

EMPLOYMENT AT WILL: THE "AMERICAN RULE" AND ITS APPLICATION IN ALASKA

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I. INTRODUCTION

Historically, American courts have adopted a laissez-faire attitude toward employment contracts, favoring a presumption that contracts of indeterminate length are terminable at will. In recent years, however, the courts and legislatures of many states have created exceptions to the American rule, which presumes that an employment contract of unspecified duration is terminable at the will of either party, in order to protect employees from unreasonable actions by employers. Alaska, while it has not explicitly repudiated the at-will doctrine, has taken major strides toward reforming the law of employment contracts.

Several recent cases of the Alaska Supreme Court¹ have examined the American rule of employment relationships. This article examines the American rule and the growing exceptions to the rule, with particular reference to applications and trends in Alaska. Part II contains an overview of the American employment-at-will rule and its historical development. Part III examines the development of exceptions to the rule, with special emphasis on judicial exceptions created during the past ten or fifteen years. Part IV focuses on the application of the rule and its exceptions in Alaska. Finally, Part V concludes with some recommendations for the future of the employment-at-will doctrine in Alaska.

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1. See *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983); *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983). These cases are discussed in detail in Part IV *infra*.

II. THE "AMERICAN RULE:" EMPLOYMENT AT WILL

The traditional English rule on the duration of employment contracts was clear: in the absence of evidence to the contrary, an employment relationship of indefinite duration was presumed to be a yearly hiring.² This rule was both mandated by statute³ and endorsed by Blackstone.⁴ Nevertheless, early American cases on employment contracts did not adopt the English presumption of a yearly hiring.⁵ Instead, the American courts employed an ad hoc examination of the facts and circumstances surrounding the creation of the employment relationship.⁶

The ad hoc approach is illustrated in *Franklin Mining Co. v. Harris*,⁷ where, after examining the facts and circumstances at issue, the Michigan Supreme Court concluded that an indefinite hiring was for a one-year term. Harris had given up another job in order to accept a supervisory position at the defendant's mine. In the negotiations preceding his acceptance, Harris stated that he would prefer a yearly contract, and the defendant's agent replied that he would see that Harris was "all right." Eight months after Harris began work, he was fired. In his subsequent action for breach of contract, a jury awarded damages for the remainder of a one-year term. The supreme court affirmed, holding that, considering all of the circumstances, particularly the fact that Harris's salary was expressed in terms of an annual rate, the jury properly could have found that the parties had agreed on a contract for a year's employment.

2. See, e.g., *Emmons v. Elderton*, 4 H.L. Cas. 624, 10 Eng. Rep. 606 (1853). Many of the English cases are collected in Annot., 11 A.L.R. 469, 470 (1917).

3. Statute of Laborers, 1349, 23 Edw. 3, ch. 1, and 1562, 5 Eliz., ch. 4, cited in Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119 n.6 (1976).

4. Blackstone stated the rule in these terms:

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.

1 BLACKSTONE, COMMENTARIES 425 (1825).

5. Normally, the basis for American common law rules can be found in the English common law on the subject, since courts faced with a case of first impression usually looked to the English case law for guidance. See, e.g., *Beach v. Mullin*, 34 N.J.L. (5 Vroom) 343 (1870).

6. In *Kansas Pac. Ry. v. Roberson*, 30 Colo. 142 (1876), for instance, the court expressly refused to follow the English rule, noting that the English rule was based on custom and usage and that, in the case before it, there was no evidence of any custom as to length of service.

7. 24 Mich. 115 (1871).

The "facts and circumstances" test, however, had its drawbacks.⁸ The need for a factual inquiry precluded summary disposal of employment contract cases. Case-by-case adjudication also presented the danger that factually similar cases would be decided inconsistently. Thus, although the English presumption was not well-suited to the American climate of rapid industrialization and laissez-faire economic theory, the interests of judicial efficiency and uniformity demanded the application of some presumption.

The need for a presumption was addressed by a "mysterious"⁹ New York attorney and writer, Horace Gray Wood. In his 1877 treatise on the law of master and servant, Wood differentiated the American and English approaches, stating that "[w]ith us, the rule is inflexible that 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."¹⁰

In support of this rule, Wood cited four American cases and two Scottish cases. In fact, none of these cases actually supported his proposition; the cases were either irrelevant to the proposition or, as in the case of *Franklin Mining Co. v. Harris*, they supported only the use of a facts-and-circumstances test.¹¹ Nevertheless, Wood's rule filled the void left by the repudiation of the English rule and reflected contemporary American thought on the legal relation of master and servant.¹² Accordingly, Wood's rule was gradually adopted by courts¹³

8. See *Field v. Dillon, Delay and Uncertainty in Judicial Administration*, 8 A.B.A. REPS. 323 (1885).

9. One author noted that although a book review of Wood's earlier treatise on the law of nuisance spoke of him as an Albany attorney, he was not listed among the members of the New York State Bar Association. Feinman, *supra* note 3, at 226 & n.60. It may also be noted that, although Wood was a frequent contributor to legal periodicals in the years prior to 1887, see 1 INDEX TO LEGAL PERIODICALS TO 1887, at 634 (1888), there is no record of his contributions in the succeeding indices. Moreover, although the legal periodicals of the time frequently published obituaries, see, e.g., 1 GREEN BAG 177 (1889), no record of Mr. Wood's obituary appears.

10. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 145, at 272 (1877).

11. For a discussion of the actual holdings of the six cases, see *Toussaint v. Blue Cross & Blue Shield of Mich., Inc.*, 408 Mich. 579, 602 n.14, 292 N.W.2d 880, 886 n.14 (1980).

12. This attitude was illustrated by cases from the United States Supreme Court, which endorsed laissez-faire economic theory under the guise of substantive due process. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), in which the majority opinion prompted Mr. Justice Holmes's retort that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Id.* at 75 (Holmes, J., dissenting).

13. Apparently the first case to follow Wood's rule was *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895), in which the court stated that "[t]he

and legislatures¹⁴ throughout the country until eventually it became accepted as "the American rule" of employment at will.¹⁵

While satisfying the needs for judicial efficiency and consistency, the employment-at-will rule and its subsequent elaborations made possible abuse and overreaching by employers. Two subsidiary factors combined with the at-will rule to enhance this danger. The first sprang from the maxim that evil motives alone cannot make unlawful an otherwise lawful act.¹⁶ Thus, since an at-will employee could be fired at any time without cause, the courts refused to intervene even when the discharge was for a morally reprehensible reason.¹⁷ For instance, in *Comerford v. International Harvester Co.*,¹⁸ the Alabama Supreme Court refused to provide relief to an employee who allegedly had been fired because his supervisor was unable to "alienate the affections" of the employee's wife. The rule of ignoring the employer's intent reached its zenith in the United States Supreme Court. In *Adair v. United States*¹⁹ and *Coppage v. Kansas*,²⁰ the Court struck down legislation designed to protect employees from discharge motivated by employers' hostility toward their union affiliations or activities. In holding that such legislation impaired the right of employer and employee alike to contract freely, the Court raised the employment-at-will doctrine to constitutional status.

The second factor that enhanced the danger of abuse by employers was the use of formalistic contract interpretation as a bar to the enforcement of employers' promises. As applied to employment contracts, this interpretation began with the premise that the at-will rule, by its terms, applied to all contracts for an indefinite term of employment. Since the duration of a contract for "permanent" or "lifetime" employment could not be determined at its inception, the courts reasoned that such a contract was for an indefinite term and therefore

decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood." *Id.* at 121, 42 N.E. at 417.

14. See, e.g., CAL. LABOR CODE § 2922 (West Supp. 1984), which is the current version of a statute originally enacted in 1899.

15. See, e.g., *Singh v. Cities Serv. Oil Co.*, 554 P.2d 1367 (Okla. 1976), in which the court decided a case as to the duration of an employment contract through the application of the "American doctrine."

16. See *Johnson v. Aetna Life Ins. Co.*, 158 Wis. 56, 147 N.W. 32 (1914) ("Malice makes a bad case worse, but does not make wrong that which is lawful.")

17. See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1894), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915), in which the court stated the oft-repeated maxim that at-will employees may be fired "for good cause, for no cause or even for cause morally wrong."

18. 235 Ala. 376, 178 So. 894 (1938).

19. 208 U.S. 161 (1908).

20. 236 U.S. 1 (1915).

terminable at will.²¹ Courts held that, because it would be unjust to force an employee to remain in a "permanent" employment relationship, an employer's promise to retain an employee permanently was illusory. Thus, the promise was unenforceable for lack of mutuality of obligation.²² The courts held that such a contract could be mutually binding only if the employee gave some independent consideration, apart from his services, for the employer's promise.²³

III. EXCEPTIONS TO THE EMPLOYMENT-AT-WILL RULE

The formerly pervasive influence of the at-will rule has been limited, particularly during the past fifty years, by specific legislative and judicial exceptions. Although the judicial exceptions to the rule are difficult to categorize clearly, the exceptions have been divided into four groups for purposes of this article: legislative exceptions; exceptions based on public policy; exceptions dealing with the rule in terms of implied-in-fact contracts; and exceptions applying an implied-in-law covenant of good faith and fair dealing.

