

EMPLOYERS BEWARE: THE IMPLIED CONTRACT EXCEPTION TO THE EMPLOYMENT-AT-WILL DOCTRINE

I. INTRODUCTION

Nineteenth century employment law defined the framework of mutual rights and obligations between employer and employee in terms of the traditional relationship between master and servant¹ rather than by reference to the mutual agreement of the parties to the employment relationship.² The law imposed upon the employer a responsibility for the employee's health, welfare, and security³ and in return required that the employee render loyal service to the employer.⁴ Nineteenth century courts envisioned the relational bond between employer and employee as an enduring one and expected that both parties would remain committed to the arrangement until the term of service⁵ ended.⁶ Where the parties did not specify a term of service, courts presumed that the relationship would continue for one year.⁷ Thus, under nineteenth century law an employment relationship could not be terminated before the end of one year merely at the will of the parties, but only for good cause.⁸

By the mid-nineteenth century, courts began to discard their traditional approach to the legal relationship between employers and employees in response to emerging notions of freedom of contract and an increasing awareness of the economic value of industrial growth.⁹ Courts began to enforce promises between employers and employees only if they were accompanied by manifestations of mutual assent of the parties evidenced by express and definite contract terms.¹⁰ In addition, courts developed the employment-at-will doctrine to address circumstances in which the parties had not entered into an express agreement regarding the terms of employment.¹¹ Under the

¹ See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980) [hereinafter Note, *Protecting At Will Employees*]. See also Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-22 (1976).

² P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 128, 123-24 (1969).

³ See *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 374, 652 P.2d 625, 627 (1982); J. KENT, *COMMENTARIES ON AMERICAN LAW* 258-66 (1884); P. SELZNICK, *supra* note 2, at 128; Note, *Protecting At Will Employees*, *supra* note 1, at 1824.

⁴ 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* 258 (1884).

⁵ Under the old rule, if the employee was hired for an unspecified time, the law would construe the hiring as being for a term of one year. See P. SELZNICK, *supra* note 2, at 125. For a discussion of this rule, see *infra* notes 27-33 and accompanying text.

⁶ P. SELZNICK, *supra* note 2, at 125-26. Some nineteenth century writers continued to view the master-servant relationship as one of domestic relations, characterized by ideas of protection and loyalty akin to those dominating the marriage relationship, which courts widely held to be terminable only for serious cause. Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457, 457-59 (1979).

⁷ Feinman, *supra* note 1, at 119-20; P. SELZNICK, *supra* note 2, at 125.

⁸ P. SELZNICK, *supra* note 2, at 126. See generally Feinman, *supra* note 1, at 119-22.

⁹ See *Parnar*, 65 Hawaii at 374, 652 P.2d at 628.

¹⁰ Note, *Protecting At Will Employees*, *supra* note 1, at 1825-26.

¹¹ See *id.*

employment-at-will doctrine, courts held any employment relationship not subject to an express agreement regarding the employment terms to be terminable at the will of either party.¹² By the beginning of the twentieth century, the employment-at-will doctrine granted the employer an absolute right to discharge an at-will¹³ employee in the absence of an express employment contract for a specified term.¹⁴ Thus, an employer could discharge an employee for good cause attributable to the employee's performance, for bad cause based on the employer's improper motives, or for no particular cause.¹⁵

Legislation and changes in the common law, however, have eroded considerably the employment-at-will doctrine.¹⁶ Substantial national and state labor legislation in the twentieth century, designed to protect employees from the whims of their employers, has sharply curtailed the applicability of the employment-at-will doctrine.¹⁷ As a result, courts have developed three common law theories to grant job security to the at-will employee.¹⁸ Some courts have refused to uphold the discharge of an employee where the discharge would violate a clearly mandated public policy.¹⁹ Other courts have imposed

¹² *Id.* at 1825. Horace Wood first expressed the rule in 1877: "With 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 on him to establish it by proof." H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 at 272 (1877). Although this doctrine was formulated without judicial support, "it was highly compatible with prevailing laissez-faire notions and was readily accepted by the courts." Glendon & Lev, *supra* note 6, at 458.

¹³ An at-will employee is one who is hired for an indefinite term. *See, e.g.*, Johnson v. National Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 781 (1976); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 313, 299 N.W.2d 147, 150 (1980).

¹⁴ *Parnar*, 65 Hawaii at 375, 652 P.2d at 628. The employer's discretion to terminate an at-will employee remained almost completely unquestioned by the courts. *See* P. SELZNICK, *supra* note 2, at 137; Note, *Protecting At Will Employees*, *supra* note 1, at 1826. The United States Supreme Court, during this period, expressed its support for this laissez-faire approach by striking down regulations of the employment relationship which, according to the Court, violated the parties' freedom to contract. Note, *Protecting At Will Employees*, *supra* note 1, at 1826. The Supreme Court addressed these concerns in *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915). For a discussion of *Adair*, see *infra* notes 61-65 and accompanying text. These decisions elevated the employer's right to terminate at will to a constitutional status. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933-34 (1983) [hereinafter Note, *The Public Policy Exception*].

¹⁵ *See Parnar*, 65 Hawaii at 375, 652 P.2d at 628 (quoting *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*; *Hutton v. Watters*, 132 Tenn. 527 (1915)).

¹⁶ *Id.* at 375-76, 652 P.2d at 628; Note, *The Public Policy Exception*, *supra* note 14, at 1935. The twentieth century has witnessed a realignment of the relative power of the employee and employer as courts have narrowed the scope of the employment-at-will doctrine. *See* Glendon & Lev, *supra* note 6, at 459. Professors Glendon and Lev observed that:

[R]ecent changes in the laws governing the termination of employment are part of a broader change in the bonding of the employment relationship, through which the web of relations that bind an individual's job to him and, more subtly, bind him to his job, is becoming tighter and more highly structured.

Id.

¹⁷ *Parnar*, 65 Hawaii at 375, 652 P.2d at 628. *See, e.g.*, Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (1976); National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-169 (1976).

¹⁸ *See* Note, *Protecting At Will Employees*, *supra* note 1, at 1817.

¹⁹ *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee refused to participate in price-fixing scheme); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee refused to testify falsely before legislative committee); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (employee

an implied-in-law²⁰ duty of good faith and fair dealing on employers, limiting their freedom to terminate employment relationships in bad faith.²¹ More recently, other courts have found implied employment contracts for at-will employees on the basis of assurances made in employee manuals and personnel handbooks.²²

One of the objectives of judge-made and statutory laws governing the employment relationship should be to balance the rights of the employer and employee. The employment-at-will doctrine created a distinct advantage for the employer over the non-union employee by granting the employer freedom to terminate the employee at will.²³ Employment legislation²⁴ and judicial limitations on the employment-at-will doctrine²⁵ have remedied in part the resulting imbalance in the employment relationship by shifting the balance back in favor of the employee. The public policy and covenant of good faith and fair dealing theories of recovery for wrongful discharge protect employees from discharge for bad cause, but retain for the employer the right to terminate for good cause or no cause.²⁶ The implied-in-fact contract theory goes even further by creating potential barriers to discharging employees for no cause, thus limiting employers to discharging employees only if they can show good cause.²⁷ The prospect of liability under the implied-in-fact contract theory because of dismissals in response to changes in business demands can seriously impair the employer's ability to function profitably.

Requiring the employer to show good cause under the implied-in-fact contract theory without also requiring the employee to show that he or she relied to his or her detriment on the employer's assurances effectively eliminates the employment-at-will doctrine and unfairly burdens employers by limiting their flexibility in responding to business changes.²⁸ This note will discuss the rise and fall of the employment-at-will doctrine and analyze the reasons for and advisability of its decline, most recently because of the adoption of the implied-in-fact contract exception. The first section will review the employment relationship before the employment-at-will doctrine emerged, the political and social attitudes which gave rise to the employment-at-will doctrine, and its

refused to date foreman); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee dismissed for going on jury duty). *But see* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (no cause of action where physician employee refused to continue drug research and failed to identify public policy at issue).

²⁰ Courts impose the implied-in-law term on the parties where there is no contract or where the contract is silent, even if the parties did not intend that the term exist. *See* Lopatka, *The Emerging Law of Wrongful Discharge -- A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 Bus. Law. 1, 17 (1984).

²¹ *See, e.g.*, *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977). In Massachusetts, courts have found a cause of action for bad-faith termination when, *inter alia*, an employer's reason for termination is contrary to public policy. *See* *Siles v. Travenol Laboratories*, 13 Mass. App. Ct. 354, 358, 433 N.E.2d 103, 106 (1982).

²² *See, e.g.*, *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 499 A.2d 64 (1985); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985).

²³ *See* Peirce, *Employee Termination At Will: A Principled Approach*, 28 VILL. L. REV. 1, 2 (1982).

²⁴ *See* *infra* notes 66-77 and accompanying text.

²⁵ *See* *infra* notes 78-197 and accompanying text.

²⁶ *See* *infra* notes 85-111 and accompanying text.

²⁷ *See* *infra* notes 112-197 and accompanying text.

²⁸ *See* *infra* notes 198-247 and accompanying text.

application to employment relationships in an increasingly industrialized society.²⁹ Thereafter, the note will consider the decline of the employment-at-will doctrine brought about by statutory changes to the employment relationship and by judicial application of the public policy exception and the implied covenant of good faith and fair dealing.³⁰

The note then will review the development of the implied-in-fact contract exception to the employment-at-will doctrine³¹ and explore the implications of widespread judicial application of this exception to the at-will employment relationship.³² This note will conclude that widespread adoption of the implied-in-fact contract exception, making employers' policy statements legally binding without requiring a showing of the employer's intent to be bound or the employee's reliance, would be unduly burdensome to employers.³³ The note also will conclude that extending the covenant of good faith and fair dealing to prevent bad faith conduct by employers, and by legislatively adopting modifications to the employment-at-will doctrine that would clarify the obligations of the parties would better serve the interests of employers and employees.³⁴

II. THE GROWTH OF EMPLOYMENT-AT-WILL DOCTRINE

In the early nineteenth century, the English rule³⁵ that an employment relationship that was established for an indefinite period was presumed to exist for a period of one year governed employment relationships in the United States.³⁶ Courts imposed a one-year employment term to prevent seasonal lay-offs or desertions which threatened the stability of an agrarian economy.³⁷ Therefore, the employer and employee were contractually bound to each other for a one-year period even in the absence of a formal contract.³⁸

²⁹ See *infra* notes 35-65 and accompanying text.

³⁰ See *infra* notes 66-111 and accompanying text.

³¹ See *infra* notes 112-97 and accompanying text.

³² See *infra* notes 198-247 and accompanying text.

³³ See *infra* notes 212-20 and accompanying text.

³⁴ See *infra* notes 238-47 and accompanying text.

³⁵ For a discussion of the English law governing the employment relationship, see Feinman, *supra* note 1, at 119-22.

³⁶ *Id.* See also Peirce, *supra* note 23, at 4; P. SELZNICK, *supra* note 2, at 125. In 1857, the New York Court of Appeals acknowledged its adherence to the English rule, reasoning that this rule would introduce an element of definiteness into the employment relationship. *Davis v. Gorton*, 16 N.Y. 255, 257 (1857). And in Charles Smith's well-regarded treatise, which was the first in America devoted entirely to the subject of master and servant, Smith reiterated this rule as applicable to all servants. Feinman, *supra* note 1, at 123.

