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# Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context

Monique C. Lillard\*

## I. INTRODUCTION

By including an express obligation of good faith in all sales contracts,<sup>1</sup> the drafters of the Uniform Commercial Code (UCC) forced the courts around the nation to recognize and make use of that admittedly amorphous concept in their analyses of contractual disputes. After the UCC utilized the phrase "good faith," the Restatement picked it up,<sup>2</sup> and good faith has been a factor in judicial interpretation of nearly all aspects of a contract case: plaintiff's prima facie case, various affirmative defenses, and all stages of contract formation, performance and enforcement.<sup>3</sup>

The phrase has recently become of prime importance to employment lawyers owing to an abundance of lawsuits alleging that an employee's firing was in breach of the covenant of good faith and fair dealing.<sup>4</sup> This Article examines what good faith and fair dealing mean in the workplace, particularly where the relationship between employer and employee is otherwise presumed to be "at will." The conclusion is that except in sporadic situations, the concept of good faith and fair dealing is too vague to be helpful to either party or even to the court. The good faith and fair dealing construct, as currently understood, should be abandoned in the employment context, as should the at will presumption. They should be replaced by legislative

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1. U.C.C. § 1-203 (1990) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

2. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) ("every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

3. Robert S. Summers, *'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). According to Summers:

Cases have been discovered which, if taken as a whole rather than by states, require good faith at every stage of the contractual process, from preliminary negotiation through performance to discharge, and in nearly all kinds of contracts. This is not to say that all cases agree as to when a duty of good faith should be imposed, for they do not.

*Id.* at 216.

4. See Appendix.

prohibition of termination absent good cause. The Model Employment Termination Act<sup>5</sup> is an example of such employee protection.

## II. HISTORY AND MEANING OF THE PHRASE "GOOD FAITH AND FAIR DEALING"

Even before the UCC was enacted, a concept which we could now identify as good faith affected the outcome of contract cases.<sup>6</sup> The classic case of *Lucy, Lady Duff-Gordon*<sup>7</sup> is an example when in 1917 Judge Cardozo interpreted a contract to pay profits resulting from exclusive agency and read in "a promise to use reasonable efforts to bring profits and revenues into existence."<sup>8</sup> Two years earlier, a California case foreshadowed the UCC's definition by nearly half a century: "As understood in law the phrase in 'good faith' has a settled and well-defined meaning, which generally imports that the transaction was honestly conceived and consummated . . ."<sup>9</sup> Good faith concepts stretch even across millennia. To the Greeks good faith was seen as

5. Approved by the National Conference of Commissions on Uniform State Laws, Aug. 8, 1991. 137 Lab. Rel. Rep. (BNA) 513 (Aug. 26, 1991). This Article is not intended as a propaganda piece on the Model Employment Termination Act. But the author does laud the concept of a uniform act which will take the matter away from each state's common law.

6. Eric Holmes has written an article probing the historical philosophical definitions of good faith. See Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381 (1978):

In an effort to keep the pure theory of contracts *pure*, courts in the early part of this century twisted existing legal concepts and rules to accomplish fair results between contracting parties. Analysis thus was driven underground and the legal profession was misled by the courts which failed to articulate the real grounds for decisions. Their fictions led to inequity, uncertainty and unpredictability. Rather than recognizing the lack of good faith as an appropriate invalidating device, courts masked their decisions in the guise of interpretation and construction, implication, want of mutuality, particularized rules of offer and acceptance, mutual mistake and lack of consideration. By using such covert tools, courts concealed the good-faith concept; but, as Llewellyn warns, such tools are never reliable.

*Id.* at 388-89 (footnotes omitted).

See also Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964) (finding that notions of good faith and fair dealing are threaded through various doctrines in American contract law).

For another multicultural survey of the concept of good faith, see Ralph A. Newman, *The Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 CORNELL L. REV. 553 (1969).

7. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

8. *Id.* at 215.

9. *Heney v. Sturo & Co.*, 153 P. 972, 974 (Cal. Ct. App. 1915). See also Raymond Wallenstein, *Breach of the Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts: A Wrong in Search of a Remedy*, 20 U. WEST L.A. L. REV. 113, 117-18 (1988-1989).

a universal social force, objectively determined.<sup>10</sup> In Canon Law good faith is a universal moral norm, determined subjectively by each individual's honesty and conception of duty to God.<sup>11</sup> Under Roman law the good faith requirement bound the parties not only to the terms actually agreed to, but to "all the terms that were naturally implied in their agreement."<sup>12</sup> More recently, Field required "good faith" in his code,<sup>13</sup> and the expression has been used in statutes with sufficient regularity that E. Allen Farnsworth terms it "the darling of draftsmen."<sup>14</sup>

Nonetheless, Farnsworth asserts that by the 1950s the obligation of good faith and fair dealing had been ignored so that "by the time of the promulgation of the Uniform Commercial Code, good faith performance had, in spite of its ancient lineage, become a poor and neglected relation of good faith purchase. The Code revived it and used good faith in both senses—good faith purchase and good faith performance."<sup>15</sup>

Despite a generation of authority created by the UCC,<sup>16</sup> the definition of good faith has remained elusive.<sup>17</sup> Farnsworth wrote: "While the varieties of good faith are not quite as infinite as those of religious faith, it would be quite extraordinary if this protean concept were used in the same

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10. See Holmes, *supra* note 6, at 402; Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818 n.35 (1982).

11. Holmes, *supra* note 6, at 402-03. Another author cites the Old Testament, *Leviticus* 19:11 as the source of the moral precept of the covenant. Wallenstein, *supra* note 9, at 131.

12. E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669 (1963) (quoting FREDERICK LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 124-25 (1955)).

13. *Id.* at 667.

14. *Id.*

15. *Id.* at 671.

16. Christina Kunz has remarked: "[T]he UCC has, by default, become an active laboratory of experiments on good faith." Christina Kunz, *Frontispiece on Good Faith: A Functional Approach Within the UCC*, 16 WM. MITCHELL L. REV. 1105, 1105-06 (1990).

17. Kunz, *supra* note 16, at 1105-06. See also *infra* note 21. But see Holmes, *supra* note 6, at 391 n.38 ("Since only six major articles on 'good faith' in contract law can be found in the legal literature, it is a much neglected area of study."). Nonetheless, Holmes concluded:

Although the concept [of good faith] is not precise, detailed, or rigid as compared with others generally used in formulations of contract law, it is suggested that "good faith" has a sufficiently common core of meaning, over a considerable range of applications, to make it functional in practical affairs. Properly perceived, "good faith" is a single mode of analysis comprising a spectrum of related, factual considerations.

*Id.* at 450-51.

For an succinct summary of the attempts to define good faith in general, see Russell A. Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 MARQ. L. REV. 1, 5-12 (1971).

sense in all of these assorted instances."<sup>18</sup> Nowhere is this more true than in the employment context.

From the beginning, the good faith criterion has been criticized for being so difficult to define that it is unhelpful as a legal standard.<sup>19</sup> Critics worry that the vagueness of the obligation will lead to uneven enforcement of sanctions or unequal treatment of parties.<sup>20</sup> On the other hand, proponents of the phrase are not only untroubled by the vagueness of the standard, but they welcome the potential for judicial flexibility provided by the lack of a positive definition.<sup>21</sup> They cite equitable discretion, as well as the concepts of negligence and unjust enrichment, as examples of doctrines which are not definite, detailed rules, but which function as viable legal standards.<sup>22</sup> Many

18. Farnsworth, *supra* note 12, at 668. Farnsworth considered himself fortunate to have narrowed the UCC's use of the phrase to two meanings, namely a state of mind, as in "good faith purchase," and a moral description where "the inquiry goes to decency, fairness or reasonableness in performance or enforcement." *Id.*

19. Kessler and Fine wrote: "The law confronts the task, in the interest of certainty, of identifying and categorizing these amorphous 'residual' concepts [like 'good faith'], only to be faced with the realization that this process is never-ending." Kessler & Fine, *supra* note 6, at 449. Despite these words of warning, the author of this Article proceeds with her task!

20. See, e.g., Clayton P. Gillette, *Good Faith Obligation*, 1981 DUKE L.J. 619, 620-21, 647 (noting in particular that the UCC promises predictability and suggesting "that the nebulous scope of good faith may be clarified by focusing on the availability of an appropriate remedy within each proffered definition.").

21. Summers wrote:

If an obligation of good faith is to do its job, it must be open-ended rather than sealed off in a definition. Courts should be left free, under the aegis of a statutory green light, to deal with any and all significant forms of contractual bad faith, familiar and unfamiliar. The legislature should grant only power; it should not try to guide through definitions . . . .

Summers, *supra* note 3, at 215.

Similarly, Eisenberg wrote:

It is the *concept* of the term which must always be stressed and applied, not standardized definitions, refined definitions, analyses of definitions and of terms. Courts and businessmen can deal with, and handle, concepts and understand them and work with them, without getting "hung up" on definitions, classifications, and rules with exceptions which only result in confusion.

Eisenberg, *supra* note 17, at 17.

Gillette, himself critical of a vague standard, notes others' contentment with case-by-case enforcement of the obligation. Of the requirement in the German Civil Code, article 242, to perform obligations "in the manner required by good faith, with regard to commercial usage," Gillette wrote:

Notwithstanding the vagueness of the German obligation, unqualified even by a limitation to honesty in fact, one distinguished commentator noted that German judges have utilized article 242 as a "roving searchlight" to identify "injustice" in particular cases "within the limits of their own function and when they had or could devise workable means to redress it."