A. Legislative Exceptions

The exceptions to the at-will rule that affect the largest number of employees are statutory. The first major statutory exception applicable to private employers²⁴ was the National Labor Relations Act of 1935,²⁵ which protected from discharge employees who joined labor organizations.²⁶ The other major federal statutory exception arises from statutes which forbid the discharge of, or other discrimination against, employees on the basis of age,²⁷ handicap,²⁸ race, color, sex,

21. See, e.g., *Smith v. Beloit Corp.*, 40 Wis. 2d 550, 162 N.W.2d 585 (1968).

22. See, e.g., *Rape v. Mobile & O.R.R.*, 136 Miss. 38, 50, 100 So. 585, 587 (1924).

23. See, e.g., *Dotson v. F.S. Royster Guano Co.*, 207 N.C. 635, 178 S.E. 100 (1935), in which the court found sufficient additional consideration in the employee's abandonment of a right to sue the employer.

24. Public employees, on both the federal and state levels, are generally covered by civil service protections or by the due process requirements of the fifth and fourteenth amendments, and thus are not employees at will. To the extent that public employees are employees at will, the exceptions discussed here would generally be applicable to them.

25. Pub. L. No. 74-198, 49 Stat. 449 (current version at 29 U.S.C. §§ 141-87 (1982)).

26. An earlier attempt to secure such protections for railway employees, Act of June 1, 1898, 30 Stat. 424, was invalidated by the United States Supreme Court in *Adair*. The Supreme Court upheld the constitutionality of the operative provisions of the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

27. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982).

28. Rehabilitation Act of 1973, 29 U.S.C. §§ 791-795 (1982).

national origin, or religion.²⁹ In addition, a number of federal statutes offer protection against discharge for specific classes of employees,³⁰ such as those whose wages have been garnished³¹ or those who report violations of the federal Occupational Safety and Health Act.³²

A number of state statutes also protect private sector employees³³ who are discharged for certain specific reasons. Most prevalent are restrictions on discharge based on labor union activities³⁴ or characteristics such as race, sex, religion, age, and handicap.³⁵ There are several other state statutes ranging from the unique, such as Louisiana's prohibition against the discharge of employees who take time off to participate in Olympic or Pan American athletic contests,³⁶ to the widely accepted, such as those forbidding the discharge of employees for serving on juries,³⁷ filing claims for workers' compensation,³⁸ refusing to participate in performing abortions,³⁹ or reporting violations of certain statutes.⁴⁰ A more recent phenomenon is the enactment in a few states of more generalized statutes that protect the rights of virtually all "whistleblowers."⁴¹

While the statutory protections afforded to at-will employees are not uniform, and in many instances offer only minimal protection against unjust discharge,⁴² they represent at least a partial check on the employer's abuse of the power to "fire at will."⁴³

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

30. See generally L. LARSON & P. BOROWSKY, UNJUST DISMISSAL § 10.53[1] (1985).

31. Consumer Credit Protection Act, 29 U.S.C. § 1674 (1982).

32. Occupational Safety and Health Act, 29 U.S.C. §§ 651-658 (1982).

33. See *supra* note 24.

34. See, e.g., Kan. Stat. Ann. § 44.808 (1981).

35. See, e.g., MICH. COMP. LAWS §§ 453.101 *et seq.* (1967).

36. LA. REV. STAT. ANN. §§ 42:431 - :435 (West Supp. 1984).

37. See, e.g., ALA. CODE § 12-16-8.1 (1983).

38. See, e.g., N.C. GEN. STAT. § 97-6.1 (1979).

39. See, e.g., KY. REV. STAT. § 311.800(5)(b) (1981).

40. See, e.g., CAL. LAB. CODE §§ 6310, 6311 (West Supp. 1984) (occupational safety act); MICH. COMP. LAWS § 408.395 (1967) (minimum wage law).

41. See, e.g., CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1984).

42. For instance, in Kansas, the penalty for discharging an employee who takes time off for National Guard duty is limited to a \$50 fine. KAN. STAT. ANN. § 48.322 (1983). The courts disagree on whether such statutes are exclusive. Compare *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (holding that penalties in state OSHA act do not preclude private suit by discharged employee) with *Portillo v. G.T. Price Prods., Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982) (holding that administrative remedy under state workers' compensation statute precludes wrongful discharge action based on that statute).

43. It has been suggested that this employer power should be restricted even further by federal or state legislation mandating a "good cause" standard for the discharge of all employees, see Steiber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 389 (1983). The enactment of such statutes seems to be highly unlikely, however, given the political

B. Judicial Exceptions

1. *Public Policy Exceptions.* The first case to enunciate a public policy exception to the at-will rule was *Petermann v. International Brotherhood of Teamsters*,⁴⁴ decided by the California Court of Appeals in 1959. Petermann alleged that he was fired because he refused to follow his supervisor's order to commit perjury when testifying before a legislative committee. Relying on the at-will rule, the trial court sustained the defendant's demurrer. The court of appeals reversed, holding that California's clear public policy against the subordination of perjury should be enforced at all costs, even if it interfered with the at-will doctrine.⁴⁵ Although *Petermann* represented a radical departure from the traditional at-will rule, the case was virtually ignored outside California for over a decade.⁴⁶ In fact, it was not even mentioned in the seminal law review article on the subject,⁴⁷ in which the author suggested that the potential for abuse by employers under the at-will rule could only be checked by recognition of a cause of action in tort for abusive discharge.