³⁷ Feinman, *supra* note 1, at 120. In an agrarian society, this rule made practical sense because it prevented the injustice created by masters who sought the benefit of servants' labor during the planting and harvest seasons, but discharged them subsequent to the harvest to avoid supporting them during the winter months. *Id.* By the same reasoning, the master who supported servants during the winter season was likewise protected from the injustice brought about by servants who left when their services were most needed. *Id.* The presumption that an indefinite hiring was a hiring for one year was not limited to agricultural and domestic workers. The rule was effectively extended to all classes of servants by the Statutes of Labourers, which prohibited a servant from leaving employment or a master from discharging the servant before the end of a term, as well as by other legislation. *Id.*

³⁸ See, e.g., Peirce, *supra* note 23, at 4; Feinman, *supra* note 1, at 120. The rule became entrenched in English law with Blackstone's pronouncement that such a rule was proper because it provided mutual equitable benefit and protection to both the servant and the master by binding the two

By the latter part of the nineteenth century, the English rule that presumed an indefinite hiring was for one year became incompatible with notions of individualism and freedom to contract evolving in the United States.³⁹ In addition, the change in employment relationships occasioned by the Industrial Revolution reduced the economic dependence on the seasonal cycles typical of the agricultural sector.⁴⁰ In response to these changes in employment relations and political attitudes that accompanied the new industrial society, courts discarded the English rule⁴¹ in favor of a new rule that an indefinite hiring was *prima facie* an at-will hiring, terminable at the will of either party for any reason.⁴² Broad societal support for the change in the legal relationship between employer and employee brought about by the employment-at-will doctrine was evidenced by widespread acceptance of the doctrine.⁴³ Despite the absence of judicial authority,⁴⁴ the employment-at-will rule soon became the primary doctrine governing termination of the employer-employee relationship.⁴⁵

As applied, the employment-at-will doctrine established a presumption that parties to an employment agreement were bound to the relationship only if they clearly intended

together throughout the seasonal cycles of the year. 1 W. BLACKSTONE, COMMENTARIES 425. Blackstone stated:

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.

Id.

³⁹ See Peirce, *supra* note 23, at 4; Note, *The Public Policy Exception*, *supra* note 14, at 1933.

⁴⁰ Peirce, *supra* note 23, at 4.

⁴¹ *Id.* The status-based employment relationship of master and servant was discarded in the late 1800's in favor of judicial insistence "on freedom of bargaining as the fundamental and indispensable requisite of progress." *Id.* (quoting Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921)).

⁴² H.G. Wood, a treatise writer, propounded the rule:

With 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 on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve . . . [I]t is an indefinite hiring and is terminable at the will of either party, and in this respect there is no distinction between domestic and other servants.

WOOD, MASTER AND SERVANT, § 134 at 273 (1877). See also Parnar, 65 HAWAII at 374-75, 652 P.2d at 628; Note, *Protecting At Will Employees*, *supra* note 1, at 1825 & n.51.

⁴³ See Feinman, *supra* note 1, at 126.

⁴⁴ See *id.* Courts widely adopted this rule even though its propounder, H.G. Wood, provided no valid legal support and no policy grounds for the proclamation. Wood's treatise on master and servant lacked the painstaking, comprehensive scholarship of his previous works. The cases he relied upon as direct support of his proposition in fact provided no such support. In addition, he inaccurately represented that the English rule had no recent support in American courts and that courts had applied the at-will rule inflexibly in the United States. *Id.* For a discussion of Wood's treatise and the cases he relied upon, see Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 & n.54 (1974) [hereinafter Note, *Implied Contract Rights*].

⁴⁵ Note, *Implied Contract Rights*, *supra* note 44, at 342-43. The courts that adopted the rule generally did so by citing Wood's treatise directly, see, e.g., McCullough Iron Co. v. Carpenter, 67 Md. 554, 557, 11 A. 176, 178 (1887); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895), but courts rarely provided their own reasoning. Note, *Implied Contract Rights*, *supra* note 44, at 342. In Harrod v. Wineman, a court for the first time asserted that cases following Wood's rule were too numerous to require citation. 146 Iowa 718, 720, 125 N.W. 812, 813 (1910).

to be bound.⁴⁶ While the rule allowed employees the freedom to terminate employment where they did not intend to be bound,⁴⁷ the employers gained a distinct benefit because it permitted them to adjust their employment practices in response to business concerns.⁴⁸ Judicial acceptance of the employment-at-will doctrine effectively saddled employees with the burden of overcoming the presumption that their employment was at-will.⁴⁹ By the end of the nineteenth century, the at-will employment contract had become, in large part, a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion in employment decisions.⁵⁰

In many early applications of the doctrine, where the courts found no express agreement as to the duration of the employment, the courts upheld the discharge summarily by recitation of the rule.⁵¹ Where the courts offered reasoned analysis rather than doctrinal adherence to the rule, they pointed to the absence of either mutuality of

⁴⁶ Note, *Protecting At Will Employees*, *supra* note 1, at 1825. See also Peirce, *supra* note 23, at 5-6.

⁴⁷ Peirce, *supra* note 23, at 5-6.

⁴⁸ Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 335-36 (1982). See also P. SELZNICK, *supra* note 2, at 135. Some writers have viewed the employment-at-will doctrine as an expression of an evolving "freedom of enterprise" in recognition of the rights of the employer to discharge employees without restraint. See Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge For Our Season*, 24 RUTGERS L. REV. 480, 481 (1970). If employers were required to retain employees even when market demands slipped and those employees were no longer needed, labor would essentially be a fixed cost, rather than a variable cost of production. This would impede the free transfer of capital and the growth of the economic system. Murg & Scharman, *supra* at 336.

⁴⁹ Murg & Scharman, *supra* note 48, at 335. See Feinman, *supra* note 1, at 129. The employer's freedom to terminate in response to changing demand in the marketplace effectively imposed the costs of the business cycle on the employee. Murg & Scharman, *supra* note 48, at 336.

⁵⁰ P. SELZNICK, *supra* note 2, at 135. Professor Selznick has argued that the application of the employment-at-will doctrine is in fact at odds with the spirit of contractualism developing in society at the time the doctrine became established in employment law:

[T]he capacity of contract imagery to legitimate that power was not complete. In the first place, a contract impliedly giving broad powers of decision to one party, and establishing the subordination of another, was hardly an ordinary contract. It was at best a Hobbesian social compact giving full discretion to the sovereign employer. This violated the spirit of nineteenth century contractualism, which looked to voluntary agreements, based on bargaining over specific terms, as the substitute for prescriptive regulation by government . . .

. . . .

In the end, most stress was laid on the theory that ownership carried with it the right to freedom of contract, and any limitation of that freedom was a violation of the rights of property. This brought the argument back to consensual agreement as the foundation of managerial authority, an agreement tainted by the manifest inequality of the parties and by the reservation of all discretion to management unless specifically limited by a provision of the contract.

Id. at 136-37.

⁵¹ Note, *Implied Contract Rights*, *supra* note 44, at 343-44. See, e.g., *Martin*, 148 N.Y. 117, 42 N.E. 416 (employee, despite ten years' service, failed to prove express term and therefore rule applied). Mechanical application of the rule often produced questionable results. Note, *Implied Contract Rights*, *supra* note 44, at 344 (citing *Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (C.C.E.D.N.Y. 1908) (200 black stevedores hired for permanent positions were discharged to make room for white stevedores)).

obligation⁵² or consideration⁵³ in affirming the employer's right to terminate at will.⁵⁴ According to these courts, any rule that left the employee free to leave the employment relationship while the employer remained bound as long as the employee performed satisfactorily and desired to remain was lacking necessary mutuality.⁵⁵ The consideration requirement was based on the view that wages and other benefits fully compensated the employee for performance of services, while a promise of job security was not enforceable unless the employee provided additional consideration.⁵⁶ The employment-at-will rule thus protected the employer's right to terminate at will where the employee was unable to show the mutual intent of the parties to be bound.⁵⁷

The employment-at-will doctrine was judicially applied without exception during the close of the nineteenth century and well into the twentieth.⁵⁸ Courts recognized the employer's right to discharge employees "for good cause, no cause, or even for cause morally wrong"⁵⁹ uniformly throughout the nation.⁶⁰

This broad power to terminate at will gained constitutional stature during the first half of the twentieth century.⁶¹ In 1908, the United States Supreme Court, in *Adair v. United States*,⁶² struck down a federal statute prohibiting common carriers from dismissing employees for union membership. The Court held that the constitutional protections of liberty and property against deprivation without due process of law under the fifth amendment restricted the government's ability to compel persons to perform services for another or to accept or retain the services of another.⁶³ According to the Court, an employer must be allowed to terminate an employee for any reason and the employee must remain free to quit for any reason, in the absence of a contractual arrangement to

⁵² See, e.g., *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 69, 139 So. 760, 761 (1932) ("[I]f the contract of employment be not binding on the employee . . . then it cannot be binding on the employer; there would be lack of 'mutuality.'").

⁵³ See, e.g., *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439, 441 (7th Cir.), cert. denied, 379 U.S. 914 (1964); *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 295-300, 266 N.W. 872, 874-76 (1936).

⁵⁴ *Peirce*, *supra* note 23, at 5-6.

⁵⁵ See *Lopatka*, *supra* note 20, at 18.

⁵⁶ See generally *Skagerberg*, 197 Minn. at 300-03, 266 N.W. at 876-78.

⁵⁷ See *Lopatka*, *supra* note 20, at 18.

⁵⁸ *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527 (1915). The *Payne* court stated,

[M]en must be left, without interference, to buy and sell where they please, and to discharge or retain employes [sic] 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 employe [sic] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

Id. at 518-19. See also *McLaughlin v. Ford Motor Co.*, 269 F.2d 120, 125 (6th Cir. 1959); *Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 554, 112 P. 886, 888 (1910); *Laiken v. American Bank & Trust Co.*, 34 A.D.2d 514, 514, 308 N.Y.S. 111, 112 (1969).

⁵⁹ *Parnar*, 65 Hawaii at 375, 652 P.2d at 628 (quoting *Payne*, 82 Tenn. at 519-20).

⁶⁰ *Murg & Scharman*, *supra* note 48, at 329. For a summary of cases throughout the United States, see *id.* at 329-30 & n.2.

⁶¹ See *Peirce*, *supra* note 23, at 6.

⁶² 208 U.S. 161, 174 (1908).

⁶³ *Id.*

the contrary.⁶⁴ The Court continued to support constitutional protection of the employment-at-will doctrine for twenty-two years.⁶⁵

In summary, courts developed the employment-at-will doctrine in recognition of the freedom of both employers and employees to enter into employment contracts. By its strict application, the doctrine provided employers the right to discharge employees for good cause, no cause, or even bad cause, in the absence of a contractual agreement for a specified term of employment.

III. THE DECLINE OF THE AT-WILL DOCTRINE

Statutory protection of the right of employees to unionize and legislation aimed at preventing employers' discrimination against protected classes of employees revolution-

⁶⁴ *Id.* at 174-76. The Court stated,

While . . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it 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 So the right of the employee 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 employee

Id. at 174-75. The Court reaffirmed its insistence on laissez-faire principles in employment matters seven years later in *Coppage v. Kansas*, where the Court struck down a state statute that prohibited employers from refusing to hire union members. 236 U.S. 1 (1915). In *Coppage*, the Court reiterated the importance of the constitutional protections of freedom of property embodied in the fifth and fourteenth amendments to the United States Constitution as supportive of the employer's unrestrained freedom of contract inherent in the employment-at-will doctrine. *Id.* at 17. In dissent, Justice Day made it clear that, in his opinion, the majority decision failed to recognize the intent of the legislation to promote the same liberty for the employee in selecting his or her affiliations as the employer enjoys in making employment decisions. In his view,

[T]he act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee to make lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

Id. at 40 (Day, J., dissenting).