Gillette, *supra* note 20, at 646 (quoting JOHN P. DAWSON, *THE ORACLES OF LAW* 261-502 (1968)).

22. Summers, *supra* note 3, at 265.

times the implied covenant of good faith serves a "gap-filling function,"<sup>23</sup> so perhaps it is natural that the scope of the covenant should expand and contract as necessary to fill the holes left by stricter doctrine.

One valiant attempt to give meaning to the phrase came from Robert Summers, writing in 1968. He suggested that to understand the words "good faith" one should ask,

What, in the actual or hypothetical situation, does the judge intend to rule out by his use of this phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an "opposite" for the species of bad faith being ruled out.<sup>24</sup>

Summers considered this "excluder" definition to be extremely useful,<sup>25</sup> primarily because potential one-word definitions are too limiting or too broad to reflect how judges use the term.<sup>26</sup> For this reason, Summers rejected the UCC's definition of good faith as unduly narrow. He argued that merchants understand good faith and fair dealing to be more than "honesty in fact."<sup>27</sup>

Summers' approach has been criticized. Eric Holmes wrote that Summers

tacitly denies predictive meaning for the good-faith obligation. His approach presupposes that the legal phrase "good faith" cannot be comprehensively known in the first instance, that judges are to apply intuitively the good-faith obligation, and that their decisions are to be taken as correct and will give the correct meaning to this term prospectively. Those who

23. Wallenstein, *supra* note 9, at 114-15.

24. Summers, *supra* note 3, at 200; Summers, *supra* note 10, *passim*.

25. Summers, *supra* note 3, *passim*. See generally Summers, *supra* note 10. For a related approach, see Holmes, *supra* note 6, at 400-01 (explaining the point of view that good faith must be defined in the negative). According to Holmes, "An analogy to visual perception may shed light on such categories. If one were to look at a full moon on a dark night, the light perceived would be known law (the law that could be positively stated), and the surrounding darkness would be residual categories, negatively perceived." *Id.*

26. Summers, *supra* note 3, at 206 ("general definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity.").

27. U.C.C. § 1-201(19) (1990) ("'Good faith' means honesty in fact in the conduct or transaction concerned."). According to U.C.C. § 1-203 cmt. (1990):

It is to be noted that under the Sales Article definition of good faith (Section 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (Section 1-201) but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

See Summers, *supra* note 3, at 196. One appellate judge in New Jersey states that the definition is "as soft in the center as the phrase which it attempts to define." *Noye v. Hoffmann-La Roche, Inc.*, 570 A.2d 12, 18, 5 Ind. Emp. Rights Cas. (BNA) 352, 356, 115 Lab. Cas. (CCH) ¶ 56,273 (N.J. Super. Ct. App. Div.) (Stein, J., concurring), *cert. denied*, 584 A.2d 218 (N.J. 1990). Throughout this Article and the Appendix, citations to CCH and BNA reporters have been included as an aid to the researcher.

initially inquired about the meaning of "good faith" will say, "I told you so."<sup>28</sup>

Yet Holmes' own attempt to give content to the phrase is scarcely more predictive.<sup>29</sup> Holmes considered that good faith

is a single mode of analysis comprising a spectrum of related, factual considerations. The context of its use is critically important, [and] the following factual elements should be considered: the nature of the undisclosed fact, accessibility of knowledge, the nature of the contract, trade customs<sup>30</sup> and prior course of dealing, conduct of the party in obtaining knowledge, and the status and relationship of the parties.<sup>31</sup>

The fact-dependent nature of this test will lead to case-by-case definitions.

Perhaps this is adequate, and no one should aspire to anything more specific. As Holmes pointed out, "liberty" and "property" are hard to define, but people know what they mean and would probably agree with him that they are not "legal construct[s] but . . . basic, straightforward concept[s]."<sup>32</sup>

Russell Eisenberg, for example, rejected attempts to define the phrase, relying instead on a statement of its purpose and its implication for business:

[t]he purpose of the term "good faith", and the reason why it pervades the Code, is to constantly remind the business community that it must act in a just and righteous manner, and that it must transact its business in a moral manner, within the framework of generally accepted prevailing business practices, and that it must be aware of what is going on. If a businessman does not act in that manner, the courts are available to impose its [sic] judgment upon the litigants and to enforce or to refuse to enforce the commercial agreements as is just and equitable under the circumstances presented to the courts.<sup>33</sup>

But a decade later Clayton Gillette cautioned against too expansive an interpretation:

[N]otwithstanding a drafting history that partially supports the use of a good faith obligation to transform altruistic behavior into a legal duty, and

28. Holmes, *supra* note 6, at 401. See also Gillette, *supra* note 20, *passim*.

29. Holmes recognized, "To the extent [Summers'] approach first seeks contextual meanings of good faith, it is not antithetical to the ideas proffered in this Article." Holmes, *supra* note 6, at 401. His objection was to Summers' "boot-strap" approach, whereby "the task of the legal scholar is to cull from the reports a sufficient number of bad-faith opinions, list the specific forms of bad faith, and then to infer a complementary list of good-faith meanings." *Id.*

30. In the employment arena the question of business practice is not merely empirical, but is affected by the ingrained legal presumption of at will employment.

31. Holmes, *supra* note 6, at 451. For a list of suggested "dos" and "don'ts" required by the covenant, see Gillette, *supra* note 20, at 620. He listed rules contemplated by great scholars on the subject.

32. Holmes, *supra* note 6, at 451.

33. Eisenberg, *supra* note 17, at 17-18.

subsequent scholarly development of that interpretation, courts justifiably have restricted the scope of the obligation. This conclusion is predicated on arguments that an expansive obligation extends the responsibilities of commercial actors beyond bargained-for risk allocations, subjects bargains to inconsistent and uncertain enforcement, and does not produce offsetting benefits in commercial conduct.<sup>34</sup>

Steven Burton named this the "contemplation standard," but continued:

The contemplation standard only directs one to consult the parties' intentions and reasonable expectations—an amorphous totality of the circumstances at the time of formation. In contrast, the cost perspective of contract *breach* behavior makes it possible to identify with greater particularity to the relevant expectations and motives that have been held to constitute *bad faith*.

. . . Bad faith performance consists of an exercise of discretion in performance to recapture opportunities foregone at formation.<sup>35</sup>

To sum up, observers of the legal ramifications of the covenant have differed first in their degree of concern over determining what the covenant means and second in their understanding of what that meaning is. One scholar suggested an "excluder" definition; another suggested a factual, case-by-case totality-of-the-circumstances approach. Another injected a moral element, while still others recommended staying close to the parties' expectations regarding their bargain.

### III. THE COVENANT OF GOOD FAITH AND FAIR DEALING IN THE EMPLOYMENT CONTEXT

Despite the continuing failure of courts or scholars to agree on a definition of good faith, some courts are willing to impose a covenant of good faith and fair dealing into the employment contract by operation of law. The purpose of this Article is to consider the concept of good faith and fair dealing in the employment context, especially in view of the at will rule. In nearly all states either the legislature or the judiciary has decreed that employment contracts which are silent on the matter of termination of the contract<sup>36</sup> are subject to a presumption that the parties intended that the contract could be terminated by either party "at will." This term has been understood to mean that the contract may be terminated for good reason, bad reason, or no reason

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34. Gillette, *supra* note 20, at 620.

35. Steven Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387 (1980) (emphasis added). For a further explanation of Burton's thesis, see Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984).

36. If an employment contract is specific as to length or duration of employment, the parties are usually deemed to have agreed that the employee will be employed for the duration of the time unless good cause exists for termination. See, e.g., *Rosecrans v. Intermountain Soap & Chemical Co.*, 605 P.2d 963 (Idaho 1980).



at all.<sup>37</sup> The presumption is triggered by the parties' failure to specify, either by their words (expressly) or by their behavior (implied-in-fact), how the relationship will be terminated.

H.G. Wood is given credit for originating the at will presumption in his now infamous treatise written over 100 years ago.<sup>38</sup> Perhaps the presumption mirrors standard practice (or what was standard practice when the presumption developed) and is a true reflection of the understanding of the parties to modern-day employment contracts.<sup>39</sup> Or perhaps it is a fiction designed to further employer interests.<sup>40</sup> Most likely, the truth is in the middle. Anecdotal evidence suggests that workers know their employer *could* fire them for no reason or an arbitrary reason, but "I know that he won't." At any rate, the presumption allows the courts to impose contractual terms beyond those agreed to by the parties.

Similarly by implying "in law" a covenant of good faith and fair dealing, the courts are also imposing contractual terms to which the parties did not actually consent. This Article addresses how the law can and whether the law should impose both the at will presumption and the good faith/fair dealing covenant into the same contract.

One understanding of the covenant allows both the presumption and the covenant to co-exist harmoniously. Steven Burton suggested that the covenant may merely require that each side "effectuate the intentions of parties, to

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37. The Tennessee Supreme Court wrote that an at will contract allowed termination "for good cause, for no cause, and even for cause normally wrong." *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884).