Until 1973, the idea of judicial exceptions to the at-will rule was confined to a handful of California cases⁴⁸ and a purely theoretical law review article. Then, within the span of two years, the Supreme Courts of Indiana,⁴⁹ New Hampshire,⁵⁰ and

realities of the American political process; existing associations of employers, such as Chambers of Commerce, could be easily mobilized to lobby against such laws, while the majority of employee organizations are labor unions, which would probably not be impelled to lobby in favor of such legislation since their members are generally already protected by just cause provisions.

44. 174 Cal. App. 2d 184, 344 P.2d 255 (1959).

45. The arguments against finding a public policy exception to the at-will rule were stronger in California than in many other states, since the at-will rule has been codified in California since 1899. See CAL. LAB. CODE § 2922 and historical note (West Supp. 1984).

46. *Petermann*, however, was followed in subsequent California cases. See Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (union activity); Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (asserting right to receive minimum wage). But see Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (no remedy for employee fired because of jury service).

47. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1401 (1967).

48. See *supra* note 45. One possible reason why these cases received little note outside California may be that they represented only the view of the intermediate court of appeals. The Supreme Court of California did not address the issue until 1980, when it endorsed the results of *Petermann* and its progeny in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 620 P.2d 1330, 164 Cal. Rptr. 839 (1980).

49. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (holding that the discharge of an employee in retaliation for filing workers' compensation benefits violated public policy).

50. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (holding

Oregon⁵¹ each decided that the at-will rule was subject to exception when the discharge of an at-will employee offended a fundamental public policy of the state. Following this initial flurry of decisions, the number of jurisdictions expressing a willingness to apply a public policy exception steadily increased.⁵² For example, courts have held that public policy is offended when an employee is discharged because he or she files a workers' compensation claim,⁵³ serves on a jury,⁵⁴ declines an invitation to "go out" with a supervisor,⁵⁵ participates in a criminal investigation,⁵⁶ or refuses to participate in an antitrust conspiracy⁵⁷ or in a violation of consumer credit⁵⁸ or food packaging laws.⁵⁹ Most courts require a showing that the employee's discharge violated a "clear mandate" of public policy,⁶⁰ usually with the proviso

that the discharge of an employee because she refused to "go out with" her foreman violated public policy).

51. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (holding that there was a violation of public policy when an employee was discharged because she served on a jury against her employer's wishes).

52. In some instances, courts have rejected the plaintiff's claim on the merits but have nevertheless taken advantage of the opportunity to make clear their intention to apply the public policy exception in future cases. *See, e.g., Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 835 (1983).

53. *See, e.g., Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) (court followed "a small band of renegade opinions" in deciding to allow an exception). *Contra Dockery v. Lampert Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978), *overruled by* N.C. GEN. STAT. § 97-6.1 (1979).

54. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). *Contra Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980), *overruled by* ALA. CODE § 12-16-8.1 (1983) (enacted 1980).

55. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *see also Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (holding that discharge of female employee who refused to sleep with a foreman violated the public policy of Arkansas as expressed in its laws against prostitution). *Cf. Wiley v. Georgia Power Co.*, 134 Ga. App. 187, 213 S.E.2d 550 (1975), *overruled by Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978). In *Wiley*, the Georgia Court of Appeals found a cause of action for a female employee, fired because she refused her supervisor's sexual advances, by the simple expedient of never discussing the at-will rule. The state supreme court tactfully denied review of the case, contenting itself with overruling it three years later.

56. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

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

58. *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982).

59. *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 427 A.2d 385 (1980).

60. *See, e.g., Adler v. American Standard Corp.* 291 Md. 31, 432 A.2d 464 (1981).

that the relevant public policy be expressed in state or federal statutes or regulations.⁶¹ This requirement, however, is sometimes applied rather loosely. For instance, the Supreme Court of Oregon recently upheld a public policy exception where the source of the public policy was neither a statute nor a regulation.⁶² The public policy can most accurately be characterized as based on the Biblical commandment: "Thou shalt not bear false witness against thy neighbour."⁶³

The trend toward the application of the public policy exception is by no means universal. Some state supreme courts expressly refuse to find a public policy exception, usually on the ground that the creation of exceptions is a job better left to the legislature.⁶⁴ Perhaps the most notable decision in this regard is that of the New York Court of Appeals in *Murphy v. Home Products Co.*⁶⁵ Ironically, the court in *Murphy* failed to note that the at-will rule itself entered the law of New York not by legislative enactment, but by judicial adoption of Wood's rule.⁶⁶