⁶⁵ Twenty-two years after its decision in *Adair*, the United States Supreme Court demonstrated in *Texas & New Orleans R.R. v. Bhd. of Railway and Steamship Clerks*, 281 U.S. 548 (1930), that its support for the employer's unrestrained freedom to terminate employees for any reason had declined. See Peirce, *supra* note 23, at 8. In upholding the constitutionality of the Railway Labor Act of 1926, Ch. 347, 44 Stat. 577 (1926) (current version at U.S.C. §§ 151-162 (1976)), which placed limitations on the employer's right to discharge employees for union membership, the Supreme Court indicated that it no longer held inviolate the employer's fundamental right to do with its property as it saw fit, including the indiscriminate hiring and firing of employees. Peirce, *supra* note 23, at 8. The *Texas & New Orleans R.R.* Court stated,

[t]he Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.

Texas & New Orleans R.R., 281 U.S. at 571 (emphasis added).

ized the law governing employment relations.⁶⁶ Increased public regulation of the workplace was intended to correct the imbalance in bargaining power between employers and employees and thus provide greater protection to employees.⁶⁷ The United States Supreme Court considered this imbalance in bargaining power in deciding the constitutionality of the National Labor Relations Act of 1935,⁶⁸ which provided protection of workers' freedom of self-organization and designation of union representation.⁶⁹ This enactment withstood constitutional attack in the 1937 decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,⁷⁰ in which the Court distinguished the normal right of the employer to discharge employees from the use of that right to intimidate or coerce employees.⁷¹ In upholding the Act, the Court indicated its concern for the employee's lack of equal bargaining power in negotiating with the employer over the terms of employment.⁷² By this decision, the Court acknowledged that freedom of contract ideals could no longer be used to shield the employment relationship from standards of fairness and social policy,⁷³ and thus the Court upheld limitations on the freedom of employers to terminate employment at will.

In addition, Congress and the states have enacted legislation that serves to modify the employment-at-will doctrine by imposing restrictions on the freedom of employers to discharge employees without limitation. For example, statutes prohibiting discrimination in employment⁷⁴ restrain employers from discharging employees for discriminatory purposes.⁷⁵ Other statutes⁷⁶ contain provisions protecting employees from discharge for exercising their rights under the statutes.⁷⁷ This legislation has altered the

⁶⁶ P. SELZNICK, *supra* note 2, at 138. Much of the New Deal labor legislation, such as the National Labor Relations Act, Ch. 372 § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (1976)), provided an impetus for increased unionization and consequently for limitations on the power of the employers. *Id.* By virtue of collective bargaining agreements, union members are not at-will employees and therefore remain insulated from changes in the employment-at-will doctrine.

⁶⁷ See Murg & Scharman, *supra* note 48, at 338; Note, *Protecting At Will Employees*, *supra* note 1, at 1827. For example, Congress has enacted legislation to promote unionization as a force against employer power, see, e.g., Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (1976); National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-169 (1976), establish a minimum level of economic entitlement for employees, see, e.g., Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976), combat discrimination in employment practices, see, e.g., Title VII of Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2, protect employee health and safety, see, e.g., Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in various sections of 5, 15, 18, 29, 42, 49 U.S.C.), and guarantee a minimum level of security for retirement and for the survivors of wage earners, see, e.g., Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829 (codified in various sections of 5, 18, 26, 29, 31, 42 U.S.C.).

⁶⁸ Ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (1976)).

⁶⁹ 29 U.S.C. § 151 (1976).

⁷⁰ 301 U.S. 1 (1937).

⁷¹ *Id.* at 45-46.

⁷² *Id.* at 33.

⁷³ Peirce, *supra* note 23, at 9 & n.45.

⁷⁴ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976).

⁷⁵ Peirce, *supra* note 23, at 9-10.

⁷⁶ See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1978).

⁷⁷ See Peirce, *supra* note 23, at 10.

employment relationship by limiting the employer's freedom to terminate employees when the motivation for discharge is contrary to the public good.

The atmosphere of interventionism created by federal and state enactment of statutes regulating the employment relationship has, over the last two decades, encouraged courts to develop common-law exceptions to the employment-at-will doctrine.⁷⁸ Courts viewed the emerging body of statutory modification of the employment relationship not as defining the outer bounds of regulation but rather as a signal for the judiciary to modify the common law to expand this protection.⁷⁹ In an effort to limit the harshness of the employment-at-will doctrine and return to employees some of the protections that the rule had taken away, courts recognized causes of action for wrongful discharge as a potential remedy for dismissed employees.⁸⁰ These courts have allowed discharged at-will employees to bring actions for wrongful discharge based on one or more of three theories:⁸¹ public policy,⁸² covenant of good faith and fair dealing,⁸³ or implied-in-fact contract.⁸⁴

A. *The Public Policy Exception*

The public policy exception to the employment-at-will doctrine is the most widely applied limitation of the employment-at-will doctrine.⁸⁵ Under this exception, an employee may have an enforceable contract or tort claim for damages against an employer if it discharges the employee for reasons that undermine an important public policy.⁸⁶

⁷⁸ See Lopatka, *supra* note 20, at 4.

⁷⁹ *Id.* at 4. In Professor Lopatka's view,

[T]he courts that would change the common law conclude not that employer's [sic] discharge rights remain unimpaired except as modified by this specifically focused legislation, but rather that in the light of these numerous restrictions [on the employer's freedom to terminate at will], it is appropriate for the judiciary to further constrain the right of discharge.

Id.

⁸⁰ See generally Lopatka, *supra* note 20, at 2-6; Note, *The Public Policy Exception*, *supra* note 14.

⁸¹ See Lopatka, *supra* note 20, at 6, 17.

⁸² See *infra* notes 85-97 and accompanying text.

⁸³ See *infra* notes 98-114 and accompanying text.

⁸⁴ See *infra* notes 111-97 and accompanying text.

⁸⁵ Lopatka, *supra* note 20, at 6; Note, *The Public Policy Exception*, *supra* note 14, at 1931. Courts in the following states have recognized or indicated their willingness to recognize the public policy theory to some extent: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. Lopatka, *supra* note 20, at 6-7 & n.30; *Another At-Will Employee Sues for Wrongful Discharge*, 5 LAW ALERT 30, 30 (1985) [hereinafter *Another At-Will Employee*]. Not all courts have been willing to modify the common law by adopting the public policy exception to the employment-at-will doctrine. See *Brainerd v. Imperial Mfg. Co.*, 571 F. Supp. 37 (D.R.I. 1983); *Greenspan v. National Medical Care, Inc.*, 485 F. Supp. 311 (E.D. Va. 1980); *Ivy v. Army Times Pub. Co.*, 428 A.2d 831 (D.C. App. 1981); *Andress v. Augusta Nursing Facilities, Inc.*, 156 Ga. App. 775, 275 S.E.2d 368 (1980). For example, the New York Court of Appeals acknowledged the trend in other jurisdictions to provide a common-law remedy for discharge in contravention of public policy, but declined to follow suit because "such a significant change in our law is best left to the Legislature." *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 301, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983).

⁸⁶ Note, *The Public Policy Exception*, *supra* note 14, at 1932.

Establishing a claim under the public policy exception requires a showing that the employer's action is contrary to a "clearly defined and well-established" public policy.⁸⁷

In one of the earliest cases that considered the public policy exception, the California Appeals Court in its 1959 decision in *Petermann v. International Brotherhood of Teamsters*⁸⁸ imposed wrongful discharge liability on a labor union which had discharged an employee after he refused to commit perjury at the employer's behest. The court looked to the state penal code, which made the commission of perjury unlawful, and held that such a discharge was in conflict with the public's interest in preventing perjury and the protection of that interest warranted judicial intervention.⁸⁹

Generally, courts look to constitutional and statutory law and to judicial decisions for indications of public policy.⁹⁰ But a clear statement of the scope of the public policy exception is difficult to formulate because each court confronted with the question has put forth an interpretation of "public policy" different from the next.⁹¹ The cases in which courts have found violations of public policy normally fall into distinct categories of reasons for dismissal.⁹² The first category involves dismissal of employees for their refusal to violate a statute, as in *Petermann*.⁹³ The second category includes dismissal in retaliation for the employee's performance of a statutory or public obligation,⁹⁴ such as

⁸⁷ Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 376, 290 N.W.2d 536, 538 (1980).

⁸⁸ 174 Cal. App. 2d 184, 188-90, 344 P.2d 25, 27-28 (1959).

⁸⁹ *Id.* at 188-89, 344 P.2d at 27. The *Petermann* court concluded that:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Id.

⁹⁰ See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878; *Pierce*, 84 N.J. at 72, 417 A.2d at 512.

⁹¹ *Peirce*, *supra* note 23, at 26. One court noted that:

[t]he sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy Absent legislation, the judiciary must define the cause of action in case-by-case determination.

Pierce, 84 N.J. at 72, 417 A.2d at 512. In this context, another court observed that:

the Achilles heel of the principle lies in the definition of public policy In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.

Palmateer, 85 Ill. 2d at 130, 421 N.E.2d at 878. In the seminal public policy decision, the *Petermann* court recognized that "[t]he term 'public policy' is inherently not subject to precise definition Public policy is a vague expression and few cases can arise in which its application may not be disputed." *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27.

⁹² *Peirce*, *supra* note 23, at 26-27; Note, *The Public Policy Exception*, *supra* note 14, at 1936-37.

⁹³ *Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (refusal to commit perjury in legislative hearings); see also *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982) (refusal to engage in illegal business practices); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (refusal to participate in illegal price-fixing scheme); *Tameny*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in price-fixing scheme in violation of state and federal anti-trust laws); *Trombetta v. Detroit, Toledo and Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to illegally alter pollution control reports).

⁹⁴ See, e.g., *Wiskotoni v. Michigan Nat'l Bank West*, 716 F.2d 378 (6th Cir. 1983) (being subpoenaed to testify at grand jury); *Nees*, 272 Or. 210, 536 P.2d 512 (performing jury duty); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (same). But see *Bender Ship*

jury duty.⁹⁵ The third category involves dismissal because of the employee's exercise of a statutory right or privilege,⁹⁶ such as filing a workers' compensation claim.⁹⁷

B. *The Covenant of Good Faith and Fair Dealing*

Courts have also upheld actions for wrongful discharge on the basis of the employer's breach of the covenant of good faith and fair dealing.⁹⁸ In those jurisdictions which have adopted the theory,⁹⁹ courts enforce the covenant on a theory of implied-in-law contract.¹⁰⁰ Implied-in-law contract terms arise from duties imposed by law on the parties where the contract is silent or where there is no written contract, even if the parties did not intend the implied term.¹⁰¹ In the employment relationship, the duty of good faith and fair dealing requires that neither party do anything which would injure the rights of the other to receive the benefits of the employment agreement.¹⁰² Therefore, a termination not made in good faith constitutes a breach of the implied-in-law contract.¹⁰³

Some courts have used the covenant of good faith and fair dealing to protect at-will employees from terminations that are intended to deprive them of certain benefits of employment, such as commissions or pensions.¹⁰⁴ Liability for wrongful discharge in

Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (dismissal for jury service upheld). This category includes what are generally known as "whistle-blower" cases, referring to the actions of employees who report criminal activity by their employers or fellow employees to the government. *Murg & Scharman*, *supra* note 48, at 344 n.89. *See, e.g.,* *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (quality control director attempted to correct, internally, false food labeling); *Palmateer*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee supplied law enforcement officials with information concerning criminal activity of another employee); *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (vice-president reported suspicions about embezzlement of corporate funds); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (credit manager called superior's attention to illegal loan practices).

⁹⁵ *See, e.g.,* *Nees*, 272 Or. 210, 536 P.2d 512.

⁹⁶ *See, e.g.,* *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (refusing to take polygraph test); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (same); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (filing workers' compensation claim). *But see* *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977) (no cause of action for dismissal for refusal to take psychological stress test); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981) (no cause of action for dismissal for filing workers' compensation claim).