38. H.G. WOOD, *LAW OF MASTER AND SERVANT* § 134 (1877). Nearly every state's seminal employment decision has a section devoted to the history of at will employment. Wood's apparent creation of the at will presumption is extraordinary in view of the far more worker-friendly statutes of ancient England. *E.g.*, Statute of Labourers, 1562, 5 Eliz., ch. 4 (Eng.) (providing that an employee could not be discharged "unless it be for some reasonable and sufficient cause or matter."). Wood's scholarship has been debunked, yet his proclamations continue to affect all workers and managers in private enterprise in the United States. *See, e.g.*, *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 784, 101 Lab. Cas. (CCH) ¶ 55,485, 117 L.R.R.M. (BNA) 2163 (Conn. 1984); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1 Ind. Emp. Rights Cas. (BNA) 526, 103 Lab. Cas. (CCH) ¶ 55,511, 119 L.R.R.M. (BNA) 3166 (Ariz. 1985); Jay M. Feinman, *The Development of the Employment at Will Rule Revisited*, 22 ARIZ. ST. L.J. 551 (1991). Certainly some modern day justification for the rule exists. *See also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (defending freedom of contract as an aspect of individual liberty and challenging the assumption that employees are unable to protect themselves in day-to-day transactions). According to Epstein, "With employment contracts we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache." *Id.* at 954.

39. Of course as the law is disseminated, it creates expectations; legal fiction can become fact.

40. While the presumption provides reciprocal rights so that the worker as well as the employer may terminate at will, this seeming symmetry is more theoretical than practical. Most of the time the worker is in a weaker economic position than the employer and will be more seriously hurt when the employer exercises at will rights than the employer will be hurt when the tables are turned.

protect their reasonable expectations."<sup>41</sup> In the at will context, the presumption decrees that the worker expects that he can be terminated for any bad, arbitrary reason. When the worker is then fired for some bad, arbitrary reason, that is in conformity with his expectations and is in line with the covenant. "Good faith" then adds nothing to this worker's rights.

Most proponents of the covenant suppose that it imposes something more on the parties than this. Yet while the motivations and goals of these proponents are laudable,<sup>42</sup> their logic is flawed *if* at the same time they cling to the idea that the at will presumption remains intact.<sup>43</sup> The two concepts are incompatible.

This last proposition may seem obvious, yet many jurists persist in arguing for imposition of a meaningful covenant while at the same time blithely asserting that imposition of the covenant will not alter the at will rule in the jurisdiction.<sup>44</sup> Nearly all courts providing relief to employees begin their opinions by asserting that the at will doctrine remains viable.<sup>45</sup> Is such adherence to expressions of the past merely evidence that even the most liberal courts are unwilling to admit that they are changing the law? Or does it bespeak that if newspaper headlines yell that "at will" has been abolished, business investment in the state will dry up? Or is it an attempt to narrow the decision, to heighten the burden of proof or to establish that these situations

41. Burton, *supra* note 35, at 371. See also *supra* notes 76-93 and accompanying text.

42. One such proponent has written:

Employment contracts are the most sensitive of all contracts. They determine the standard of living and the quality of education for children, and affect the general welfare of all the people in this country. It is ludicrous that the covenant of good faith and fair dealing has been adopted pertaining to commercial transactions but has not been adopted for transactions involving human working conditions.

Morris v. Coleman, Inc., 738 P.2d 841, 851-52, 2 Ind. Emp. Rights Cas. (BNA) 844, 107 Lab. Cas. (CCH) ¶ 55,825 (Kan. 1987) (Herd, J., concurring) (citation omitted).

43. Gillette made a similar point in a different context, for he ended his piece by saying: "The point of the article is not the wrongheadedness of attempts to conform commercial conduct to ethical or economic objectives. Rather, the intent is to raise questions about using notions of good faith for that purpose." Gillette, *supra* note 20, at 661.

44. Consider the following misunderstanding of the at will presumption:

The public policy torts in general and the tort of retaliatory discharge in particular cannot be seen as erosions of the so-called at will doctrine. An employer still has in the typical at-will employment situation the absolute right to dismiss an employee at-will or at whim; the employer just cannot do so for reasons which offend public policy, such as the rightful filing of an industrial insurance claim.

K Mart Corp. v. Ponsock, 732 P.2d 1364, 1369, 2 Ind. Emp. Rights Cas. (BNA) 56,106 Lab. Cas. (CCH) ¶ 55,683 (Nev. 1987). For a dubious attempt to reconcile good faith and at will, see *infra* text accompanying Appendix note 172.

45. The BNA Manual on Individual Employment Rights begins nearly every state's summary with a reaffirmation of the at will doctrine. For other examples, compare the dictum and the holdings in Hoffmann-La Roche, Inc. v. Campbell, 512 So. 2d 725, 2 Ind. Emp. Rights Cas. (BNA) 739 (Ala. 1987); Metcalf v. Intermountain Gas Co., 778 P.2d 744, 4 Ind. Emp. Rights Cas. (BNA) 961, 113 Lab. Cas. (CCH) ¶ 56,136 (Idaho 1989).

are rare and must be proven as exceptions? Whatever the reasons, such a position is untenable.

On the other hand, the courts that do admit an intention to erode the at will rule would do better to find a more direct means of doing so, rather than relying on the covenant. This Article will explain some preliminary concepts, examine the law of the covenant of good faith and fair dealing in all fifty states, and conclude that so much ambiguity exists as to just what the covenant means and how much it can accomplish that the covenant should be abandoned.

The covenant does not provide adequate protection to most workers,<sup>46</sup> yet succeeds in muddying the waters sufficiently that employers are hesitant to take decisive action and fear wild-card lawsuits. This is the worst of all possible worlds.<sup>47</sup> The covenant proves a useless vehicle in preventing unfairness in the workplace and should be eschewed for more direct and less ambiguous legislation to protect workers.

Lawmakers<sup>48</sup> should abandon the at will presumption and impose an obligation on most employers to terminate only for good cause. In jurisdictions where the at will presumption is statutory, the separation of powers doctrine requires this change to come from the legislature. This is the type of macro-level decision best suited to legislative action. However, in jurisdictions where both at will and good faith are creatures of the common law, it is entirely within the province of the state's highest bench to modify the common law.<sup>49</sup>

46. The most popular definition of the covenant—the benefit of the bargain rule—is relatively clear cut but it provides additional protection to only a handful of employees. For an explanation of the benefit of the bargain rule, see *infra* part VII.

47. Cynical readers may not agree with this assertion. An argument can be made that uncertainty in the law keeps people on their toes, especially if the stakes are high, as they were when verdicts for tortious breach of the covenant were estimated to average between \$300,000 and \$700,000. Compare 9A Lab. Rel. Rep. (BNA) § 540 at 23 with Ralph King, Jr., *Fair—To Whom?*, FORBES, Nov. 28, 1988, at 124. The argument is that it is better for workers if employers are scared of lawsuits and hence bend over backwards to be fair. This is in line with the practice of many large law firms not to set a minimum yearly total of billable hours for their associates. Each paranoid associate then tries to top the next in billables, and the resultant escalation inures to the benefit of the firm.

48. The fairest result for workers across the nation would be a national law. There is a risk that if state lawmakers begin to act in this area they will also begin to vie with other states which are desperate for economic growth. A bidding war could result, with workers' rights being traded away for potential economic development. However, the common law nature of wrongful discharge actions makes it unlikely that a national solution will seriously be considered.

49. The North Carolina Supreme Court correctly wrote:

[As] this Court, not the legislature, adopted the employee-at-will doctrine in the first instance, it is entirely appropriate for this Court to further interpret the rule. Further, it is important to note that this Court is applying the doctrine in the light of the established public policy and not changing public policy to suit the rule.

*Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 448 n.3, 4 Ind. Emp. Rights Cas. (BNA) 987, 113 Lab. Cas. (CCH) ¶ 56,135 (N.C. 1989).

#### IV. THE CONTRACTUAL NATURE OF THE EMPLOYMENT RELATIONSHIP

In even the most casual employment situations, a contract is formed. It is either a bilateral contract, whereby one party promises to work and the other to pay, or a continuing unilateral contract, whereby if one party works, the other promises to pay. The contract may be express or may be implied in fact by conduct. However formed, if a deal has been accepted whereby one person works for another for remuneration, the parties have what can be called the basic employment contract.

Where parties run into difficulty is in establishing the terms of the contract. When the parties have not been sufficiently specific,<sup>50</sup> the court will have to fill in the gaps, or, in effect, specify the terms of the contract. To do so, the court considers provisions that are implied in law or in fact.

The court first looks at what the parties actually said. The court then interprets the words used by the parties, often by taking other facts (e.g., industry practice) into account. Depending on the extent to which the court considers facts beyond the words used by the parties, the court's activity is called interpretation of an express contract or enunciation of implied-in-fact contractual provisions.

Recently in employment law, courts have expanded the range of outside facts that they will consider. Employment manuals, personnel policies, past employer practices and industry practices have supplied the facts from which courts were willing to create implied-in-fact contractual provisions.

These scenarios are ambiguously referred to by some courts and many lawyers as "situations where a contract exists." This language is confusing.<sup>51</sup> The existence of basic contract is always crucial to the creation of the employment relationship. What these people mean is that an express or implied-in-fact contractual provision regarding termination exists. Sloppy language further obscures the issues in an already murky area of the law.<sup>52</sup>

To repeat, one method used by the courts to fill in the gaps in the basic employment contract is to scrutinize the facts surrounding the contractual dealing to imply in fact certain provisions. The other gap-filling method looks

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50. Sometimes the parties have failed to discuss a matter. Other times they have not fully discussed a matter or have been imprecise in their discussion. Nonetheless, because of certain facts, or by operation of law, the court will conclude that the parties intended to make a certain deal.

51. For an example of a confusing misstatement, see *Noye v. Hoffmann-La Roche, Inc.*, 570 A.2d 12, 14, 5 Ind. Emp. Rights Cas. (BNA) 352, 115 Lab. Cas. (CCH) ¶ 56,273 (N.J. Super. Ct. App. Div.) ("a tort for wrongful discharge has been recognized, even in the absence of any contract . . ."), *cert. denied*, 584 A.2d 218 (N.J. 1990).