2. *Exceptions Based on Implied-in-Fact Contracts.* The effect of the at-will rule is broadened by the rule that a promise not to discharge except for good cause is enforceable only if the employee has given independent consideration.⁶⁷ The result is that, in many instances, employers may make promises to their employees—or prospective employees—without fear that the promises are enforceable. Some courts reason that because employment relationships of an unspecified duration can be terminated at will, the employment contract provides no basis for the employer's promises of job security.⁶⁸ Other courts enforce employers' promises regarding employment security only where independent consideration was given by the employee, on the theory that the at-will doctrine otherwise renders employers' promises unenforceable for lack of mutuality.⁶⁹ Finally, where the

61. See, e.g., *Brockmeyer*, 113 Wis. 2d at 573, 335 N.W.2d at 840 (1983).

62. See *Delaney v. Taco Time Int'l, Inc.*, 681 P.2d 114 (Or. 1984).

63. *Exodus* 20:16 (King James). The *Delaney* court did not, however, cite the Bible; it found the relevant public policy in two state constitutional provisions that "indicate that a member of society has an obligation not to defame others." 681 P.2d at 118.

64. See, e.g., *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

65. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

66. See *supra* note 13. The dissent in *Murphy* characterized the *Martin* court's adoption of Wood's rule as "bizarre." 58 N.Y.2d at 308 n.1, 448 N.E.2d at 93 n.1, 461 N.Y.S.2d at 239 n.1 (Meyers, J., dissenting in part).

67. See *supra* note 23 and accompanying text.

68. See, e.g., *Murphine v. Hospital Auth.*, 151 Ga. App. 722, 261 S.E.2d 457 (1979).

69. See, e.g., *Russell & Axon v. Handshoe*, 176 So. 2d 909, 915-16 (Fla. Dist. Ct. App. 1965).

employer's promise of job security is embodied in a personnel handbook or similar document, it is often held that the handbook does not form part of the employment contract, either because it can be unilaterally amended by the employer⁷⁰ or because the employee received it after starting work and thus could not have relied on it in accepting the job.⁷¹

In several recent cases, however, courts have taken a less formalistic view of contract law in order to give effect to employers' promises of job security set forth in personnel handbooks. In these cases, the courts held that a contract has been formed in accordance with the terms of the handbook. The requirement of mutuality of obligation has usually⁷² been dismissed as a rule of construction, rather than a rule of substance,⁷³ or as a "forbidden inquiry into the adequacy of consideration."⁷⁴ Some courts reason that, because employees are free to depart at will, their forbearance in not leaving when they receive an employee handbook constitutes adequate consideration for the enforceability of its provisions.⁷⁵ Arguments that statements in personnel handbooks are not enforceable because they may be unilaterally withdrawn or amended are typically rebutted with comments such as those of the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield of Michigan, Inc.*:⁷⁶

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. . . . No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars . . . or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time. . . .⁷⁷

70. See, e.g., *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976).

71. See, e.g., *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982).

72. *But cf.* *Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 2d 1056, 322 N.E.2d 574 (1974) (the court impliedly required a finding of mutuality of obligation before it gave effect to the non-profit agency's personnel procedures, but found such mutuality in a portion of a policy manual that provided for the forfeiture of accumulated vacation pay by an employee who quit without notice).

73. *Toussaint v. Blue Cross & Blue Shield of Mich., Inc.*, 408 Mich. at 600, 292 N.W.2d at 885.

74. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 629 (Minn. 1983).

75. See, e.g., *Yartzoff v. Democrat-Herald Publishing Co.*, 281 Or. 651, 657, 576 P.2d 356, 359 (1978).

76. 408 Mich. 579, 292 N.W.2d 880 (1980).

77. *Id.* at 613, 292 N.W.2d at 892.

3. *Exceptions Based on the Implied-in-Law Covenant of Good Faith and Fair Dealing.* The implied covenant of good faith and fair dealing has become an important part of modern contract law. It is part of all commercial contracts under the Uniform Commercial Code by virtue of Section 1-203 of the Code.⁷⁸ This covenant is also frequently applied by courts in the context of litigation between insurers and their insureds.⁷⁹ Nevertheless, despite language in some opinions to the effect that a covenant of good faith and fair dealing is inherent in all contracts,⁸⁰ most courts are hesitant to apply the concept to at-will employment contracts, largely because of the traditional judicial reluctance to subject employers' legitimate business decisions to court scrutiny.⁸¹

The implied covenant of good faith and fair dealing, however, has been extended to protect at-will employees in a few limited situations. One of these situations is illustrated by an early case, *Zimmer v. Wells Management Corp.*⁸² The parties in *Zimmer* had entered into both an express employment contract for a one-year term and a stock option agreement by which the employee's right to the stock was to vest over the first five years of his employment. The parties never agreed on the terms of subsequent employment contracts, and the employee, Zimmer, was fired after approximately eighteen months of work. Allegedly, he was fired because he "didn't mix well in the swinging environment" of the company. The court held that Zimmer's partial payment on the stock option obligated the employer to deal in good faith with regard to Zimmer's subsequent employment contracts.⁸³