⁹⁷ *See, e.g.,* *Frampton*, 260 Ind. 249, 297 N.E.2d 425.

⁹⁸ *See, e.g.,* *Mitford v. LaSala*, 666 P.2d 1000 (1983) (Alaska); *Cleary*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (California); *Magnan v. Anaconda Indus.*, 193 Conn. 558, 479 A.2d 781 (1984) (Connecticut); *Fortune*, 373 Mass. 96, 364 N.E.2d 1251 (Massachusetts); *Dare v. Montana Petroleum Marketing Co.*, 687 P.2d 1015 (Mont. 1984) (Montana); *Monge*, 114 N.H. 130, 316 A.2d 549 (New Hampshire).

⁹⁹ Courts have recognized the implied covenant exception, in one form or another, in the following states: Alaska, California, Connecticut, Iowa, Massachusetts, Montana and New Hampshire. *Another At-Will Employee*, *supra* note 85, at 30.

¹⁰⁰ *Lopatka*, *supra* note 20, at 17.

¹⁰¹ *Id.*

¹⁰² *Id.* at 23. *See also* *Fortune*, 373 Mass. at 104, 364 N.E.2d at 1257.

¹⁰³ *Fortune*, 373 Mass. at 101, 364 N.E.2d at 1256.

¹⁰⁴ *See* Note, *The Public Policy Exception*, *supra* note 14, at 1935-36. *See, e.g.,* *Maddaloni v. Western Mass. Bus Lines*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981); *Fortune*, 373 Mass. 96, 364 N.E.2d 1251 (1977). In other decisions,

these cases prevents the employer from taking financial advantage of the employee.¹⁰⁵ For example, in a Massachusetts case, *Fortune v. National Cash Register*,¹⁰⁶ the employer terminated a sales employee with twenty-five years' service the day after he was credited with a sale entitling him to a \$92,000 bonus. Despite express language in the employment contract stating that the employment was terminable at will without cause, the Massachusetts Supreme Judicial Court held that where an employer terminated an employee for the primary purpose of depriving that employee of commissions due for work performed, the employer acted in bad faith.¹⁰⁷ The court further held that a discharged employee could recover damages for wrongful discharge on the implied covenant of good faith and fair dealing where the employer terminated the employment relationship in bad faith.¹⁰⁸

In other jurisdictions, courts apply the covenant of good faith and fair dealing as a rough equivalent of the public policy exception¹⁰⁹ to the employment-at-will doctrine.¹¹⁰ In these jurisdictions, the employer is liable in contract for bad faith termination of an at-will employee when the reason for discharging the employee is contrary to public policy.¹¹¹

Thus, the covenant of good faith and fair dealing in either form limits the scope of the employment-at-will doctrine. By the implication at law of the employer's duty to act in good faith, the employer is liable for wrongful discharge when he or she discharges an employee in bad faith.

courts have invoked the good-faith covenant on other grounds to constrain the employer from terminating an employee for other than good cause. See, e.g., *Cleary*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (long service of employee gives rise to duty to terminate only for good cause); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982) (employer bound under covenant to abide by dismissal policies in handbook distributed after hiring plaintiff employee).

¹⁰⁵ See *Lopatka*, *supra* note 20, at 24.

¹⁰⁶ 373 Mass. 96, 98-99, 364 N.E.2d 1251, 1253-54 (1977).

¹⁰⁷ *Id.* at 102, 364 N.E.2d at 1256. The Massachusetts Supreme Judicial Court stated 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." *Id.*

¹⁰⁸ *Id.* at 101, 364 N.E.2d at 1255-56.

¹⁰⁹ For a discussion of the public policy exception, see *supra* notes 85-97 and accompanying text.

¹¹⁰ See, e.g., *Magnan*, 193 Conn. 558, 479 A.2d 781; *Siles*, 13 Mass. App. Ct. 354, 433 N.E.2d 103; *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980). The decision of the New Hampshire Supreme Court in *Howard*, 120 N.H. 295, 414 A.2d 1273, in which the court held that an employer is liable for breach of the covenant of good faith and fair dealing when the discharge violates public policy, narrowed its previous holding in *Monge*, 114 N.H. 130, 316 A.2d 549. The *Monge* court found a breach of the implied covenant of good faith and fair dealing for termination of an at-will employee based on bad faith, malice, or retaliation. *Id.* at 133, 316 A.2d at 551. The court held that the termination of an employee motivated by bad faith or retaliation for an act or omission of the employee is not in the public's best interest. *Id.* The court noted the importance of the public's interest in maintaining the proper balance between the employer's interest in running its business as it sees fit and the employee's interest in retaining employment. *Id.* The *Monge* court stated that 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." *Id.*

¹¹¹ *Siles*, 13 Mass. App. Ct. at 358, 433 N.E.2d at 106. Under Massachusetts law, a plaintiff has a claim for "bad faith" termination of an at-will employment contract if he or she can show "that (1) the discharge involved an intent of the defendant to benefit financially at the plaintiff's expense . . . or (2) that the employer's reason for the discharge was contrary to public policy." *Id.*

C. The Implied-in-Fact Contract Exception

More recently, courts in a number of jurisdictions have implied employment contracts in at-will relationships on the basis of the employer's explicit or implicit statements made within employment and personnel documents.¹¹² These statements assure the employee of continued employment given satisfactory work performance,¹¹³ in the absence of just or good cause for dismissal,¹¹⁴ or subject to the employer's adherence to stated dismissal procedures.¹¹⁵ Courts have increasingly enforced these "implied-in-fact contracts," previously given no legal effect, as binding.¹¹⁶ Although the courts are divided on whether to enforce implied-in-fact contracts, courts are more frequently favoring the discharged employee and enforcing statements made in personnel manuals.¹¹⁷

Strict application of the traditional employment-at-will rule has precluded recovery in some cases brought by discharged employees who have relied in court on the implied-in-fact contract theory. In these cases, employees alleged that statements in personnel manuals¹¹⁸ formed the basis for an implied employment contract.¹¹⁹ The courts hesitated to recognize a cause of action for breach of the implied contract where there was no

¹¹² Murg & Scharman, *supra* note 48, at 367. Courts in the following states have recognized, to varying degrees, actions for wrongful discharge based on breach of an implied contract arising from assurances regarding job security made in personnel and policy manuals: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Idaho, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, South Dakota and Washington. Courts in Arkansas and North Carolina have indicated their willingness to adopt the exception. Lopatka, *supra* note 20, at 17 n.92; *Another At-Will Employee*, *supra* note 85, at 30.

¹¹³ See, e.g., *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983) (promise of employment until retirement age as long as employee properly performed duties); *Bondi v. Jewels by Edwar Ltd.*, 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (1968) (oral agreement to employ as long as performance of duties is satisfactory).

¹¹⁴ See, e.g., *Ryan v. Upchurch*, 474 F. Supp. 211 (S.D. Ind. 1979); *Comfort & Fleming Insurance Brokers, Inc. v. Hoxsey*, 26 Wash. App. 172, 613 P.2d 138 (1980).

¹¹⁵ See, e.g., *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 499 A.2d 64 (1985); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

¹¹⁶ See Lopatka, *supra* note 20, at 17. Courts have traditionally enforced some promises made in personnel policy manuals, such as promises to provide pensions, see, e.g., *Hainline v. General Motors Corp.*, 444 F.2d 1250 (6th Cir. 1971); *Hindle v. Morrison Steel Co.*, 92 N.J. Super. 75, 223 A.2d 193 (1966), severance payments, see, e.g., *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875 (S.D.N.Y. 1975); *Anthony v. Jersey Central Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (1958), bonuses, see, e.g., *Raybestos-Manhattan, Inc. v. Rowland*, 460 F.2d 697 (4th Cir. 1972), and seniority systems, see, e.g., *Wagner v. Sperry-Univac*, 458 F. Supp. 505 (E.D. Pa. 1978); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978). The distinction made, generally, was that the work done and the benefits (pensions, severance pay, bonuses, etc.) and compensation paid were the intended *quid pro quo*, *Anthony*, 51 N.J. Super. at 147, 143 A.2d at 766, while additional consideration was required to support an employer's assurances of continued employment. See, e.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); *Brawthen v. H&R Block, Inc.*, 52 Cal. App. 3d 139, 149, 124 Cal. Rptr. 845, 851 (1975); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 894, 568 P.2d 764, 769 (1977).

¹¹⁷ See Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 205 (1985) [hereinafter Note, *Employee Handbooks*].

¹¹⁸ In some of these cases, the employee based a claim on the employer's failure to adhere to company policy regarding performance evaluation and employee termination procedures. See, e.g., *Beidler v. W.R. Grace, Inc.*, 461 F. Supp. 1013 (E.D. Pa. 1978); *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975).

¹¹⁹ See, e.g., *Johnson*, 220 Kan. 52, 551 P.2d 779; *Mau*, 207 Neb. 308, 299 N.W.2d 147.

specific agreement between the parties as to the duration¹²⁰ of employment.¹²¹ In the absence of an agreement, these courts found the employment was at-will and that either party could terminate it at any time.¹²² The reluctance of courts to treat provisions of employment manuals as binding contracts was usually founded upon the absence of mutual intent of the parties to be obligated to each other.¹²³

In other jurisdictions, in contrast, discharged employees have brought successful wrongful discharge actions premised on the implied contract theory. In these cases the courts showed a willingness to enforce statements assuring continued employment, in the absence of good cause for termination, where there was a showing of additional consideration in return for the granting of job security.¹²⁴ Traditionally, the payment of wages in return for the performance of services constituted the necessary exchange of consideration in an employment contract.¹²⁵ Therefore, unless the employee provided consideration in addition to the rendering of services, the employer could not be held to an agreement to grant job security for life in addition to paying wages.¹²⁶ Separate consideration served as an indication of the intention of the parties to enter into a long-term, secure employment arrangement.¹²⁷

¹²⁰ In some cases, dismissed employees brought causes of action contending that their employment arrangements were not at-will because a specific duration of employment could be implied from employers' promises of "permanent" or "lifetime" employment or employment until retirement. See, e.g., *Eales*, 663 P.2d 958; *Degen v. Investors Diversified Servs., Inc.*, 260 Minn. 424, 110 N.W.2d 863 (1961); *Piechowski v. Matarese*, 54 N.J. Super. 333, 148 A.2d 872 (1959). Therefore, these plaintiffs argued, the employer could not lawfully dismiss them before the end of the term (i.e. upon death or retirement) except for good cause. The question of whether to construe these verbal promises as establishing fixed or definite employment periods thereby bringing the employment relationship outside the purview of the employment-at-will doctrine confronted the courts. Courts have treated this question as one of interpretation and application of the at-will rule, requiring the trier of fact to ascertain the intentions of the parties to enter into long-term commitments. See, e.g., *Savarese v. Pyrene Mfg., Inc.*, 9 N.J. 595, 599-601, 89 A.2d 237, 239-40 (1952). The New Jersey Supreme Court in *Savarese* refused to give contractual status to a promise of lifetime employment stating that "agreements of this nature have not been upheld except where it most convincingly appears it was the intent of the parties to enter into such long-range commitments and they must be clearly, specifically and definitely expressed." *Id.* at 601, 89 A.2d at 240.

¹²¹ See *Lopatka*, *supra* note 20, at 18. See, e.g., *Beidler*, 461 F. Supp. at 1015; *Johnson*, 220 Kan. at 54, 551 P.2d at 781; *Paisley v. Lucas*, 346 Mo. 827, 842, 143 S.W.2d 262, 270 (1940); *Savarese*, 9 N.J. at 600-01, 89 A.2d at 239.