52. A further source of confusion is the many definitions and uses of the word "term." A contractual provision is referred to as a "contractual *term*." The specified duration of the contract is referred to as the "*term* of the contract." Colloquial usage of "term" as a verb renders the phrase "*termed* to be" synonymous with "said to be" or "inferred to be." Add to this that the primary issue at hand is the *termination* of the contract, and one can wind up with sentences like: "If the contract is for a definite term, the termination term is termed to be 'for cause.'" See *supra* note 36.

to the law itself. Both the at will presumption and the covenant of good faith and fair dealing fall into the second category. They allow the court to tell the parties that they "agreed" to certain provisions, whether they knew it or not. The difference between at will and the covenant is that at will is a presumption for interpretational purposes which can be overcome by any express or implied-in-fact agreement to the contrary. On the other hand, the covenant is deemed present in all contracts.<sup>53</sup> In other words, the at will presumption arises only in the face of the parties' silence, whereas the covenant is an additional clause in all contractual obligations.

If both the presumption and the covenant are read into the same contract, the contractual provisions regarding termination are as follows: employer may terminate this contract for whatever reason—good, bad, unfair, arbitrary, capricious, downright mean—but will do so in good faith.<sup>54</sup>

Many state courts avoid the internal inconsistency of this by exempting employment contracts from the covenant. This certainly solves the problem, but oftentimes judicial failure to be forthright muddles the issue. Some courts quote the Restatement rule that the covenant exists in every contract, then assert that it does not apply to employment contracts, but never explain the seeming contradiction, nor even admit that they are making an exception to the Restatement rule.<sup>55</sup> These jurisdictions are doing one of two things: either they are excepting employment contracts from general contract law, or they are suggesting that the covenant applies to the employment contract but has little or no meaning, so as to be a nullity. The difference between these two possibilities is academic, since the result is the same—no cause of action lies. But the approach more in keeping with precedent and logic is the latter. The covenant lies dormant in all contracts, and it must be filled up with definitional content in order to affect either interpretation or determination of breach.

Some courts expressly state that the implied covenant cannot run counter to either express or statutorily implied contract terms, for example the at will presumption. These courts then refuse to impose the obligations of the covenant on the parties. Such opinions are at least internally consistent.<sup>56</sup>

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53. The possibility of contracting out of the obligation of good faith and fair dealing is not the direct subject of this Article.

54. The North Carolina Supreme Court, in *Coman v. Thomas Manufacturing Co.*, 381 S.E.2d 445, 448, 4 Ind. Emp. Rights Cas. (BNA) 987, 113 Lab. Cas. (CCH) ¶ 56,135 (N.C. 1989), makes a nearly identical proclamation, except that the North Carolina court's understanding of at will is more restricted. Prohibition on bad faith discharge in that state goes back to 1874. See *Haskins v. Royster*, 70 N.C. 601 (1874).

55. See, e.g., *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308, 6 Ind. Emp. Rights Cas. (BNA) 1057, 122 Lab. Cas. (CCH) ¶ 56,962 (Wyo. 1991). For courts which are clearer in explaining their thought processes, see *Morriss v. Coleman Co.*, 738 P.2d 841, 849-51, 2 Ind. Emp. Rights Cas. (BNA) 844, 107 Lab. Cas. (CCH) ¶ 55,825 (Kan. 1987); *Sheets v. Knight*, 779 P.2d 1000, 1007-08, 4 Ind. Emp. Rights Cas. (BNA) 1196, 115 Lab. Cas. (CCH) ¶ 56,267 (Or. 1989).

56. See, e.g., *Sheets*, 729 P.2d at 1008.

## V. THE ROLE OF THE COVENANT IN CREATING RIGHTS AND OBLIGATIONS IN THE WORKPLACE

Using the covenant of good faith and fair dealing to interpret express or implied-in-fact contractual obligations is hardly controversial. For instance, many courts, when presented with breach of a satisfaction contract, allow good faith concepts to help define what the parties meant by using the word "satisfaction" when they formed the contract.<sup>57</sup> More unusual are courts which use the covenant as the source of a private right of action. Of those which do allow a cause of action on the covenant, some limit these suits to situations where some express or implied-in-fact provisions exist other than the basic employment contract. More interesting are the jurisdictions which allow the covenant to be the source of a separate cause of action in all employment relationships, including those relationships which have been designated at will by the operation of the presumption.

Suits brought by otherwise at will employees for breach of the covenant currently sound only in contract.<sup>58</sup> Assuming the action sounds in contract, the remedies are still not clear: what is the measure of the expectation loss?

To appreciate the question of how to measure damages in a suit brought by an otherwise at will employee for breach of the covenant, consider the following classic example of an employer who does not act fairly. An employer and a salesperson have a contract spelling out the method of payment of commissions, but not articulating the circumstances under which the employment relationship may be terminated. The at will presumption then goes into operation. The employer fires the salesman but articulates no reason, and the firing is timed so that the salesman does not receive full commissions on a sale he worked on extensively. There is no technical breach of express contract.<sup>59</sup> If the facts permit, the salesman may be able to point to the employer's past practices or to oral statements in order to imply in fact a contractual term to fire only for cause or only after certain procedures are followed.<sup>60</sup> If such facts do not exist, the salesman loses in most jurisdic-

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57. See, e.g., *Kramer v. Philadelphia Leather Goods Corp.*, 73 A.2d 385, 386-87 (Pa. 1950).

58. Nevada has allowed tort recovery for breach of the covenant when a contractual limitation on the employer's right to terminate exists and malice is found. An employee working under such a contract is not at will. *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370, 2 Ind. Emp. Rights Cas. (BNA) 56, 106 Lab. Cas. (CCH) ¶ 55,683 (Nev. 1987). Much has been written about whether breach of the covenant in the employment context should be enforced in tort or in contract; that question will not be discussed in this Article.

59. This classic situation is a modified version of the facts in *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (Mass. 1977). In order to make our collective moral sense of fairness congruent with the law, the Massachusetts high court used the covenant to fill in the gap in contract law. *Id.* at 1255-56. The jury verdict in favor of the plaintiff salesman was upheld. *Id.* at 1259. See *infra* text accompanying Appendix notes 134-43.

60. Some jurisdictions speak of implying in fact a covenant of good faith and fair dealing. See, e.g., *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 378, 1 Ind. Emp. Rights Cas. (BNA) 1092 (Minn. Ct. App. 1984). This mixture of legalisms is not a true description of what these courts are doing. They are scrutinizing the facts, most often past practices and industry custom, and implying in fact a contractual provision to treat employees in a certain

tions. In the few jurisdictions allowing a covenant of good faith and fair dealing to be implied in law, the employer may not act to destroy the benefit the salesperson had a right to expect because of the express commissions contract. Absent the covenant, the salesman is out of luck, even though nearly everyone<sup>61</sup> would consider the employer's actions unfair. Rather than allow such a result, the courts avail themselves of the covenant. But the remedies question remains: Is the salesperson entitled to her or his job back, to back and front pay<sup>62</sup> for the expected continued employment, or merely to the dollar amount of the unpaid commissions?<sup>63</sup>

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specific way.

61. Firm believers in freedom of contract would point out that both parties knew or should have known what they were getting into, that the salesperson should have read the contract, realized that he was not protected against an at will firing, and used his bargaining position to renegotiate the contract. If his bargaining position was not good enough to get him a better deal from his boss, so be it: the market has spoken.

This position is logically sound, and for those people who consider a purely rational world to be the ideal world, this position may have normative value. Perhaps it would be best if everyone thought through every ramification of every aspect of every agreement, although at some point all of this worrying might itself become inefficient. But to the extent that freedom of contract proponents seriously contend that they have explained how the world works, they fail to take into account human nature, *see infra* text accompanying note 84, and the realities of the workplace. There will nearly always be more applicants for sales jobs than there will be jobs, so seldom will a worker be able to renegotiate the contractual terms with the boss. And rarely will the worker have the luxury of being choosy.

62. Back pay is wages and benefits that would have been earned but for the wrongful discharge. Front pay is prospective lost wages granted in lieu of reinstatement.

63. *See Wakefield v. Northern Telecom Inc.*, 769 F.2d 109, 1 Ind. Emp. Rights Cas. (BNA) 1762, 120 L.R.R.M. (BNA) 2080 (2d Cir. 1985).