In one state, California, the courts have invoked an implied covenant of good faith and fair dealing in the employment-at-will context simply on the basis of an employee's long years of satisfactory service

78. U.C.C. § 1-203 (1978).

79. See, e.g., *Comunale v. Traders Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 193 (1958).

80. See, e.g., *Moore v. Home Ins. Co.*, 601 F.2d 1072 (9th Cir. 1979) (applying Arizona law).

81. See, e.g., *Parnar v. Americana Hotels*, 65 Hawaii 370, 652 P.2d 625 (1983).

[T]o imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.

Id. at 377, 625 P.2d at 629.

82. 348 F. Supp. 540 (S.D.N.Y. 1972).

83. Although New York has since rejected the idea that there is an implied covenant of good faith in all employment contracts, see *Murphy v. Home Prods. Co.*, 58 N.Y.2d 293, 488 N.E.2d 56, 461 N.Y.S.2d 232 (1983), the result in *Zimmer* may still be good law, since the decision rests on the plaintiff's expenditure of funds for the option contract, i.e., on at least partial consideration independent from the services to be rendered.

with the employer. In the two primary cases expressing this rule, *Cleary v. American Airlines, Inc.*⁸⁴ and *Pugh v. See's Candies, Inc.*,⁸⁵ the employees spent eighteen and thirty-two years, respectively, with their employers and, in both instances, consistently received promotions and other indications that their work was satisfactory. Certainly, requiring that employees with this kind of work record be fairly treated comports with traditional notions of justice and equity.

The other situations in which courts have applied the implied covenant of good faith and fair dealing are those in which an employer has discharged an employee in order to deprive him of a promised reward for his work. In the leading case, *Fortune v. National Cash Register Co.*,⁸⁶ company rules entitled Fortune to a commission on all sales made in his district. However, when a multi-million dollar sale was made in Fortune's territory, Fortune was notified that his job was terminated as of the day after the sale. He was kept on the payroll in another capacity for a few months and received a portion of the commissions on the large account, but eventually he was fired and never received all of the commissions to which he was entitled. The Supreme Judicial Court of Massachusetts held that the implied covenant of good faith and fair dealing precluded the discharge of an employee for the purpose of depriving him of commissions. Subsequently, *Fortune* has been applied in Massachusetts⁸⁷ and elsewhere⁸⁸ to prevent an employer from depriving an employee of the financial fruits of his labors.

IV. THE EMPLOYMENT-AT-WILL RULE AND EXCEPTIONS IN ALASKA

The employment-at-will rule is not codified in the Alaska statutes, nor has it been the basis of supreme court decisions sanctioning employer abuse of employee rights.⁸⁹ Nevertheless, the existence of the rule has been acknowledged in Alaska. For example, in *Long v. Newby*,⁹⁰ the supreme court explicitly stated that the plaintiff was an employee at will,⁹¹ thus leading to the assumption that the "American rule" applies to all indefinite term contracts in Alaska.

84. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

85. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). *But cf.* *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613 (Ct. App. 1984) (no implied covenant prevented discharge of employee who had spent only 3½ years with employer).

86. 373 Mass. 96, 364 N.E.2d 1251 (1977).

87. *See Maddaloni v. Western Mass. Bus Lines*, 386 Mass. 877, 438 N.E.2d 351 (1982).

88. *See Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983), which is discussed in more detail in text accompanying notes 100-104 *infra*.

89. *See supra* notes 16-17 and accompanying text.

90. 488 P.2d 719 (Alaska 1971).

91. *Id.* at 722.

There are a few statutory protections for at-will employees in Alaska. Two of these statutes parallel existing federal laws: the statute protecting those who protest violations of the state wage and hour law⁹² and the Human Rights Law, which prohibits terminations of an employee on the basis of race, religion, color, sex, or national origin, as well as in retaliation for participation in the statute's enforcement.⁹³ The Human Rights Law also prohibits most terminations on the basis of age, physical handicap, marital status, changes in marital status, pregnancy, or parenthood, although discrimination on these bases is prohibited only when "the reasonable demands of the position do not require distinction."⁹⁴ The only other protections for at-will employees found in the Alaska statutes are those that require employers to provide time off for voting⁹⁵ and forbid the use of lie detector tests as a condition of employment.⁹⁶

Significantly, the legislature has not acted to prohibit many of the abuses that have figured prominently in reported cases. There are no statutory prohibitions on the discharge of private sector employees based on their service on a jury⁹⁷ or their assertion of the right to receive workers' compensation. There is no "abortion conscience" statute, and no statutory protection for whistleblowers. As to judicial exceptions, the Alaska Supreme Court has not explicitly considered the various public policy exceptions to the American rule of at-will contracts. Nonetheless, the court's decisions in three recent contract cases⁹⁸ indicate its willingness to depart from the traditional at-will rule in the interests of protecting employees from abusive discharge.