¹²² For example, in *Johnson*, the Kansas Supreme Court in 1976 held that the publication of a personnel manual, absent an agreement as to the intended duration of employment, was no more than a unilateral expression of the employer's policies and was not evidenced by bargaining between the parties which would suggest a "meeting of the minds." *Johnson*, 220 Kan. at 55, 551 P.2d at 779. The court stated that it followed "the general rule that in the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party. . . ." *Id.* at 54, 551 P.2d at 781. See also *Shaw*, 167 Ind. App. at 5, 328 N.E.2d at 778.

¹²³ See *Lopatka*, *supra* note 20, at 18. See also *Savarese*, 9 N.J. at 600-01, 89 A.2d at 239.

¹²⁴ See, e.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); *Brawthen*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845; *Weber v. Perry*, 210 S.C. 8, 21 S.E.2d 193 (1942); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977). But cf. *Albers v. Wilson & Co.*, 184 F. Supp. 812 (D. Minn. 1960) (employees' subjecting themselves to violence by breaking strike did not constitute additional consideration); *Cedarstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213 (1962) (loans to employer did not constitute additional consideration).

¹²⁵ Note, *Implied Contract Rights*, *supra* note 44, at 351-52.

¹²⁶ See *id.*

¹²⁷ *Id.* Examples of additional consideration deemed adequate to support a promise of job

More recent cases have evidenced a trend toward application of the implied-in-fact contract exception even where no separate consideration was clearly present.¹²⁸ In these cases, courts have viewed consideration not as a substantive requirement but rather as a representation of the parties' intentions.¹²⁹ Consequently, the courts look not for additional consideration but for indications of the intent of the parties to be bound to the employment relationship.¹³⁰ In 1980, the Michigan Supreme Court was one of the first courts to find an implied-in-fact contract without separate consideration in *Toussaint v. Blue Cross & Blue Shield of Michigan*.¹³¹ The *Toussaint* court held that statements contained in employment manuals may be contractually binding even when the employment is at-will¹³² and even when the employee has not relied on those statements.¹³³

In *Toussaint*, the employee specifically discussed the issue of job security with his employer and as a result the employer told him that he would be with the company as long as he did his job.¹³⁴ The employer also gave him a personnel policy manual which reinforced the oral assurance of continued employment by its indication that the company's policy was to discharge "for just cause only."¹³⁵ The employer discharged *Toussaint* after five years of employment, and he filed suit against his employer claiming that his discharge violated the employment agreement.¹³⁶

The *Toussaint* court held that where employment is at-will, discharge provisions in an employment manual are enforceable and may become part of the employment contract either by express oral or written agreement or based on the legitimate expectations of employees arising from the employer's policy statements.¹³⁷ The court declined

security include the employee providing some benefit to the employer, *see, e.g.*, *Pierce v. Tennessee Coal, Iron & R.R.*, 173 U.S. 1 (1898) (employee surrendered tort claim against employer); *Downes v. Poncet*, 38 Misc. 799, 78 N.Y.S. 883 (N.Y. City Ct. 1902) (employee hired subject to his bringing large business account to new employer); *Ward v. Consolidated Foods Corp.*, 480 S.W.2d 483 (Texas 1972) (employee with special expertise needed by employer accepted salary below market rate), or the employee relying on the employer's promise to the employee's detriment, *see, e.g.*, *Bondi*, 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (employee's loss of own business through sale of business to third party); *Epps Air Serv., Inc. v. Lampkin*, 125 Ga. App. 779, 189 S.E.2d 127 (1972) (employee's loss of own business by sale of business to employer).

¹²⁸ *See, e.g.*, *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985).

¹²⁹ *See Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885.

¹³⁰ *See id.*

¹³¹ 408 Mich. 579, 292 N.W.2d 880 (1980). The Michigan Supreme Court decided *Toussaint* along with *Ebling v. Masco Corp.*, unreported opinion (Docket No. 29916, November 9, 1977).

¹³² *Toussaint*, 408 Mich. at 598, 292 N.W.2d at 885.

¹³³ *Id.* at 613, 292 N.W.2d at 892.

¹³⁴ *Id.* at 612, 292 N.W.2d at 891.

¹³⁵ *Id.* at 597, 292 N.W.2d at 884.

¹³⁶ *Id.* at 595, 292 N.W.2d at 883. The trial court rendered judgment for the employee on his claim that his discharge violated the employment agreement, as contained in the policy manual, which permitted discharge only for just cause. *Id.* The Michigan Court of Appeals reversed on the basis of a strict employment-at-will rationale, stating that "a contract of indefinite duration cannot be made other than terminable at will by a provision that states that an employee will not be discharged except for cause." *Toussaint v. Blue Cross & Blue Shield of Michigan*, 79 Mich. App. 429, 435, 262 N.W.2d 848, 851 (1977).

¹³⁷ *Toussaint*, 408 Mich. at 598, 292 N.W.2d at 885. The Michigan Supreme Court held,

1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term — the term is "indefinite," and

2) such a provision may become part of the contract either by express agreement,

to accept the employer's argument that the traditional employment-at-will doctrine created a substantive barrier to upholding the enforceability of provisions of an employee policy manual.¹³⁸ The court held that there was sufficient evidence for the jury to have concluded that Blue Cross & Blue Shield had violated the plaintiff's employment contract¹³⁹ and reinstated a verdict for damages of \$72,835.¹⁴⁰

The *Touissant* court stated that the employment-at-will rule is one of construction rather than substantive law¹⁴¹ and agreed with the defendant's position that an employment agreement for an indefinite period is presumptively at-will.¹⁴² The court went on, however, to ask whether the employment *must* remain terminable at the will of either party, thereby precluding the employer from entering into a legally enforceable agreement to discharge an employee only for just cause.¹⁴³ While noting that employers can establish policies requiring employees to acknowledge their employment status as at-will,¹⁴⁴ the court concluded that it could see no reason why an employment relationship, technically at-will, could not by an employer's promise provide job security.¹⁴⁵ According to the court, then, the employer's freedom to terminate an at-will employee can give way to an express or implied agreement to the contrary.

The Michigan Supreme Court went on to further clarify the nature of the obligation imposed on the employer. The court noted that there need not be bargaining between the parties nor a meeting of the minds for an implied-in-fact contract to arise.¹⁴⁶ Moreover, according to the court, the employee need not know any of the details of the

oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements

Id.

¹³⁸ *Id.* at 599-612, 292 N.W.2d at 885-91. The defendant employer argued:

It is settled Michigan law that employment contracts for an indefinite term are terminable at the will of either party unless the employee has furnished consideration to his employer other than his services. A promise by an employer to discharge only for an obviously determinable cause represents such a departure from firmly established doctrines of contract formation and the normal expectations accompanying an indefinite employment relationship that it should require separate and distinct consideration in order to be enforceable.

Id. at 599, 292 N.W.2d at 885.

¹³⁹ *Id.* at 620-21, 292 N.W.2d at 895.

¹⁴⁰ *Id.* at 595, 292 N.W.2d at 883.

¹⁴¹ *Id.* at 600, 292 N.W.2d at 885.

¹⁴² *Id.* at 599, 292 N.W.2d at 885. The defendant argued that the plaintiff's employment was therefore terminable at the will of either party, oral agreements to the contrary notwithstanding. The defendant further contended that to require the employer to continue the relationship as long as the employee was willing to work, while the employee was free to quit at any time, was an unacceptable alternative. *Id.* The defendant stated,

[w]here a definite term of employment is specified, each party has furnished consideration by limiting his right to terminate the relationship at will, but where one party (the employer) obligates himself to continue the relationship as long as the other desires and the other (the employee) reserves the right to terminate at will, there is no mutuality of obligation and so the agreement must fail for lack of consideration.

Id.

¹⁴³ *Id.* at 609, 292 N.W.2d at 890 (emphasis in original).

¹⁴⁴ *Id.* at 612, 292 N.W.2d at 891.

¹⁴⁵ *Id.* at 610, 292 N.W.2d at 890. *Contra Mau*, 207 Neb. at 314-15, 299 N.W.2d at 151 (even if personnel publications constituted part of employment contract, in absence of agreement that employment is for definite period of time employment relationship remains terminable at the will of the employer).

¹⁴⁶ *Touissant*, 408 Mich. at 613, 292 N.W.2d at 892.

employer's policies and practices or even know of the existence of the policy manual at the time of hiring and the policy manual need not refer to the specific employee, his or her job description, or compensation.¹⁴⁷ Because the obligation of the employer exists even if the employee first learns of the manual after hiring, it is unnecessary for the employee to show that he or she relied to his or her detriment on the employer's statements.¹⁴⁸

After refusing to require that employees show reliance to establish an implied-in-fact contract, the *Toussaint* court went on to discuss whether the implied contract theory requires employees to show mutuality of obligation or consideration to recover. According to the court, enforceability of a contractual agreement implied from an employment manual requires a showing of the parties' intent to become bound, rather than that the parties actually are mutually bound to the employment relationship.¹⁴⁹ The court found the defendant employer's intent to be bound by the mere inclusion of the good cause provisions in the policy manual, presumably with the goal of enhancing the employment relationship.¹⁵⁰ The court acknowledged that the employer need not establish personnel policies or distribute personnel manuals that could then form the basis of this obligation. However, the *Toussaint* court justified the imposition of this unilateral obligation where the employer chooses to establish such policies because the employer, by doing so, obtains in return a work force that is orderly, cooperative, and loyal.¹⁵¹

The *Toussaint* court then addressed the issue of sufficiency of consideration. The court recognized that the "enforceability of a contract depends . . . on consideration," but viewed this as a rule of construction rather than substantive law.¹⁵² The court found that the lesson of earlier cases was that the search for consideration was in truth an attempt to discover and implement the parties' intentions.¹⁵³ The court, then, acknowledged the need for consideration but demonstrated its willingness to look to the unilateral intentions of the employer as a guide to enforcing implied contract provisions.¹⁵⁴ The court proceeded to discover intent in the employer's obtaining an enhanced employment relationship, but held that "good cause" provisions benefited all employees, even if they were unaware of their existence.¹⁵⁵ By its holding, the *Toussaint* court placed little emphasis on the employee's reliance on the employer's promises and greater emphasis on the benefits attained by the employer in making such assurances.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 613 & n.25, 292 N.W.2d at 892 & n.25. The court refused to accept the distinction made in a companion case, *Ebling v. Masco Corp.*, unreported opinion (Docket No. 29916, November 9, 1977), between statements concerning compensation and statements assuring job security, to the effect that the former are enforceable because the employer should reasonably expect that the promise would induce reliance by the employee. *Toussaint*, 408 Mich. at 598, 292 N.W.2d at 884. The court professed an inability to understand "why an employer should reasonably expect that a promise of deferred compensation would induce reliance while a promise of job security would not." *Id.*

¹⁴⁹ *Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885.

¹⁵⁰ *See id.* at 613, 292 N.W.2d at 892.

¹⁵¹ *Id.*

¹⁵² *Id.* at 600, 292 N.W.2d at 885.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 613, 292 N.W.2d at 892.

¹⁵⁵ *See id.* at 613-15, 292 N.W.2d at 892.