## VI. "PUBLIC POLICY" AND OTHER STATE TORTS

In many jurisdictions a tort cause of action is allowed when an employee has been discharged in violation of a substantial public policy.<sup>64</sup> Some states<sup>65</sup> have recognized that the questions of whether the employer has acted in good faith, or fairly, are essentially questions of public policy.<sup>66</sup> In those jurisdictions, breach of the covenant is a subset of public policy cases.<sup>67</sup>

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64. In a few states, a cause of action for discharge in violation of public policy sounds in contract. Alaska: *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 4 Ind. Emp. Rights Cas. (BNA) 129, 116 Lab. Cas. (CCH) ¶ 56,337 (Alaska 1989); *Arco Alaska, Inc. v. Akers*, 753 P.2d 1150 (Alaska 1988); *Walt v. State*, 751 P.2d 1345, 3 Ind. Emp. Rights Cas. (BNA) 808, 122 Lab. Cas. (CCH) ¶ 57,045 (Alaska 1988); Thomas P. Owens, *Employment at Will in Alaska: The Question of Public Policy Torts*, 6 ALASKA L. REV. 269 (1989); Massachusetts: *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 4 Ind. Emp. Rights Cas. (BNA) 1030, 113 Lab. Cas. (CCH) ¶ 56,108 (1st Cir. 1989); *Stepanischen v. Merchants Dispatch Transp. Corp.*, 722 F.2d 922, 1 Ind. Emp. Rights Cas. (BNA) 309, 99 Lab. Cas. (CCH) ¶ 10,609, 114 L.R.R.M. (BNA) 3641 (1st Cir. 1983); *Mello v. Stop & Shop Cos.*, 524 N.E.2d 105, 3 Ind. Emp. Rights Cas. (BNA) 1105, 122 Lab. Cas. (CCH) ¶ 56,932 (Mass. 1988); *Hobson v. McLean Hosp. Corp.*, 522 N.E.2d 975, 3 Ind. Emp. Rights Cas. (BNA) 1217 (Mass. 1988); *DeRose v. Putnam Mgt.*, 496 N.E.2d 428, 1 Ind. Emp. Rights Cas. (BNA) 1672, 105 Lab. Cas. (CCH) ¶ 55,659 (Mass. 1986); Michigan: *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 109 Lab. Cas. (CCH) ¶ 55,888, 115 L.R.R.M. (BNA) 4708 (Mich. 1980); *Lopus v. L & L Shop-Rite, Inc.*, 430 N.W.2d 757, 3 Ind. Emp. Rights Cas. (BNA) 1690, 119 Lab. Cas. (CCH) ¶ 56,645 (Mich. Ct. App. 1988). The Michigan cases must be viewed in light of the following additional authorities indicating a split among the different panels of the Michigan Court of Appeals as to whether a retaliatory discharge claim sounds in tort or contract: *Pratt v. Brown Mach. Co.*, 855 F.2d 1225, 3 Ind. Emp. Rights Cas. (BNA) 1121, 111 Lab. Cas. (CCH) ¶ 56,025 (6th Cir. 1988) (tort); *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 1 Ind. Emp. Rights Cas. (BNA) 250, 99 Lab. Cas. (CCH) ¶ 55,412, 114 L.R.R.M. (BNA) 2596 (6th Cir. 1983) (tort); *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395, 6 Ind. Emp. Rights Cas. (BNA) 193, 121 Lab. Cas. (CCH) ¶ 56,861 (Mich. Ct. App.) (contract), *appeal denied*, 478 N.W.2d 443 (Mich. 1991); *Lopus v. L & L Shop-Rite, Inc.*, 430 N.W.2d 757, 3 Ind. Emp. Rights Cas. (BNA) 1690, 119 Lab. Cas. (CCH) ¶ 56,645 (Mich. Ct. App. 1988) (contract); *Watassek v. Michigan Dep't of Mental Health*, 372 N.W.2d 617 (Mich. Ct. App. 1985) (contract); *Goins v. Ford Motor Co.*, 347 N.W.2d 184, 116 L.R.R.M. (BNA) 3231 (Mich. Ct. App. 1983) (tort). New Hampshire: *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 115 L.R.R.M. (BNA) 4755 (N.H. 1974); South Dakota: *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 3 Ind. Emp. Rights Cas. (BNA) 1767 (S.D. 1988); Wisconsin: *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 98 Lab. Cas. (CCH) ¶ 55,398, 115 L.R.R.M. (BNA) 4484 (Wis. 1983).

65. *Fleming v. Pima County*, 685 P.2d 1301, 1306, 119 L.R.R.M. (BNA) 2338 (Ariz. 1984).

66. Indeed this is the argument for why breach of the covenant should sound in tort. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988). Several states do a flip on this argument and hold that the public policy cause of action sounds in contract. See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385-86, 3 Ind. Emp. Rights Cas. (BNA) 1060 (Ark. 1988); *Mello*, 524 N.E.2d at 105-08.

67. E.g., *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1410, 2 Ind. Emp. Rights Cas. (BNA) 696, 12 L.R.R.M. (BNA) 2605 (D.N.M. 1986); *Vandegrift v. American Brands Corp.*, 572 F. Supp. 496, 498, 115 L.R.R.M. (BNA) 2317 (D.N.H. 1983); *Glaz v. Ralston Purina Co.*, 509



Any approach which recognizes that breach of the covenant is essentially a breach of social norms, as opposed to an actual contractual term, goes a long way toward avoiding legal fictions and reducing arbitrary results.<sup>68</sup> Currently most states' law on public policy cases is that the source of the public policy must be grounded in statute. But a narrow reading of this rule and selectivity as to statute leads to capricious results. Someone fired for filing a workers' compensation claim can bring a public policy claim and recover tort damages in many states. Someone fired because his wife incurred substantial medical expenses that the employer was required to pay pursuant to a hospitalization plan<sup>69</sup> might at best be able to file an action on the covenant and recover contract damages in a few states. The employee goes uncompensated in most. The difference? State statutes establish that workers have a right to workers' compensation, but nothing establishes a right to dependent health care. The second firing is not prohibited by a constitution, a statute or a regulation and fairness is not recognized as a substantial policy goal. Of course, if courts did adopt a broad understanding of public policy to encompass fairness, it would become as nebulous as good faith and fair dealing. This Article would still ask: What do those words mean? How are employers to act toward their employees?

Various other state torts address behavior which could also be termed "bad faith" or even "breach of the covenant." These include the torts of outrage, intentional infliction of emotional distress and fraud.<sup>70</sup> Also the "malice, opprobrium" formulations necessary to prove punitive damages cover many bad faith acts.<sup>71</sup> Because this Article is intended as a critique of the use of the covenant, it is confined to court opinions on the covenant rather than on other common law actions.

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N.E.2d 297, 299, 2 Ind. Emp. Rights Cas. (BNA) 497 (Mass. Ct. App. 1987) (citing *DeRose v. Putnam Mgt. Co.*, 496 N.E.2d 428, 1 Ind. Emp. Rights Cas. (BNA) 1672, 105 Lab. Cas. (CCH) ¶ 55,659 (Mass. 1986)) (sounding in contract).

68. Some courts have made the point that "the public policy approach is largely encompassed within the covenant." *Knight v. America Guard & Alert, Inc.*, 714 P.2d 788, 792, 104 Lab. Cas. (CCH) ¶ 55,566 (Alaska 1986).

69. See *Miller v. Correction Corp. of Am.*, 119 Lab. Cas. (CCH) ¶ 56,692 (Tenn. Ct. App. 1991) (disallowing public policy/retaliatory discharge claim because conduct which does not violate any constitutional, statutory or regulatory provision is not "against the public policy of the state."). The example assumes that the wife's condition did not arise to the status of a disability as defined by the Americans with Disabilities Act (ADA).

70. Some jurisdictions are quite creative. See, e.g., *McWilliams v. AT & T Info. Sys., Inc.*, 728 F. Supp. 1186, 5 Ind. Emp. Rights Cas. (BNA) 295 (W.D. Pa. 1990) (Pennsylvania's tort of "discharge intended specifically to cause harm," but note that the existence of this tort has been called into question); see also *Dake v. Tuell*, 687 S.W.2d 191, 2 Ind. Emp. Rights Cas. (BNA), 104 Lab. Cas. (CCH) ¶ 55,569, 118 L.R.R.M. (BNA) 3449 (Mo. 1985) ("prima facie tort" discussed but rejected in Missouri).

71. In fact, E. Allan Farnsworth suggests that the creation of bad faith torts is a back door means of allowing punitive damages in contract: "What better way for courts to justify an award of punitive damages than to invent a new tort: 'bad faith for breach of contract.'" E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 204 (1990).

## VII. ATTEMPTS TO DEFINE THE COVENANT IN THE EMPLOYMENT CONTEXT

Before rejecting the covenant as a means to protect employees while providing some guidelines for employers, it is necessary to examine what content the state courts have given to the phrase "good faith and fair dealing." Certainly the common law is replete with phrases and concepts which are hard to define in the abstract, but about which a consensus of denotative convention has been reached. "Good faith and fair dealing" could have become such a phrase, but it has not. Jurists, whether friendly or hostile to the imposition of the covenant in the workplace, have wildly disparate conceptions of the rights and obligations implied by the words "good faith and fair dealing."<sup>72</sup> These conceptions fall generally into the following categories:

1. Too vague to discuss. Many state courts make use of the phrase "covenant of good faith and fair dealing" only for the purpose of rejecting the concept as a basis for a private cause of action in the employment context. These courts usually do not take the trouble to define the phrase, although they must have had some notion of what they were rejecting. The very difficulty of definition is what leads many courts to decline to make use of the concept.<sup>73</sup>

2. I know it when I see it. When state courts do venture to define the phrase, many define merely by giving examples of either good faith or bad faith behavior. Standard scenarios involve the commissions salesperson<sup>74</sup> and the person who is fired just before his or her pension vests.<sup>75</sup>

3. Benefit of the bargain. Currently the most popular definition focuses on protection of the benefit of the employee's bargain.<sup>76</sup> This is the

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72. The law relating to the covenant is redesigned by nearly every case applying or rejecting the use of the covenant. Perritt has gathered covenant cases and grouped them according to methods that courts have used to limit the doctrine of the covenant. The covenant can be restricted by limiting actionable situations to those where "an employer failed to follow employer promulgated procedures," where service was long-term, longevity, "where an employee was deprived of compensation for past service," and where public policy is violated. Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur*, 20 SETON HALL L. REV. 683 *passim* (1990). For further discussion of what the covenant means in the employment context, see James R. Madison, *The Employee's Emerging Right to Sue for Arbitrary or Unfair Discharge*, 6 EMPLOYEE REL. L.J. 422 (1980-1981).