The first of these decisions, *Mitford v. de Lasala*,⁹⁹ is perhaps more notable for the remedy suggested by the court than for its holding. Mitford had spent approximately nine years as an employee of various corporations controlled by Robert de Lasala, when Robert's son, Ernest, assigned Mitford to be the accountant for two family investment corporations. According to letters sent by both Ernest and

92. ALASKA STAT. § 23.10.140 (1984).

93. *Id.* §§ 18.80.010-.300 (1982).

94. *Id.* § 18.80.220.

95. *Id.* § 15.56.100 (1982).

96. *Id.* § 23.10.037 (1981).

97. *But cf. id.* § 39.20.340 (1980), which provides such protection to public employees.

98. Note that public policy exceptions are generally held to sound in tort, even in states that have not yet adopted a public policy exception. *See, e.g., Johnston v. Farmers Alliance Mut. Ins. Co.*, 218 Kan. 543, 545 P.2d 312 (1976). *But see Brockmeyer*, 113 Wis. 2d at 573, 335 N.W.2d at 840 (1983) (adopting public policy exception to sound in contract).

99. 666 P.2d 1000 (Alaska 1983).

Robert at the time of this transfer, Mitford was to work for both corporations and their affiliates and was to receive ten percent of the profits of the two corporations "as computed in accordance with the rules of Federal Income Tax BUT with a minimum guaranteed drawing allowance of \$850.- per month. . . ." ¹⁰⁰ Mitford worked for the family companies for sixteen more years, receiving only his drawing allowance. When Mitford finally asserted his right to ten percent of the profits earned by the companies over the years, he was discharged. The trial court granted summary judgment, deciding that Mitford was contractually entitled to \$35,545.10 in profits.

In reviewing Mitford's contention that he had been discharged in order to deprive him of his rightful share of the profits, the supreme court followed Massachusetts's lead in *Fortune*,¹⁰¹ stating that "Mitford's employment contract contained an implied covenant of good faith and fair dealing. In particular, good faith and fair dealing in this case would prohibit firing Mitford for the purpose of preventing him from sharing in *future* profits of [the two companies]."¹⁰² Remanding the case so that the corporate employers could "offer evidence, if it exists, tending to rebut the inference of bad faith that arises from the facts" the court offered guidance for the trial court as to the proper measure of damages.¹⁰³ The suggestion that an employee may have a right to future profits is unparalleled in other jurisdictions; other states only permit discharged employees to share in profits already realized. By allowing Mitford to share in the future profits of the corporations, the court sent two strong messages to Alaska employers: first, the covenant of good faith and fair dealing does apply to at-will employment contracts, and second, this covenant cannot be thwarted by accounting practices that would place a discharged employee "at the mercy of [his or her] former employer."¹⁰⁴

The second recent decision in Alaska demonstrating the supreme court's willingness to protect employees was issued seven days after *Mitford*. In *Eales v. Tanana Valley Medical-Surgical Group, Inc.*,¹⁰⁵ the court rejected a consideration requirement in enforcing an at-will employment contract. The plaintiff in *Eales* contended that he had been promised a job until retirement but had been fired without cause

100. *Id.* at 1002.

101. *See supra* note 87 and accompanying text.

102. 666 P.2d at 1007 (emphasis added).

103. *Id.* at n.4.

104. *Id.* Although Mitford's contract called only for a share of the profits "as determined by the rules of Federal Income Tax," i.e., those which had been realized for purposes of tax liability, a literal application of this provision would clearly allow the company to evade the spirit of its agreement by refusing to realize any profits while the actual profits of the corporation continued to accrue in the form of unrealized accretions to its net worth.

105. 663 P.2d 935 (Alaska 1983).

after only six years. Even though the defendant did not contest these allegations, the trial court granted summary judgment for the defendant on the ground that a contract of employment until retirement was for an indefinite term and was therefore terminable at will. In a two-page opinion, the supreme court reversed, announcing its "rejection of those authorities which hold that employment contracts until retirement, or for permanent employment, or for life are necessarily terminable at the will of the employer, where the employee furnishes no consideration in addition to the services incident to the employment."¹⁰⁶ The court noted that, although the majority rule was to the contrary, it felt no compulsion to follow the "unsound" rationale based on mutuality of obligation. Quoting Corbin,¹⁰⁷ the court held that "permanent" employment offers need not satisfy any requirement of mutuality of obligation because they are unilateral contracts in which the employer's promise is supported by the employee's performance in reliance on that promise.¹⁰⁸ The use of unilateral contract analysis to sustain an employee's right to a long term of employment is virtually unprecedented; the only other cases applying unilateral contract analysis to employment contracts dealt with the enforcement of specific promises set forth in an employee handbook, rather than the general promise of "permanent" employment.¹⁰⁹