In contrast, the Court of Appeals of New York in *Weiner v. McGraw-Hill, Inc.*,¹⁵⁶ viewed the presence of consideration as a "fundamental requisite" for the enforceability of provisions of personnel manuals. In *Weiner*, McGraw-Hill invited the plaintiff to consider employment with the firm and assured him that the company's policy not to terminate employees without good cause would provide him with job security.¹⁵⁷ The court found that the employee's reliance on the assurance of job security as an inducement to leave his previous employer was sufficient consideration to support an implied-in-fact contract containing a promise of job security.¹⁵⁸ In so holding, the court considered the intentions of the employer and employee and acknowledged that the value of the consideration given in exchange for the assurance of job security may be negligible, but held that consideration was required as an indication of the employee's intent to enter into a long-term employment arrangement.¹⁵⁹

Other courts have deemed the consideration requirement¹⁶⁰ satisfied by finding consideration in the employee's continuing to stay on the job, although free to leave because the employment was at will.¹⁶¹ These courts reason that the employer's assurances of continued employment unless the employer had good cause for discharge constitutes an offer to the employee to enter into a unilateral contract, and the employee's continued work in the absence of an obligation to do so constitutes acceptance of the offer.¹⁶²

Many courts have relied upon unilateral contract formation analysis to support an employee's claim for wrongful discharge.¹⁶³ The Supreme Court of Minnesota employed this approach in its 1983 decision in *Pine River State Bank v. Mettelle*.¹⁶⁴ The court specified that, as a question of fact to be determined by the finder of fact, statements made in personnel manuals may create a binding unilateral contract if the statements constitute a promise in the form of an offer and the employee accepts them.¹⁶⁵ The *Pine River*

¹⁵⁶ 57 N.Y.2d 458, 463-65, 443 N.E.2d 441, 444-45 (1982).

¹⁵⁷ *Id.* at 460, 443 N.E.2d at 442.

¹⁵⁸ *Id.* at 465-66, 443 N.E.2d at 445.

¹⁵⁹ *See id.* at 464-65, 443 N.E.2d at 445.

¹⁶⁰ In the view of one writer,

the use of the separate consideration concept to justify enforcement of these contracts is, of course, artificial. There is no obvious reason why a promise of employment should be broken down into two separate parts — one to employ and one to employ permanently — each of which must have separate consideration. In reality, the concept is nothing more than a rationale for giving effect to the objective intentions of the parties.

Note, *Implied Contract Rights*, *supra* note 44, at 351 n.113. The showing of additional consideration, then, creates the inference that it was the intent of the parties to enter into a long-term commitment: the employee would not sell his or her business or relocate his or her family unless there was a mutual understanding of continued employment. *See id.* at 354 & n.126.

¹⁶¹ *See, e.g.,* *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 809 (D. Colo. 1983); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. 1984); *Martin*, 109 Ill. App. 3d at 603, 440 N.E.2d at 1004 (1982); *Pine River State Bank*, 333 N.W.2d at 627; *Woolley*, 99 N.J. at 302, 491 A.2d at 1267.

¹⁶² *See, e.g.,* *Woolley, Inc.*, 99 N.J. at 302, 491 A.2d at 1267; *Pine River State Bank*, 333 N.W.2d at 627.

¹⁶³ *See, e.g.,* *Wagner*, 458 F. Supp. at 521; *Finley*, 5 Conn. App. at 409-10, 499 A.2d at 74; *Pine River State Bank*, 333 N.W.2d at 627.

¹⁶⁴ 333 N.W.2d 622 (Minn. 1983).

¹⁶⁵ *Id.* at 626.

State Bank court held that the employee's continued employment while free to leave may constitute acceptance even if the employment manual is published and distributed to the employee after employment has begun.¹⁶⁶ This analysis is consistent with conclusions reached in other jurisdictions.¹⁶⁷ In this context, courts have found acceptance on the basis of the employee's decision to leave a former employer, decline other job offers, or simply accept a position with an employer making such promises.¹⁶⁸

In a recent decision, the Supreme Court of New Jersey considered the implied-in-fact contract exception and adopted conclusions consistent with those of the *Toussaint*¹⁶⁹ court. In *Woolley v. Hoffman-LaRoche, Inc.*,¹⁷⁰ the New Jersey Supreme Court addressed the question of whether an implied promise in an employment manual that an employer would fire an employee only for good cause was enforceable in an at-will employment relationship. The court found that absent a clear and prominent disclaimer, such promises are enforceable against the employer even when the employment is for a period of indefinite duration.¹⁷¹

Defendant Hoffman-LaRoche hired the plaintiff in *Woolley* as an engineer to begin work in November 1969.¹⁷² The parties did not enter into a written employment contract, and the plaintiff did not receive nor read the personnel manual that provided the basis for his claims until he had been working for three months. Hoffman-LaRoche terminated the plaintiff, after repeated requests for his resignation, because of a lack of confidence in plaintiff's work. Woolley subsequently filed a complaint for breach of contract.¹⁷³

Woolley claimed that the defendant's employment manual created an employment contract under which Hoffman-LaRoche could fire him only for cause, notwithstanding that the employment was for indefinite duration, because the types of termination set forth within the policy manual did not include discharge without cause.¹⁷⁴ Further, Woolley alleged that his dismissal was not for good cause and therefore constituted a breach of the implied contract.¹⁷⁵

Relying on a number of early New Jersey decisions, the trial court granted summary judgment for the defendant, holding that because the personnel policy manual contained no clear expression of the intent of the parties to enter into a long-term arrangement and because there was no additional consideration to support a promise of job security, the employment remained terminable at will.¹⁷⁶ The Appellate Division affirmed the

¹⁶⁶ *Id.* at 627.

¹⁶⁷ See, e.g., *Finley*, 5 Conn. App. 394, 499 A.2d 64; *Woolley*, 99 N.J. 284, 491 A.2d 1257; *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982).

¹⁶⁸ See, e.g., *Brooks*, 574 F. Supp. at 809 (employee accepted employment with understanding that management decisions would be made in accordance with policy manual); *Martin*, 109 Ill. App. 3d at 602-03, 440 N.E.2d at 1003-04 (employee declined more lucrative job offer).

¹⁶⁹ For a discussion of *Toussaint*, see *supra* notes 131-51 and accompanying text.

¹⁷⁰ 99 N.J. 284, 285-86, 491 A.2d 1257, 1258 (1985).

¹⁷¹ *Id.*

¹⁷² *Id.* at 286, 491 A.2d at 1258.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 286-87 & n.2, 491 A.2d at 1258-59 & n.2. The employment manual identified five types of termination: layoff, discharge due to performance, disciplinary discharge, retirement, and resignation. The manual also stated that "[i]t is the policy of Hoffman-LaRoche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively." *Id.* at 287 n.2, 491 A.2d at 1259 n.2.

¹⁷⁵ *Id.* at 287, 491 A.2d at 1258.

¹⁷⁶ *Id.* at 288-89, 491 A.2d at 1259. Hoffman-LaRoche contended that the requisites for

trial court decision on identical grounds, stating that the personnel manual was a unilateral expression of company policy not evidenced by bargaining between the parties.¹⁷⁷ That court further held that the distribution of the personnel manual gave the plaintiff no enforceable rights¹⁷⁸ and noted its objections on public policy grounds to the creation of lifetime employment contracts.¹⁷⁹

On appeal, the Supreme Court of New Jersey held that an implied promise in an employment manual that the employer would fire employees only for good cause may be enforceable against the employer even when the employment is otherwise terminable at will.¹⁸⁰ The court reversed the lower courts and remanded the case for trial.¹⁸¹ The *Woolley* court considered not only whether the employer could discharge the plaintiff without cause, but also whether the answer to that question should be based on sole and strict application of traditional contract doctrine.¹⁸² The court held that when an employer with a substantial number of employees distributes to those employees a manual with job security provisions that are "incident[s] of employment," these provisions should be construed according to the "reasonable expectations of the employees" and therefore may be found to be binding.¹⁸³ The *Woolley* court reasoned that strict contract analysis should give way to an examination of the underlying interests of the parties in the employment relationship.¹⁸⁴

In reaching this conclusion, the court placed great emphasis on the changing socio-economic environment as a factor in the reassessment of the traditional employment-at-will rule.¹⁸⁵ It pointed to both legislative and judicial actions which limit the impact of the traditional employment-at-will doctrine when it conflicts with society's interests.¹⁸⁶ In

formation of a contract of the type the plaintiff claimed existed were not present and consequently the claim must fail. *Id.* at 288, 491 A.2d at 1259. The defendant argued that the plaintiff had not specified the duration, as well as other terms of employment, and therefore under New Jersey law, the employment was at will. *Id.* Further, the defendant contended that the plaintiff had not clearly and convincingly shown the intent of the parties to enter into a long-term relationship. *Id.* Finally, the defendant argued that the consideration, in addition to the employee's continued work, necessary to support enforceability of employment manual provisions was lacking. *Id.* The trial court, in granting summary judgment for the defendant, relied on *Savarese*, 9 N.J. 595, 89 A.2d 237, *Hindle v. Morrison Steel Co.*, 92 N.J. Super. 75, 223 A.2d 193 (App. Div. 1966), and *Piechowski v. Matarese*, 54 N.J. Super. 333, 148 A.2d 872 (App. Div. 1959). *Woolley*, 99 N.J. at 288-89, 491 A.2d at 1259.

¹⁷⁷ *Woolley*, 99 N.J. at 289, 491 A.2d at 1259-60.

¹⁷⁸ The New Jersey Supreme Court read the decision of the Appellate Division as suggesting that only provisions such as those involving severance pay might lead to enforceable contractual rights. *Id.* at 289, 491 A.2d at 1260.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 285-86, 491 A.2d at 1258.

¹⁸¹ *Id.* at 307, 491 A.2d at 1269.

¹⁸² *Id.* at 289-90, 491 A.2d at 1260.

¹⁸³ *Id.* at 297-98, 491 A.2d at 1264.

¹⁸⁴ *Id.* at 291-92, 491 A.2d at 1261-62. Notwithstanding this conclusion, the court stated that "a jury, properly instructed, could find, in strict contract terms, that the manual . . . set forth terms and conditions of employment." *Id.* at 298, 491 A.2d at 1265.

¹⁸⁵ *Id.* at 291-92, 491 A.2d at 1261.

¹⁸⁶ *Id.* at 290-92, 491 A.2d at 1260-61. The New Jersey Supreme Court stated:

[t]he Legislature here, as in most states, has limited the at-will rule to the extent that it conflicts with the policies of our various civil rights laws

This Court has clearly announced its unwillingness to continue to adhere to rules

addition, the court viewed changes in organizational structure and growth in the number of employees within employer organizations as factors which necessitate rethinking of the traditional employment-at-will doctrine.¹⁸⁷ The *Woolley* court indicated its willingness to modify the traditional doctrine by its statement that the rule "must be tested by its legitimacy today and not by its acceptance yesterday."¹⁸⁸

In the *Woolley* court's view, courts that hold that policy manual provisions do not give rise to enforceable contractual obligations mistakenly view the claimed promise of job security as one intended to establish individual contracts for lifetime or long-term employment for employees.¹⁸⁹ In contrast, the *Woolley* court viewed the policy manual provisions not as creating individual lifetime contracts but, rather, as creating a contract for an indefinite term for a group of employees which the employer may not terminate, except for good cause.¹⁹⁰ The court found, therefore, that the traditional requirements of specificity of terms and separate consideration are inapplicable in the group contract situation.¹⁹¹ Further, the court viewed the policy manual as an attempt to avoid a collective bargaining agreement.¹⁹² The rationale for distributing a policy manual that includes

regularly leading to the conclusion that an employer can fire an employee-at-will, with or without cause, for any reason whatsoever.

Id. at 290-91, 491 A.2d at 1260. It cited its 1980 decision in *Pierce*, where it recognized that "[t]he interests of employees, employers and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will." *Id.* at 291, 491 A.2d at 1261 (quoting *Pierce*, 84 N.J. at 71, 417 A.2d at 511).

¹⁸⁷ *Woolley*, 99 N.J. at 292, 491 A.2d at 1261-62. Quoting its earlier decision in *Pierce*, the *Woolley* court stated,

In the last century, the common law developed in a laissez-faire climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an employee at will The twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.

Id. at 292, 491 A.2d at 1261 (quoting *Pierce*, 84 N.J. at 66, 417 A.2d at 509).