73. See, e.g., *Parnar v. Americana Hotels Inc.*, 652 P.2d 625, 115 L.R.R.M. (BNA) 4817 (Haw. 1982).

74. See *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 1 Ind. Emp. Rights Cas. (BNA) 1762, 120 L.R.R.M. (BNA) 2080 (2d Cir. 1985); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (Mass. 1977); *supra* note 59 and accompanying text; *infra* text accompanying Appendix notes 134-43.

75. Pennsylvania seems to have had a run of such situations. See, e.g., *Foley v. Presbyterian Ministers' Fund*, 749 F. Supp. 109, 5 Ind. Emp. Rights Cas. (BNA) 1551 (E.D. Pa. 1990); *Mudd v. Hoffman Homes for Youth*, 543 A.2d 1092 (Pa. Super. Ct. 1988).

76. *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1 Ind. Emp. Rights Cas. (BNA) 526, 103 Lab. Cas. (CCH) ¶ 55,511, 119 L.R.R.M. (BNA) 3166 (Ariz. 1985). Courts in other states have followed *Wagenseller*. See, e.g., *ARCO, Inc. v. Akers*, 753 P.2d 1150, 3

narrowest possible definition, applicable to very few cases, and is the least intrusive into management discretion.<sup>77</sup> The Arizona Supreme Court in *Wagenseller* is often cited for holding:

[T]he implied-in-law covenant of good faith and fair dealing protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into. The denial of a party's right to those benefits, whatever they are, will breach the duty of good faith implicit in the contract. . . . The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee.<sup>78</sup>

At least one scholar, Deborah Schmedmann, endorsed this rule as being the farthest the courts can legitimately go in an at will world, especially if the at-will presumption is created by the legislature.<sup>79</sup> She pointed out that the origins of this approach can be found in the Restatement definition of good faith as "faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party."<sup>80</sup> The covenant is violated if the employer deprives the employee either of the clear monetary benefits of the bargain or of procedural safeguards (e.g. promises regarding bases for termination, systems for evaluation and discipline).<sup>81</sup> Schmedmann realized that insofar as courts allow promises to create contract liability, the action could be based on implied-in-fact contract as well as on the covenant, but she suggested that the more flexible covenant could withstand technical contract defenses better than a claim for breach of implied-in-fact contract.<sup>82</sup>

The benefit-of-the-bargain approach is moderate, protecting employees to some degree yet also preserving management prerogative. The parties remain free to avoid bargains they do not want, but cannot weasel out of their obligations once the deal is struck. This rule prohibits terminations which "are troublesome because they are antithetical to the bargain."<sup>83</sup>

Proponents of this definition do not acknowledge that human nature may render the benefit-of-the-bargain rule ineffective as a means of protecting most

Ind. Emp. Rights Cas. (BNA) 808, 122 Lab. Cas. (CCH) ¶ 57,045 (Alaska 1988); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 4 Ind. Emp. Rights Cas. (BNA) 961, 113 Lab. Cas. (CCH) ¶ 56,136 (Idaho 1989).

77. E. Allan Farnsworth considers that *Wagenseller* and *Foley* refused "to extend the doctrine of bad faith breach to the employer-employee relationship." Farnsworth, *supra* note 71, at 206. He apparently considers the protection offered by these cases so minimal that it does not meaningfully affect the at will rule.

78. *Wagenseller*, 710 P.2d at 1030-41. See also *Foley*, 765 P.2d at 401 n.41; *Metcalf*, 778 P.2d at 749.

79. Deborah A. Schmedmann, *Working Backwards: The Covenant of Good Faith and Fair Dealing in Employment Law*, 16 WM. MITCHELL L. REV. 1119 (1990).

80. *Id.* at 1135 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979)).

81. *Id.*

82. *Id.* at 1136-37.

83. *Id.* at 1137.

employees. People are not clear on their bargains, particularly at the beginning of their dealings with each other. This is especially true in the employment context. If people are really thinking about the bargain they are getting into—and this usually occurs when a great deal of money is involved—they hire lawyers and reduce the bargain to writing. Most prospective employees do not behave in so calculated a fashion. They are uneasy if not desperate when seeking a job. If they can get a foot in the door at a company, they sign on, "giving it a try." Gradually, they work their way up, paying attention to the rest of their lives, but building up subliminal expectations about job security, about "how things are done around here." If they are then fired in a certain way, or for a certain reason (or lack thereof), they feel that "it isn't fair," or "that's not what I expected."<sup>84</sup>

Most of the cases covered by the benefit-of-the-bargain rule are also covered by another doctrine. For example, the commission salesman should be able to sue in some form of restitution or quantum meruit.<sup>85</sup> His recovery may well be the same,<sup>86</sup> and the jurisdiction would not be burdened by additional lawsuits which arise whenever a new cause of action is created. But the benefit-of-the-bargain rule does provide some protection for workers who are treated in a way that most Americans find offensive.

One of the best examples of such a case arose in Idaho.<sup>87</sup> Armida Metcalf worked subject to a policy by which "an employee could accrue sick leave at a rate of one day per month."<sup>88</sup> She got sick and used some but not all of her accrued sick leave. Her absences exceeded the company average for that time and caused "serious work problems for that office," so the company changed her status from full to part time. Traditional contract rules would not allow Metcalf to sue to get either her full job back or monetary damages for it. The contract allowed her paid sick leave, and she was properly paid for the days off. To recover for her termination she needed to argue one or both of the following legal theories: contract (implied-in-fact) not to terminate for using the accumulated sick leave or covenant (implied-in-law into the contract) which prohibited her firing.

The Idaho Supreme Court remanded the question of implied-in-fact contract, asking the trial court to determine if "by providing for accumulated sick leave benefits, the employer impliedly agreed with the employee that the employment relationship would not be terminated or the employee penalized

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84. In fact, in many of the wrongful termination cases, management has changed, so that the "old man" who first hired the worker has left and the terms of the deal have changed, and few people are around to recollect what the expectations were. *See, e.g.,* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 919-20, 115 L.R.R.M. (BNA) 4002 (Ct. App. 1981).

85. *See, e.g.,* Schackleton v. Federal Signal Corp., 554 N.E.2d 244 (Ill. 1989).

86. This assumes that recovery for breach of the covenant sounds only in contract. Much of the initial appeal of the covenant was the potential for tort damages. Again, this tort vs. contract debate is beyond the scope of this Article.

87. *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 4 Ind. Emp. Rights Cas. (BNA) 961, 113 Lab. Cas. (CCH) ¶ 56,136 (Idaho 1989).

88. *Id.* at 745. The employer admitted that this was part of the oral employment contract. *Id.* at 746.

for using the sick leave benefits which the employee had accrued."<sup>89</sup> As to the covenant, the court agreed that the employee had stated a cause of action: "[A]ny action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant which we adopt today."<sup>90</sup>

Even in the *Metcalf* case, however, a plaintiff's stronger case rests on implied-in-fact contract. The benefit of the bargain formulation depends on an answer to the question: "What did the parties expect?"<sup>91</sup> The parties' expectations will probably be proven by evidence of what was said at the time the relationship was created. If the parties were specific enough, they may well have an implied-in-fact contract. As with any contract-based argument,<sup>92</sup> the advantage goes to the person who is more specific in bargaining. This is the party who knows what she is doing, gets the better legal advice, and expresses herself more clearly—nearly always the employer. In the end, the "haves" continue to have. The employer's superior bargaining position and greater litigation strength will result in her winning more cases than employees, and the evolution of contract law to protect employees will in fact have helped very few. Courts began with strict contract rules. Then, to help employees—those who don't articulate their expectations—courts relaxed the traditional rules, allowing for liberal implication of terms "in fact." Then courts went a step further by protecting, by operation of law, even less articulated expectations. But still parties must prove that the expectations were there. This last step has provided relief for only a few more employees than were protected before such efforts at protection.

Employers certainly find no solace in the benefit-of-the-bargain rule, for it is sufficiently fact-based that no party can predict the outcome of a court case. The employer remains uncertain about whether a firing will be "legal" or not. Thus, for only a minimal enhancement of workers' positions, the wheels of commerce are congested. The benefit of the rule is at best only barely worth the cost. Schmedmann endorsed the rule only so far as to say that the benefit-of-bargain idea is as far as the courts can legitimately go; the rest is up to legislature.<sup>93</sup>

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89. *Id.* at 747.

90. *Id.* at 749.

91. And what of the pessimist, who expects to be treated badly? Has he no cause of action because his expectations were met? According to Larry Ross, Management Consultant and former CEO, "The most stupid phrase anybody can use in business is loyalty." WORKING 409-10 (Studs Terkel ed., 1974). And this from a person who, as CEO, formerly had as much bargaining power as any employee can.

92. The jaded populism of the following line of reasoning applies to all confrontations between unequal parties, and is directed to those who, like Epstein, insist that private agreements are the best way to protect most people's interests. *See supra* note 38.

93. Most scholars favor a legislative approach, despite early calls for judicial activism. *See, e.g.,* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Karen Paull, Note, *Employment Termination Reform: What Should a Statute Require Before Termination? Lessons from the French, British and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619 (1991). For an early call for a judicial solution, see Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to*

4. Good cause. Other judges,<sup>94</sup> usually dissenters,<sup>95</sup> have equated the obligation imposed by the covenant with an obligation to have good cause for discharge.<sup>96</sup> The opinions have not articulated what causes are good, evidently leaving that for the fact finder. Other common law courts have refined the covenant by articulating a sliding scale definition<sup>97</sup> of good faith and fair dealing, whereby many factors are taken into account: longevity of employment, express policies of employer, oral statements, past patterns and practices,<sup>98</sup> and industry standards. While some of these factors could also be used to create an implied-in-fact contractual term to discharge only for good cause, this sliding-scale description of the covenant may be the most "fair."<sup>99</sup> Generally, people expect<sup>100</sup> more the longer they have been

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*Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

94. See, e.g., *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 720 P.2d 257, 1 Ind. Emp. Rights Cas. (BNA) 1410, 104 Lab. Cas. (CCH) ¶ 55,589, 122 L.R.R.M. (BNA) 2597 (Mont. 1986).

95. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988) (Broussard, J., dissenting).

96. For three vigorous opinions discussing the difference between good faith and good cause, see *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 5 Ind. Emp. Rights Cas. (BNA) 1009, 116 Lab. Cas. (CCH) ¶ 56,350 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991). Judges Reinhardt, Kozinski and Trott each wrote separate opinions.

97. An early and influential commentator developed the sliding-scale definition: "What constitutes bad faith in terminations for unsatisfactory job performance may vary from case to case because employment at will arrangements cover a broad spectrum of occupations." Note, *supra* note 93, at 1840.

Similarly Perritt agrees with the school of thought that obligations evolve over time: "Under the relational theory, the parties expect that the terms of their relationship will evolve. There is no need for formalities to validate new practices to make them part of the contract." Perritt, *supra* note 72, at 716.

Perritt recalls the phrase of Macaulay and MacNeil that "parties treat their contract more like marriages than like one-night stands." *Id.* at 713 (quoting Robert W. Gordon, *Macaulay, MacNeil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 568-69). This analogy is particularly apt in the employment context. Wrongful termination cases often resemble divorce cases in the haziness of the facts, the viperousness of the parties and the obviousness, to an observer, of some truth on both sides.

One commentator expects that much of the time good faith will require a good cause for discharge. Note, *supra* note 93, at 1836-44.

98. Including this factor demonstrates an ingrained belief that one of the primary obligations of fairness is to treat like cases alike.

99. Several scholars have noted the beauty of a flexible idea of good faith. See, e.g., Note, *supra* note 93, at 1840. Certainly, there is no need to insist that employment contracts be either at will, on one end of the scale, or for cause, on the other end. A balanced, middle ground is possible and often desirable to both parties.

100. The reference to the expectation interest does not show a uniquely contractual nature of the obligation. Many tort obligations arise from expectations. Rather the tort vs. contract distinction turns on the source of the expectation: social (tort) or private (contract). The practical distinction between tort and contract is the dollar amount which the plaintiff is likely to recover; this is the distinction which is the source of the rage in the debate. Recently, tax

around, and cavalier treatment of a six-month probationary employee shocks us less than identical treatment of a fifty-two-year employee.<sup>101</sup>

Other jurists consider that if an employer has a "fair and honest reason," good faith exists.<sup>102</sup> Upon examination, a "fair and honest" cause differs so little from a "good" cause as to justify including these definitions in the same category. "Honest" reasons must be truthful, but they may well be subjective and arbitrary reasons for termination. On the other hand, the word "fair" has an objective component; a fair reason is one a reasonable person would agree with. While requiring a "fair reason" might be setting a slightly lower standard than a "good reason" requirement, the jury is still invited to second guess the employer's reason for firing. Ultimately, the jury is determining whether an adequate reason existed.

Henry Perritt wrote: "It is a small theoretical step, albeit a major policy step, to translate 'good faith and fair dealing' into a requirement that employment be terminated only for legitimate employer related reasons, i.e., good cause."<sup>103</sup> Perritt considered the implied covenant to be a legitimate limitation of the employer's at will rights.<sup>104</sup> He pointed out that there is nothing radical or new about limiting at will rights, which have been limited since the early labor acts of the 1930s. Nor is the standard of good faith and fair dealing foreign to the law, for it is comparable to fiduciary obligations and to the fundamental notion of a prima facie tort which "incorporate[s] the idea that conduct that is not ordinarily actionable can become actionable because of the state of mind of the actor."<sup>105</sup>

Perritt was not blind to the drawbacks of imposing a good-cause requirement on all employment termination, primarily that "employers will be discouraged from dismissing employees who should be dismissed, therefore causing the efficiency of the economic system to suffer."<sup>106</sup> But he went on to advance a Jesuitical reason for adoption of the covenant as a good cause requirement: "it creates an incentive for the employer community to favor balanced legislation."<sup>107</sup> He suggested "treat[ing] the covenant as a rebuttable presumption of good cause, when that seems most consistent with the

consequences have come to light as well. See *Redfield v. Insurance Co. of North America*, 940 F.2d 542, 120 Lab. Cas. (CCH) ¶ 56,779 (9th Cir. 1991). Note also that in California jury verdicts have continued to climb despite Foley's abolition of most tort causes of action. See *Brooks v. Hilton Casinos, Inc.*, 959 F.2d 757, 121 Lab. Cas. ¶ 56,892, 7 Ind. Emp. Rights Cas. (BNA) 507 (9th Cir.), *cert. denied*, 113 S. Ct. 300 (1992).

101. This is echoed in the nation's strong protection of seniority rights. See *AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

102. *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 720 P.2d 257, 262, 1 Ind. Emp. Rights Cas. (BNA) 1410, 104 Lab. Cas. (CCH) ¶ 55,589, 122 L.R.R.M. (BNA) 2597 (Mont. 1986).

103. Perritt, *supra* note 72, at 723.

104. *Id.* at 708.

105. *Id.* at 712.

106. *Id.* at 723.

107. Perritt devotes a great deal of space to how the good-cause rule should work. After having expended such considerable resources to working out a scheme, does he really just want a legislature to overturn it?

employment relationship, and as something else when that seems most appropriate."<sup>108</sup>

5. Not bad faith—excluder definitions. Other courts, rather than describing the obligations of good faith, seek to define bad faith, often using words like "arbitrary,"<sup>109</sup> "malice"<sup>110</sup> and "disinterested malevolence."<sup>111</sup> One concurrence avoided these terms but suggested that bad-faith dismissal is one "[having] nothing to do with the worker's job performance or the employer's employment needs."<sup>112</sup> This is helpful only if one has a common notion of what employers' needs are. Further, the *raison d'être* of a businessperson is to make money either by saving costs or raising prices. In a competitive economy, the former is the preferred method.

An example is the case of the person fired just before his pension vests. That worker was not fired for an arbitrary or irrational reason, but rather to enable the employer to save money. Usually saving employment costs is considered laudable in the business world. Since no breach of actual contract exists, why are courts inclined to step in to protect the employee? Again, a basic sense of fairness would indicate that the rug has been jerked from under him, that he had a justified, albeit unexpressed, expectation that the employer would not do that. But undeniably the employer has acted in accordance with her needs and indeed her very nature.

Another example: an employee is fired because the supervisor is repelled by the worker's moral standards,<sup>113</sup> because the supervisor is sexually jealous,<sup>114</sup> or merely because the supervisor is sick of looking at the worker. This is an employment-related problem. The firing is subjective, but not necessarily arbitrary. The employee has apparently so affected the supervisor's work performance that the supervisor is willing to go through the unpleasantness of terminating the employment. When the choice is between the serenity of a supervisor or an underling, a hierarchical society normally answers that the supervisor's desires come first, and the person lower on the totem pole must go.<sup>115</sup>

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108. Perritt, *supra* note 72, at 725.

109. On the other hand, some courts reject the idea that "mere" arbitrariness is synonymous with bad faith. See *Magnan v. Anaconda Indus.*, 479 A.2d 781, 787 n.19, 101 Lab. Cas. (CCH) ¶ 55,485, 117 L.R.R.M. (BNA) 2163 (Conn. 1984).

110. *Id.* at 790.

111. *Tourville v. Inter-Ocean Ins. Co.*, 508 A.2d 1263, 1265 (Pa. Super. Ct. 1986), *appeal denied*, 521 A.2d 933 (Pa. 1987).

112. *Morriss v. Coleman Co.*, 738 P.2d 841, 852, 2 Ind. Emp. Rights Cas. (BNA) 844, 107 Lab. Cas. (CCH) ¶ 55,825 (Kan. 1987) (Herd, J., concurring). See *infra* text accompanying Appendix notes 120-24.

113. *Morriss*, 738 P.2d at 852. Undue concern with an employee's off duty sexual activity may constitute an invasion of privacy. *E.g.*, *Slohda v. United Parcel Serv. Inc.*, 475 A.2d 618 (N.J. Super. Ct. App. Div. 1984).

114. *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 110 Lab. Cas. (CCH) ¶ 55,998, 115 L.R.R.M. (BNA) 3030 (Ct. App. 1980).

115. An example may well be found in *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1 Ind. Emp. Rights Cas. (BNA) 526, 103 Lab. Cas. (CCH) ¶ 55,511, 119 L.R.R.M. (BNA) 3166 (Ariz. 1985). The hospital administration could hardly have been taking the position that



A person taking the position that these firings are in bad faith is making a series of judgments. He decides, first, that "good" or "acceptable" reasons are required and, second, that these particular reasons are "bad." He is questioning whether in private enterprise an employer's personal moral scheme should be imposed on employees and their off-work activities.<sup>116</sup> He may also be judging the moral code itself. If the employee is a child molester, his termination is not shocking even if he is not in a job where he works with children. If the employee is fired for vacationing in Montana with a female not his wife, his termination is labeled "arbitrary."<sup>117</sup> Perhaps the distinction is that the employment of a child molester may affect public relations and, hence, impact business.<sup>118</sup> This rationale uses capitalism as a refuge for moral judgmentalism.

