharges defined only in the negative.²⁴³ Efforts by the Alaska Legislature to define wrongful discharge liability should, like Montana, focus instead on reducing uncertainty in the ranks of management without suffocating at-will employment.

240. V.I. CODE ANN. tit. 24, §§ 76-79 (Supp. 1989).

241. *Id.* § 76. The statute provides as follows:

- (a) Unless modified by contract, an employer may dismiss any employee:
 - (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
 - (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
 - (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
 - (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; . . .
 - (5) who performs his work assignments in a negligent manner;
 - (6) whose continuous absences from his place of employment affect the interests of his employer;
 - (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
 - (8) who is dishonest; or
 - (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

- (c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged.

242. *Id.* § 79.

243. Presumably, for example, an employer could be subject to punitive damages for discharging an upper level employee who was generally competent but less ambitious or creative than originally thought. *See supra* note 109 and accompanying text.

A second legislative approach is to permit arbitration to serve as an alternative forum for the resolution of wrongful discharge disputes.²⁴⁴ This proposition is considerably more controversial than enacting a wrongful discharge statute. The greatest opposition would undoubtedly come from the plaintiff's bar, which would stand to lose a considerable amount of business. Nevertheless, arbitration does offer both the employer and the employee some advantages over the current system.

Arbitration benefits the employee most significantly by providing a forum to hear his or her claim at less cost and risk than is possible with traditional litigation. By reducing these systemic impediments, employees are better able to hold employers accountable for truly abusive discharges. More importantly, arbitration may prevent future wrongful discharges, not by intimidating employers with large recoveries, but by fostering the development and enforcement of reasonable employer policies governing at-will discharges. Professor Gould, the leading proponent of arbitration in the at-will employment context,²⁴⁵ has written:

Under an arbitration system, employee Joe Smith, who is fired by IBM, Kodak, or any other nonunion employer for alleged deficiencies in performance, would have a right to confront his accusers at a hearing. Moreover, unless Smith is alleged to have committed theft or some other egregious misconduct, the company must warn him about his failings and provide him with an opportunity to change his ways. Generally, arbitrators will not uphold managements that accuse an employee of sloppy workmanship, for instance, and then subsequently rely upon other reasons, such as theft or drunkenness on the job when it looks as though the employee will protest and the workmanship argument will be difficult to prove. In essence, arbitration provides the employee a measure of due process.²⁴⁶

Employers are given the benefit of the arbitrator's expertise in labor matters and his reputation for impartiality. The risk that upper level employees will recover simply because the reasons for the discharge are difficult to articulate²⁴⁷ is thus minimized. Moreover, an

244. See generally Gould, *supra* note 65.

245. *Id.*

246. *Id.* at 416. In *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), the California Supreme Court recognized the inadequacies of current trends in wrongful discharge liability and relied extensively on Gould's arguments to keep tort theories of recovery at a distance. The majority noted: "Gould advocates exploring arbitration as an alternative, and his emphasis on the sporadic effectiveness of the tort cause of action to remedy perceived inadequacies in employee protection is important to our consideration of the effectiveness of the [tort] remedy sought here." *Id.* at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

247. See *supra* discussion at note 109 and accompanying text.

arbitrator is also more likely to appreciate economic necessity arguments as justification for a discharge,²⁴⁸ which an employee of long standing claims was unwarranted. Perhaps the penultimate benefit to employers is that arbitration remedies are limited to back pay and reinstatement rather than the extensive relief available under modern tort theories like the public policy exception.²⁴⁹ Arbitration will make it easier for employees to bring claims and, therefore, employers will be called upon to defend more discharge decisions than under the present litigation-based system. Nevertheless, the fact that both the risk and amount of liability are considerably lower may in the long run prove arbitration a preferable alternative.

A final legislative approach is to impose liability for breaches of specific public policy, but deny any private right of action for such breaches. The state, not the discharged employee, could investigate the discharge and make the ultimate decision of whether or not to bring suit. The effect of this approach is to separate the employee's interest in compensation for wrongful discharge from the state's interest in deterring conduct contrary to public policy. Denying a private right of action for breaches of public policy prevents the interest of individual plaintiffs from bastardizing a public policy tort theory into a tool for private recovery.

The idea of denying a private right of action stems from the theoretical underpinnings of the public policy doctrine itself. When an employee is wrongfully discharged, he or she suffers a loss. That loss may have both monetary and non-monetary components for which compensation may be awarded. However, the employee's personal loss is made no greater by the fact that the discharge has also violated some public policy. The harm of public policy violations is that they undermine legal rules enacted for public security. The justification for imposing liability on public policy grounds is to protect the community at large, not to vindicate the recovery rights of a discharged employee. Several courts have explicitly acknowledged this fact.²⁵⁰ In *Tameny v. Atlantic Richfield Co.*,²⁵¹ the California Supreme Court noted:

[A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any

248. Gould, *supra* note 65, at 416.

249. *Id.*

250. *See, e.g.,* Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055 (E.D. Pa. 1977); Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985).

251. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

express or implied "promises set forth in the [employment] contract" . . . but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.²⁵²

In *Foley v. Interactive Data Corp.*,²⁵³ the California Supreme Court reemphasized the focus of the public policy tort:

When such a termination occurs, the nature of the employee's relationship with the employer, whether at will or contractual, is essentially irrelevant. What is vindicated through the [public policy] cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy.²⁵⁴

Preferring state action to private litigation, especially where a public harm is involved, is far from a novel approach. In tort law, for example, it is well settled that certain forms of public nuisance actions may be brought only by the state. While the nuisance may have a harmful effect on individuals, the wrong is inflicted upon the public in general and, accordingly, private remedies are subordinated to state action.²⁵⁵ Similarly, in the field of trusts and estates law, the traditional approach has been to deny standing to an individual beneficiary seeking to enforce a charitable trust. Instead, breaches of charitable trusts are generally actionable only at the discretion of the state attorney general.²⁵⁶ State prosecution of criminal violations provides yet another example. The common thread running through these diverse illustrations is that the responsibility for deciding whether to bring suit has been shifted from the individual claiming to have suffered harm, to the state on behalf of the public interest.

252. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 843 (citations omitted).

253. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

254. *Id.* at 667 n.7, 765 P.2d at 377-78 n.7, 254 Cal. Rptr. 215-16 n.7. The Oregon Supreme Court echoed these sentiments in *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc), stating that the effect of its holding was to create "a right in plaintiff to recover compensatory damages because of the substantial 'societal interests' in having citizens serve on juries." *Id.* at 220, 536 P.2d at 516. The court emphasized that "[i]t is only in those instances where the violation of societal interests is sufficiently great and of a kind that sanctions would tend to prevent, that the use of punitive damages is proper." *Id.*, (citation omitted). See also *Mallor*, *supra* note 11, at 495.

255. Admittedly, the public nuisance analogy has its limitations. Public nuisance law does permit individuals to bring private suits where it can be shown that the private harm is distinguishable either in kind or degree from the public harm. W. PROSSER & W. KEETON, *TORTS* § 90, at 646-52 (5th ed. 1984). An employee wrongfully discharged in a manner contrary to public policy would invariably be able to make such a showing.

256. G. BOGERT, *TRUSTS* § 156 (6th ed. 1987).

Adopting a similar approach for discharges in violation of public policy has several advantages. First, the state serves a natural screening function in investigating and evaluating the merits of each public policy claim. Only those cases which have merit will be pursued, thereby minimizing the costs of frivolous claims on the judicial system. Second, and more important, placing all public policy claims within the purview of state discretion reinforces the distinction between the collective harm of public policy breaches and the private harm of contractual breaches. Such an approach maintains the contractual essence of the employment relationship and thus shapes wrongful discharge recoveries in strict accordance with the harm actually suffered by the plaintiff employee. Third, the fact that the employer has a separate liability to the state, or to the public, regardless of what the employee has personally suffered, holds offending employers accountable. Liability for public policy breaches is thus not constrained by the financial limitations that suits against large corporations often pose for individual litigants.²⁵⁷ Finally, while public rights are vindicated, innocent employers are protected from having to fend off frivolous public policy tort claims every time an at-will employee is discharged. The general advantage of this alternative, therefore, is that it affords ample protection to both the public and to innocent employers without impairing the legitimate recovery rights of the employee.

On a practical level, persuasive arguments can be made that the administrative costs of establishing and maintaining such investigative machinery will simply shift the burden of frivolous claims from the judicial to the executive branch. Moreover, it may be urged that the cost to the public of funding such a system will far outweigh any of the foregoing benefits. While these arguments tend to overestimate the costs of implementing such a system (the infrastructure for which is already in place), they do have merit. Nevertheless, at least on a theoretical level, the idea of functionally distinguishing the remedies for a breach of contract and a violation of public policy underscores a theme of this note. A wrongfully discharged employee has suffered harm because of a breach of contract. For that breach, the employer must be made to pay contract damages which, the law presumes, will make the employee whole. If the public policy exception is recognized, it should at least be acknowledged that the employee is being afforded a windfall for the benefit of the public good. Since such windfalls are likely to entice undeserving plaintiffs and increase litigation costs, it is not fanciful to suggest that the state have some role in screening public policy claims.

257. Professor Gould estimates that bringing a wrongful discharge suit costs the average employee over \$10,000 just to get to trial. Gould, *supra* note 65, at 413.

VI. CONCLUSION

Despite the emerging trend in other jurisdictions to limit the American rule, employment at will in Alaska has remained largely intact. Legislative modifications of the rule, if at times sporadic, have nevertheless been well-reasoned efforts to protect basic employee rights from abuse. The judicial treatment of employment at will has been not only cautious, but also, more importantly, philosophically sound. The Alaska Supreme Court has made clear efforts to respect the contractual nature of the employment relationship. The modifications the court has imposed, the implied contract and the implied covenant of good faith and fair dealing, are rooted in basic contract law and are ultimately designed to enforce contractual expectations. Consistent with this approach, the role of tort law has been confined to liability for the commission of traditional and independent torts. The court will not look favorably upon attempts to translate contractual wrongs into tort recoveries.

Together, the *Walt* and *Akers* cases have introduced the prospect of tort liability for wrongful discharges that violate public policy. To accept the public policy doctrine as a significant limitation on at-will employment would mark an abrupt change in direction for Alaska employment law. While it is possible that the court may permit a very limited exception, it is unlikely that public policy will be allowed to tip the contractual balance between employers and employees.

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