¹⁸⁸ *Id.* at 292, 491 A.2d at 1262.

¹⁸⁹ *Id.* at 292-95, 491 A.2d at 1262-63. In so viewing wrongful discharge claims, the New Jersey Supreme Court noted that these courts have held that a valid, express contract not to discharge except for good cause must exist if policy manual provisions are to be enforceable. Thus, the agreement must clearly specify the terms, including the duration, and consideration in addition to continued work must support the promise of job security. *Id.* at 293, 491 A.2d at 1262.

¹⁹⁰ *Id.* at 295-96, 491 A.2d at 1263-64. The court stated that "[w]hat is before us in this case is not a special contract with a particular employee, but a general agreement covering all employees." *Id.* at 296, 491 A.2d at 1264.

¹⁹¹ *Id.* at 293, 491 A.2d at 1262. Nevertheless, the court found consideration in the employee's continued work while under no obligation to do so, *id.* at 302, 491 A.2d at 1267, and abandoned any requirement of a showing of reliance by holding that the unilateral contract becomes binding upon distribution of the employment manual and extends to all employees, including those who never read it and those who were not even aware of its existence. *Id.* at 302-04 & n.10, 491 A.2d at 1267-68 & n.10. In general, the *Woolley* court applied a unilateral contract analysis similar to that employed by the Supreme Court of Minnesota in *Pine River State Bank*, 333 N.W.2d 622.

¹⁹² *Woolley*, 99 N.J. at 296, 491 A.2d at 1264.

provisions regarding job security, the court noted, is the employer's realization that the failure to do so could lead to collective bargaining and subsequently collective bargaining agreements.¹⁹³

Given the size of the company and the number of persons employed there without benefit of a contract, the court concluded that it is reasonable to assume that the personnel policy manual constitutes the most reliable statement of the terms of employment.¹⁹⁴ In addition, the *Woolley* court found that the importance to employees of job security as addressed within the employment manual made it even more vital to hold the employer to those provisions as understood by the employees, regardless of the employer's true intentions.¹⁹⁵ The court presumed reliance in the case of an employee who had no awareness of the policy manual provisions to avoid the inequity that would result if some employees were protected while others were not.¹⁹⁶ Finally, the *Woolley* court noted that where an employer chooses not to be bound by the provisions of its personnel policy manuals, the employer could include a disclaimer in a prominent place in the manual asserting its right to discharge at will.¹⁹⁷

Thus the group contract analysis fashioned by the *Woolley* court extended to non-union employees protections similar to those available in collective bargaining agreements. While other courts have not adopted the *Woolley* analysis, the expansive language is indicative of the trend towards greater protection of the employee from wrongful discharge.

IV. THE DEMISE OF THE EMPLOYMENT-AT-WILL DOCTRINE?

The increasing judicial acceptance of the implied-in-fact contract exception constitutes an attack on the traditional employment-at-will doctrine and may present a greater challenge to that doctrine than have other judicial exceptions.¹⁹⁸ The public policy exception encourages employers to approach termination decisions in accordance with generally accepted societal ideas about appropriate conduct in these situations.¹⁹⁹ This exception does not disable the employer in its efforts to run the business efficiently; it only requires that the employer conduct business in proper accordance with the interests of society.²⁰⁰ Similarly, the judicially imposed covenant of good faith and fair dealing imposes upon the employer the duty to conduct business affairs, with respect to employment practices, fairly and equitably.²⁰¹ Both exceptions protect the employer's freedom to terminate for good cause, but neither exception restricts the employer's right to

¹⁹³ *Id.* at 296-97, 491 A.2d at 1264.

¹⁹⁴ *Id.* at 298-99, 491 A.2d at 1265.

¹⁹⁵ *Id.* at 300, 491 A.2d at 1266.

¹⁹⁶ *Id.* at 302-04 & n.10, 491 A.2d at 1267-68 & n.10.

¹⁹⁷ *Id.* at 309, 491 A.2d at 1271. This caveat is consistent with decisions by courts in other jurisdictions. See, e.g., *Crain v. Burroughs Corp.*, 560 F. Supp. 849, 852 (C.D. Cal. 1983); *Finley*, 5 Conn. App. at 412, 499 A.2d at 75; *Toussaint*, 408 Mich. at 624, 292 N.W.2d at 897; *Pine River State Bank*, 333 N.W.2d at 627 (Minn. 1983).

¹⁹⁸ See *Lopatka*, *supra* note 20, at 17.

¹⁹⁹ For a discussion of the public policy exception, see *supra* notes 85-97 and accompanying text.

²⁰⁰ *Id.*

²⁰¹ For a discussion of the implied covenant of good faith and fair dealing, see *supra* notes 98-110 and accompanying text.

discharge for no cause, such as a layoff due to lack of work.²⁰² Thus, both exceptions, as modifications to the employment-at-will rule, seek to maintain a balance between the interests of employees and employers as well as those of society in general.²⁰³

In contrast, the implied-in-fact contract exception goes beyond the modification brought about by judicial adoption of the public policy and good faith exceptions and provides a degree of job security not enjoyed by non-union employees since the emergence of the employment-at-will doctrine.²⁰⁴ Where an employee can point to statements in personnel policy and procedure manuals that might lead a jury to conclude the employee legitimately expected job security in the absence of a showing of good cause for termination, the implied-in-fact contract theory may bind the employer, without good cause to discharge, to continue the employment relationship as long as the employee desires even though the employee is not similarly bound.²⁰⁵ The benefit to employees is gained at the expense of the employer's right to discharge employees in response to changes in business demands, as would occur in lack-of-work layoff situations, by restricting the employer's freedom to terminate for no cause attributable to the employee's performance.²⁰⁶

Given the prevalent use of personnel policy manuals that could give rise to an implied-in-fact contract and the practical problems involved in removing all statements that might be construed as assuring continued employment,²⁰⁷ widespread judicial adoption of the implied-in-fact contract exception may lead to the disappearance of the traditional employment-at-will doctrine. If the courts widely adopt the implied-in-fact contract exception, the judicial presumption that employees hired for an unspecified term are entitled to job security will effectively displace the presumption that an indefinite hiring is at will.²⁰⁸

Taking this proposition even further, the New Jersey Supreme Court, in *Woolley v. Hoffman-LaRoche, Inc.*,²⁰⁹ reasoned that because the implicit rationale for including such statements in personnel documents and distributing them to employees is avoidance of unionization and collective bargaining agreements, courts should give commitments purportedly made in these documents the same force as collective bargaining agreements.²¹⁰ The *Woolley* court viewed job security as so fundamental a protection for

²⁰² See *supra* notes 85-111 and accompanying text.

²⁰³ *Monge*, 114 N.H. at 133, 316 A.2d at 551.

²⁰⁴ See *Lopatka*, *supra* note 20, at 17.

²⁰⁵ See *Toussaint*, 408 Mich. at 614, 292 N.W.2d at 892.

²⁰⁶ See *supra* notes 112-97 and accompanying text.

²⁰⁷ See *Lopatka*, *supra* note 20, at 17.

²⁰⁸ For a discussion of the presumptions behind the employment-at-will doctrine, see *supra* notes 35-65 and accompanying text.

²⁰⁹ For a discussion of *Woolley*, see *supra* notes 170-97 and accompanying text.

²¹⁰ See *Woolley*, 99 N.J. at 296-97, 491 A.2d at 1264 (dicta). As Professors Murg and Scharman warned,

for the first time, the more than eighty million non-unionized employees in this country may be accorded the protection of job security which the unionized sector of the workforce traditionally has enjoyed.

Indeed, in its practical application, providing for the enforcement of such promises could afford non-unionized employees greater job security than unionized employees. Under most collective bargaining agreements, disputes over whether good cause existed for a discharge are determined by an arbitrator. The arbitrator normally will have the experience and expertise necessary to unravel the issues presented by

workers that a jury should be allowed to find that a personnel manual constitutes an explicit statement of policy rather than an expression of company philosophy, subject to appropriate business judgment.²¹¹

The flawed rationale of *Woolley* and *Toussaint* is the justification that statements in personnel manuals regarding continued employment promise a benefit of job security that serves as an inducement for employees to work for the employer.²¹² By this reasoning, these courts and others recognize that employees might in fact rely upon these policy provisions.²¹³ These courts readily acknowledge, however, that the dismissed employee need not show reliance on the policies.²¹⁴ This reasoning is erroneous because only if the employee actually relies upon the job security provision can it reasonably serve as an inducement to employment.²¹⁵ Where the employee is totally unaware of the existence of the employee manual or its provisions specifically relating to job security, the employer receives no gain in employee morale or productivity.²¹⁶ The employer compensates the employee for services performed within the normal course of employment, and this compensation is consideration for work performed.²¹⁷ Under these circumstances, the job security provision becomes merely gratuitous.

One of the judicial objectives in implied-in-fact contract analysis is to discover the mutual intentions and expectations of the parties and to enforce them.²¹⁸ But the *Woolley* court and others require that these mutual intentions be implicit under the circumstances rather than *actual*. Rather than searching for mutual intent of the parties to enter into long-range commitments, the *Toussaint* and *Woolley* courts relied on the intent presumed from unilateral actions of the employer and the intentions of the employee which may first become apparent after the employer has dismissed the employee. Employers may,

such disputes. A civil suit by a private employee for breach of contract, however, carries with it the right to a jury trial. In *Toussaint*, the court recognized that the legitimacy of the employee's expectations regarding promises of continued employment were for the jury to determine. Because the jury probably will lack an arbitrator's expertise in this field, and because it probably will be more sympathetic to the claims of the employee than an arbitrator, juries may render verdicts which accord non-unionized employees greater protection than unionized employees have achieved.

Murg & Scharman, *supra* note 48, at 369-70 (citations omitted).

²¹¹ See *Woolley*, 99 N.J. at 298, 491 A.2d at 1264-65.

²¹² See Murg & Scharman, *supra* note 48, at 370. In ruling that the provisions of employment manuals could be contractually binding, the Supreme Court of New Jersey in *Woolley* stated that "[o]ur courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable." *Woolley*, 99 N.J. at 300, 491 A.2d at 1266. In *Toussaint*, the Michigan Supreme Court reasoned that "[t]he employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security . . ." *Toussaint*, 408 Mich. at 614, 292 N.W.2d at 892.

²¹³ See, e.g., *Woolley*, 99 N.J. at 300, 491 A.2d at 1266; *Toussaint*, 408 Mich. at 614, 292 N.W.2d at 892.

²¹⁴ See *Woolley*, 99 N.J. at 304 n.10, 491 A.2d at 1268 n.10; *Toussaint*, 408 Mich. at 613 n.25, 292 N.W.2d at 892 n.25.

²¹⁵ For a discussion of reliance as consideration for a promise of job security, see generally Note, *Implied Contract Rights*, *supra* note 44, at 354-56.

²¹⁶ Where the employee becomes aware of the employment manual provisions after accepting employment, this new information may or may not affect morale or productivity.

²¹⁷ See Murg & Scharman, *supra* note 48, at 337-38.