The third case in the Alaska Supreme Court's at-will trilogy, *Glover v. Sager*,¹¹⁰ is not purely an employment case. Nevertheless, it is notable because of the theory on which the court based its decision. The plaintiffs in *Glover* were truck drivers who alleged that, in reliance on representations made by Sager and his agents, they had given up their jobs as drivers for Sager's company to become owner-operators of trucks under lease to Sager. When they complained about not receiving tariff increases that allegedly had been promised them, Sager terminated their truck leases, thus depriving them of their livelihood as effectively as though they had been discharged from their original

106. *Id.* at 959.

107. *Id.* at 960, quoting 1A A. CORBIN, CORBIN ON CONTRACTS § 152, at 14 (1963).

108. This recalls the illustration of a unilateral contract usually given by the instructors in first-year contracts courses. The hypothetical usually involves *A*'s offer of five or ten dollars if *B* will climb a flagpole or walk across the Brooklyn Bridge. In both instances it might be said that *B*'s acceptance creates an employment contract.

109. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (application of unilateral contract analysis to uphold termination procedures in employee handbook); *Langdon v. Saga Corp.*, 566 P.2d 524 (Okla. Ct. App. 1977) (applying unilateral contract analysis to issue of whether employee was entitled to severance pay promised in employee handbook).

110. 667 P.2d 1198 (Alaska 1983).

jobs.¹¹¹ The superior court dismissed the plaintiffs' complaints with prejudice, but the supreme court reversed and remanded, holding that the plaintiffs had made out a prima facie case of promissory estoppel.

The holding in *Glover*, like that in *Eales*, is a clear departure from the majority rule on at-will employment contracts. Most courts have held that reliance by an at-will employee on an employer's promise cannot give rise to promissory estoppel because the at-will nature of the relationship precludes reasonable reliance.¹¹² A few courts recognize a cause of action in promissory estoppel for employees who give up one job in reliance on the promise of a new job with another employer.¹¹³ Nonetheless, some of these courts have held that this cause of action is only theoretically available, noting that the employee can show no legally cognizable damages since he could have been fired immediately after starting the new job.¹¹⁴ Thus, by holding that the plaintiffs in *Glover* had made out a prima facie case of promissory estoppel in the context of an *existing* employment relationship,¹¹⁵ the Supreme Court of Alaska again clearly rejected the majority position on at-will employment contracts.

V. CONCLUSION

The *Mitford*, *Eales*, and *Glover* decisions represent a notable departure from traditional precepts of employment at will. The Supreme Court of Alaska is the first American court to analyze employment-at-will contracts in terms of ordinary contract law instead of applying the "special rules" developed during the laissez-faire period.¹¹⁶ Although this type of analysis constitutes a radical departure from the analysis accepted elsewhere under the rubric of the "American rule," the departure is warranted by changes in American society. Perhaps the rapid industrialization of the country required that "masters" of industry be free to discharge their "servants" at will. Further, perhaps the relatively unsophisticated "servants" of the industrialization era

111. In fact, the employees may have been worse off since they now had truck payments and expenses to meet.

112. See, e.g., *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982).

113. See, e.g., *Hunter v. Hayes*, 533 P.2d 952 (Colo. Ct. App. 1975); *Pepsi Cola Gen. Bottlers, Inc. v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639 (Mo. 1961).

114. This was the holding of the courts in *Pepsi Cola* and *Morsinkhoff*. See *supra* note 113.

115. It could be argued, of course, that the change in the type of relationship from that of employee/driver to independent contractor was analogous to starting a new job but the facts indicate so much continuity that characterizing the change as more akin to a transfer or promotion in an existing job seems more realistic.

116. See *supra* Part II.

may have been in danger of being exploited had they not been free to leave their jobs at will. Today, however, employers and employees should be free to bargain for the terms of their contracts.

The Alaska Supreme Court's recent trilogy of contract cases involving the employment-at-will rule indicates a willingness to protect employees from abuses of the employer's power to "fire at will." The attitude reflected in these cases suggests that the court would also be willing to find a cause of action for employees discharged in derogation of public policy. Nonetheless, the court should not be required to bear the burden of adjudicating public policy cases on an ad hoc basis. The legislature should set out clear limits on an employer's right to discharge at-will employees. Specifically, the legislature should consider protecting employees' rights to serve on juries, to file claims for work-related injuries, to refuse to participate in abortions, and to report violations of law to the proper authorities. In so doing, the legislature would continue the positive and progressive trend set by the Alaska Supreme Court.