²¹⁸ See, e.g., *Drzewiecki v. H&R Block, Inc.*, 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 174 (1972); *Toussaint*, 408 Mich. 579, 600, 292 N.W.2d 880, 885 (1980).

on the other hand, reasonably expect in the normal course of business that the traditional employment-at-will doctrine will preclude the enforceability of a wide range of employee manual statements, and they then will issue personnel documents to provide guidance to both management and employees alike.²¹⁹ The intent of the employer may, therefore, differ from that of the dismissed employee. This being so, the employer may become saddled with a fixed labor force when demand shifts resulting from changes in the political, economic and technological environment warrant labor reductions.²²⁰

Because the implied contract exception may allow an employer to discharge an at-will employee only for good cause and thus not to meet changing business demands, the need for judicial determination of what constitutes good cause ultimately places the courts in the position of making business decisions in lieu of the employer.²²¹ When the ultimate decision whether the employer had good cause for discharge falls in the hands of a jury, there arises a risk that the jury will impose its subjective judgment as a substitute for that of the employer, and the employer may find itself liable for wrongful discharge even though the dismissal was in good faith.²²²

As the courts become more involved in defining good cause and in protecting the job security of employees, they are likely to find good cause provisions where none previously existed.²²³ The courts will look beyond express statements of company policy contained in personnel handbooks in order to infer a policy of continued employment without a showing of good cause for discharge. When courts have looked beyond personnel documents to provide job security, some have indicated their willingness to find binding good cause requirements from, for example, the employer's "custom, practice, or policy"²²⁴ or from business usage, the nature of employment, and circum-

²¹⁹ In *Toussaint*, one *amicus curiae* argued on behalf of the employer that large organizations regularly distribute memoranda, bulletins and manuals reflecting established conditions and periodic changes in policy. These documents are drafted "for clarity and accuracy and to properly advise those subject to the policy memo of its content." If such memoranda are held by this Court to form part of the employment contract, large employers will be severely hampered by the resultant inability to issue policy statements.

Toussaint, 408 Mich. at 619, 292 N.W.2d at 894.

²²⁰ Murg & Scharman, *supra* note 48, at 336.

²²¹ See, e.g., *Toussaint*, 408 Mich. at 622, 292 N.W.2d at 896.

²²² See *id.* The *Toussaint* court expressed its concern that:

[w]here an employee is discharged for stated reasons which he contends are not 'good cause' for discharge, the role of the jury is more difficult to resolve. If the jury is permitted to decide whether there was good cause for discharge, there is the danger that it will substitute its judgment for the employer's. If the jurors could not have fired the employee for doing what he admittedly did, or they find he did, the employer may be held liable in damages although the employee was discharged in good faith and the employer's decision was not unreasonable.

Id. Nevertheless, the court held that the good cause provision provides more than a promise to act in good faith. *Id.*

²²³ See, e.g., *Tiranno v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984). The *Tiranno* court held that an employer's statement that employees would be terminated if their performance did not measure up to company standards was effectively a good cause standard, and therefore it remained for the jury to find if good cause for termination existed. *Id.* at 675, 472 N.Y.S.2d at 50.

²²⁴ See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 902-03 (3rd Cir. 1983).

stances surrounding the employment.²²⁵ As one commentator suggests, where the duration of an employment relationship is unexpressed and cannot be determined from the terms of the agreement, the court may rely upon the "common law of the job" to discover the expectations of the parties and conclude that an employee either does or does not have job security.²²⁶

Judicial acknowledgment of the employer's right to limit the effect of this exception by disclaimer provisions stating that the employment is terminable at will²²⁷ may be of little practical significance or protection to the employer. For example, subsequent to the *Toussaint* decision, which explicitly acknowledged that an employer's use of a disclaimer could avoid liability, a Michigan court of appeals ruled that when a policy manual contains both assurances of job security and a disclaimer, it remains a question for the jury as to which governs.²²⁸ Decisions like this inject even greater uncertainty into the scope of the implied-in-fact contract exception, and make it more difficult for employers to issue policy statements without running the risk of incurring wrongful discharge liability.

In addition, extension of the protection of the implied-in-fact contract exception to greater numbers of employees without requiring a showing of reliance upon or even awareness of the job security provisions could prove to be a disincentive to employers to produce manuals otherwise helpful to employees, and could serve to limit job security in contrast to the exception's intended effect. For example, the threat of wrongful discharge litigation will motivate employers to scrutinize all personnel documents and memoranda in an effort to limit wrongful discharge liability.²²⁹ In so doing, employers will be compelled to choose between two conceptual approaches in response to widespread adoption of the implied-in-fact contract exception. The "hard-line" approach is to avoid strictly the creation of any job security rights through policy statements; this approach would involve explicitly informing employees by way of express disclaimers not to expect any such rights.²³⁰ Employers would therefore remove any and all language that might be construed as providing any degree of security in employment.²³¹ The other, more supportive approach, would lead employers to freely confer the right of continued employment.²³²

Both of these approaches are preventive measures against wrongful discharge litigation, but it is unlikely that employers will choose one approach over another solely because the approach better protects against liability.²³³ Rather, traditional business considerations will remain the determinative factors, and employers will continue to conduct

²²⁵ See, e.g., *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 491 (Ky. 1983); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 725, 649 P.2d 181, 183 (1982).

²²⁶ Note, *Implied Contract Rights*, *supra* note 44, at 356.

²²⁷ See, e.g., *Toussaint*, 408 Mich. at 612, 292 N.W.2d at 891; *Woolley*, 99 N.J. at 309, 491 A.2d at 1271. See also *Crain v. Burroughs Corp.*, 560 F. Supp. 849, 852 (C.D. Cal. 1983). The reasoning here is that the disclaimer becomes part of the employment contract upon distribution as would a provision regarding job security. In the view of one court, if statements in manuals favorable to employees can bind an employer, it should be able to obtain protection from liability by a disclaimer in the manual. See *Batchelor v. Sears, Roebuck & Co.*, 114 L.R.R.M. (BNA) 3467 (E.D. Mich. 1983).

²²⁸ *Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 310-11 (Mich. App. 1981).

²²⁹ See *Lopatka*, *supra* note 20, at 27-29.

²³⁰ See *id.* at 27.

²³¹ See *Lopatka*, *supra* note 20, at 27-29.

²³² *Id.*

²³³ *Id.*

their business affairs so as to attract the best employees, avoid unionization, and earn a profit.²³⁴ In this regard, employers will likely grant some degree of job security in order to maintain a productive work environment.²³⁵ But lifetime employment that potentially would result from expansive job security provisions generally would be undesirable to most employers. Therefore, employers will need to achieve an acceptable balance between the hard-line and the supportive approaches.²³⁶ The risk of wrongful discharge liability will compel employers to rely upon cost-benefit analyses to achieve that balance; they will need to weigh their potential liability, the costs of expanded job security, and the value to the business of manuals and handbooks.²³⁷ It is likely that the results of such analyses, and subsequent excision of policy manual provisions, would not lead to the protection of job security that judicial adoption of the implied contract exception seeks to achieve.

In sum, the implied-in-fact contract exception gives a great deal of protection to the discharged employee at the expense of the employer's flexibility to make personnel decisions. Widespread acceptance of the implied contract theory of recovery will drastically reduce the scope of the traditional employment-at-will doctrine. Alternatives are available, however, that would more equitably balance the interests of the employer and employee.

One alternative to the adoption of the implied-in-fact contract exception is the expansion of the application of the implied covenant of good faith and fair dealing.²³⁸ When an employee brings a wrongful discharge action to enforce an employer's promise, that employee in effect is seeking to require the employer to conduct affairs in good faith.²³⁹ For example, a court could find the termination of an employee who relied on an employer's assurances of job security to be a breach of the implied covenant of good faith and fair dealing. While this approach still involves judicial determination of what constitutes good cause for termination, the covenant of good faith theory more faithfully considers the interests of the employer and employee and protects the employer from wrongful discharge liability when it terminates the employee in good faith.

Legislative modification of the employment-at-will rule is a second alternative to the implied-in-fact contract exception.²⁴⁰ Legislation to reform application of the employment-at-will doctrine should have two goals: uniformity in the resolution of employment disputes;²⁴¹ and a fair balance between the interests of the employee in job security and those of the employer in retaining enough discretion in employment matters to operate

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ For a discussion of the covenant of good faith and fair dealing, see *supra* notes 98-111 and accompanying text.

²³⁹ The Supreme Court of Montana followed this approach in its 1982 decision in *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982). The *Gates* court held that employee handbook provisions had not been bargained for, but rather constituted a unilateral statement of company policies, and therefore did not become part of the employment contract. *Id.* at 1066. The court further held that the employment contract implied a covenant of good faith and fair dealing and that it remained a question for the jury to consider whether the manner in which the employer carried out the employee's termination constituted a breach of the implied covenant. *Id.* at 1067.

²⁴⁰ See Peirce, *supra* note 23, at 45.

²⁴¹ *Id.*

the business effectively and efficiently.²⁴² The legislation should define "good cause" as it relates to employment termination decisions and establish standards for allocating the burden of proof.²⁴³ It also should establish standards for employers to follow in promulgating internal policy documentation, including the prerogative to incorporate in a prominent place a disclaimer proclaiming that employment is at-will.²⁴⁴

The advantages of legislative modification of the employment-at-will rule are many. First, the employee and employer will benefit from the availability of a statutory remedy that clearly identifies the burden of proof required and thus reduces the inherent variability in jury determinations of what constitutes good cause.²⁴⁵ Second, the employer will benefit from greater certainty in making employment decisions and issuing policy statements and thus will be able to produce personnel manuals and handbooks but with greater ability to limit liability from wrongful discharge litigation.²⁴⁶ Finally, the employment relationship will benefit from a better understanding of the obligations of the parties.²⁴⁷

These alternatives to the implied-in-fact contract exception will provide employees with a considerable amount of protection in the face of discharge from employment based on improper motives. At the same time, these alternatives will preserve the employer's discretion to make personnel decisions, constrained only by identifiable standards of conduct.

V. CONCLUSION

The public policy and good faith common law exceptions as well as the implied-in-fact contract exception have greatly eroded the employment-at-will doctrine. Courts developed each theory because of the concern that an employer's zealous pursuit of business objectives would unfairly or unlawfully trample the rights and interests of employees. The implied-in-fact contract exception, in which courts infer assurances of job security from employment manuals and personnel documents, has caused extensive erosion of the employment-at-will doctrine because it can be applied so as to limit the employer's freedom to terminate employment except upon a showing of good cause.

²⁴² Courts faced with the application of the employment-at-will doctrine to employment disputes consider this a primary objective. See, e.g., *Monge*, 114 N.H. at 133, 316 A.2d at 551 ("[T]he employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment . . ."); *Pierce*, 84 N.J. at 71, 417 A.2d at 511 ("In recognizing a cause of action to provide a remedy for employees who are wrongfully discharged, we must balance the interests of the employee, the employer, and the public").

²⁴³ Peirce, *supra* note 23, at 45-46. Professor Peirce proposes a statutory limitation on the employer's right to terminate after an initial probationary period absent statutorily defined good cause. *Id.* This approach, it seems, is unduly burdensome on the employer, but nevertheless the resulting greater certainty would be preferable to the uncertainty of the judicial application of the employment-at-will doctrine.

²⁴⁴ Legislation in this area would go far towards satisfying the concerns of, for example, one *amicus curiae* in *Toussaint*, who argued that organizations who regularly distribute internal memoranda and manuals "will be severely hampered by the . . . inability to issue policy statements" if courts hold that these memoranda and manuals form part of the employment contract. *Toussaint*, 408 Mich. at 619, 292 N.W.2d at 894.

²⁴⁵ See *supra* notes 221-26 and accompanying text.

²⁴⁶ See *supra* note 244.

²⁴⁷ Peirce, *supra* note 23, at 47.

The implied-in-fact contract exception extends job security protections to large numbers of employees who may not have placed reliance on employment manual provisions and who are fully compensated for services performed, and this will unfairly burden employers. If the exception becomes widely adopted, employers' reliance on what remains of the traditional employment-at-will doctrine in the conduct of business affairs may subject them to wrongful discharge liability. As an alternative, courts should limit recovery by discharged employees to situations in which the employer has acted in bad faith. Further, legislative rather than judicial modification of the employment-at-will rule can lead to a greater amount of certainty in employment relations and thereby protect the interests of both employers and employees.

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