Some arbitrary firings are rational. For example, an employer may decide that if a worker comes in three times with unshined shoes, the worker will be fired for being lazy and slovenly, even if he does not work with the public. Certainly, unshined shoes are evidence of imperfect personal grooming, and imperfect personal grooming may be evidence of sloppiness and sloth. The employer's test is based in reason although many people would label the employer's test arbitrary for several reasons. First, unshined shoes are only one of many examples of carelessness; therefore, the employer's emphasis on this one criterion seems undue. Second, other reasons may explain the unshined shoes, including the employee's lack of knowledge of the importance of shined shoes in the world at large. Finally, if the employer's "test" is not communicated to the employee at least before the third unshined day, the employee does not have fair notice of the employer's obsession.

For many people malice is synonymous with bad faith. Yet, as is pointed out by the majority of the California Supreme Court, motivation in breach of

public toilet functions, heavy drinking and mooning are job requirements for nurses. *See infra* Appendix note 23. But the administration was yielding to the supervisor who was annoyed with the underling who had apparently conveyed her disapproval of these activities. In this case the hospital administration's choice may well not have withstood remand, given Arizona's indecent exposure statute which gave rise to Wagenseller's suit for tortious discharge in violation of public policy. *Wagenseller*, 710 P.2d at 1035.

116. This assumes that the "moral code" is not a euphemism for "religion." Religious discrimination is obviously prohibited by Title VII.

117. *See Morriss*, 738 P.2d at 787.

118. According to one commentator:

Courts should consider only the factors that employers can validly require as conditions of employment. . . . The factors [in an employee's personal life] that an employer *should* consider depend largely on the type of employee the employer is considering. For example, employers might properly consider the affiliations of their salespeople outside the workplace, because the salespeople's social relationships may directly affect business.

Joanne Sokachitch, Note, *Good Faith and Fair Dealing in Illinois: An Application in the Employment Context*, 1 U. ILL. L. REV. 183, 214-15 (1987) (footnotes omitted). This same "impact on customers" argument could apply in some communities to an employee who is becoming known as a womanizer—whether in Montana or elsewhere.

contract is normally irrelevant.<sup>119</sup> Normally, when a contract is performed according to its terms, no one chastises a party for making a deal that is good for itself.<sup>120</sup> If the contract is breached, it is irrelevant whether the breach is intentional or unintentional, gloating or reluctant. Indeed, an intentional, greedy breach of contract is often encouraged as "efficient."<sup>121</sup> But in the employment context, some would label such greed "bad faith." And many of the covenant cases go one step beyond punishing an employer for malicious breach, for in the classic situations there is *no* technical breach of contract.<sup>122</sup> At some point these cases become "malicious compliance" cases. The employer is blamed for being too technical, for following the word but not the spirit of the contract.

The employee may not be particularly well protected by any definition which focuses on the employer's state of mind such as the presence of malice or honesty. These subjective states of mind can be difficult to prove and determine especially when various employer agents are involved in the firing.<sup>123</sup>

6. Honesty in fact. The Model Employment Termination Act<sup>124</sup> defines good faith as "honesty in fact"<sup>125</sup> and imposes that obligation on the performance and enforcement of the employment contract.<sup>126</sup> The Act further provides: "An unconscionable agreement or part of an agreement is not enforceable."<sup>127</sup> The Act requires that good cause be shown for most terminations of over one-year employees as well.<sup>128</sup>

Honesty in fact is a limited definition. It works well within the scheme of the Act, but would provide little or no meaningful protection if it stood alone as the common law definition of good faith because it provides no normative standard. Employers would be free to say, "I honestly value money more than I care about your life," or "I am honestly out to screw you because I honestly enjoy watching people's lives crumble."

Promulgation of an honesty-in-fact standard would encourage forthright communication between employers and employees by prohibiting employers

119. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 400, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988).

120. An exception to this generalization is the doctrine of unconscionability. Nevada's definition of bad faith harkens to the unconscionability doctrine, for it defines bad faith to include malice and extreme differential of bargaining position. *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 2 Ind. Emp. Rights Cas. (BNA) 56, 106 Lab. Cas. (CCH) ¶ 55,683 (Nev. 1987).

121. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 107-08 (3d ed. 1986).

122. *See, e.g., Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 4 Ind. Emp. Rights Cas. (BNA) 961, 113 Lab. Cas. (CCH) ¶ 56,136 (Idaho 1989).

123. Schmedmann, *supra* note 79, at 1133.

124. *See supra* note 5.

125. Model Employment Termination Act § 1(5).

126. *Id.* § 4(e).

127. *Id.* § 4(e).

128. Various proposed state statutes, and one existing statute, require good faith and fair dealing in the employment context. None of these legislative works defines when bad faith occurs or, alternatively, what amounts to good faith.

from lying about the reasons for the firing.<sup>129</sup> Many employers soft pedal dismissals in order to reduce the amount of emotional distress to each party, to avoid confrontation and to allow the employee to save face and to maintain some self esteem.

7. Community standards/business practice. Another definition focuses on community standards or "accepted notions of business ethics."<sup>130</sup> It requires proof of facts which would also help prove an implied-in-fact contractual term limiting the employer's right to discharge. If such facts are found, perhaps the implied-in-fact contract cause of action would be more straight-forward, and the more convoluted covenant formulation could be avoided.

The mixture of contract workers, civil servants, union workers and at will workers in a given community provides such a wide range of "accepted" practices among employers that this standard may well be unworkable. It also leads to reinforcement of the status quo—whatever that may be—which reformers might find undesirable.

8. Fair Dealing. The fair dealing aspect of the covenant, usually ignored by the courts, has attracted many academic commentators.<sup>131</sup> It reinforces an administrative law model which requires rules and process.<sup>132</sup> The law could impose certain protective procedures upon the private workplace. At least one warning (except for egregious transgressions), notice and an opportunity to be heard are probably minimal requirements to a collective understanding of fairness. Indeed, arbitrators, who are called upon to determine good cause in the context of collective bargaining agreements, often include some procedural fair play as a condition to a finding of good cause to terminate.<sup>133</sup>

#### VIII. SURVEY OF STATE COURT ATTEMPTS TO DEFINE THE COVENANT IN THE EMPLOYMENT CONTEXT

Following this Article is an appendix containing a state-by-state discussion of how state courts have considered whether the covenant of good faith and fair dealing should be used in the common law as a tool to restrict the at will doctrine. Thirty-seven states have refused to allow an action on the

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129. Missouri has codified a requirement that employers explain reasons for discharge, under certain circumstances. MO. REV. STAT. § 290.140 (1986). For a decision expressly declining to impose an honesty-in-fact standard, see *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 115 L.R.R.M. (BNA) 5127 (Mass. 1982). See also *infra* text accompanying Appendix notes 144-48. But see *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 720 P.2d 257, 1 Ind. Emp. Rights Cas. (BNA) 1410, 104 Lab. Cas. (CCH) ¶ 55,589, 122 L.R.R.M. (BNA) 2597 (Mont.), *appeal dismissed*, 479 U.S. 980 (1986) (requiring fair and honest reason); *infra* Appendix note 175.

130. See, e.g., *Koehrer v. Superior Ct.*, 226 Cal. Rptr. 820, 829 (Ct. App. 1986).

131. See, e.g., Kenneth A. Clark, Note, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. 285, *passim* (1984).

132. *Id.* at 298-300.

133. See *infra* note 138.

covenant in an at will situation.<sup>134</sup> Fourteen states have allowed an obligation of good faith in some form to restrict the employer's at will rights.<sup>135</sup>

The survey reveals how vague the definition of the covenant is in the minds of jurists, no matter whether the individual judge is friend or foe of the covenant. The cases cited also reveal the degree to which judges are uncomfortable with the harshness of the at will doctrine.<sup>136</sup> Even when judges refuse to allow recovery to a plaintiff, their very willingness to recite the at times egregious facts bespeaks a human empathy for the discharged employee. As a result, judges often reach for sometimes far-fetched rules of law to reprieve or assuage the employee. Clutching at rules leads to the bending or even breaking these rules.

## IX. CONCLUSION

Rather than risk the manipulation of existing doctrine, the law should move toward a frank good cause requirement, leaving behind the harshness of at will and the imprecision of the covenant. At first glance "good cause" may seem as hard to define as good faith;<sup>137</sup> but, labor arbitrators have long been

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134. This count includes states which have declined to take a position on the covenant. *See infra* survey of Alabama, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

135. This count is the most generous possible, for it includes bad faith actions even if not predicated on the covenant, and it includes jurisdictions which allow covenant and public policy actions to sound together. Note that New Mexico requires good faith but will not allow an action on the covenant, hence was counted in each category. *See infra* survey of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico and North Carolina.

136. *See, e.g.,* Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 2 Ind. Emp. Rights Cas. (BNA) 805, 107 Lab. Cas. (CCH) ¶ 55,812 (Miss. 1987). The opening paragraph of the opinion states:

This appeal from Chancery Court of Forrest County presents us with a story all the more depressing for being sadly familiar. Willis Perry served the Sears, Roebuck organization faithfully and with distinction for some twenty years. He was almost within sight of retirement when Sears unceremoniously dumped him because of a personality conflict with his immediate supervisor. This is not the first time we have taken note of corporate callousness towards loyal workers. *See, e.g.,* our remarks in Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985). In that case, we observed with chagrin that "the attendant rights and burdens are imposed by law, not by sympathy or outrage." 481 So. 2d at 249. It is the same in today's case. The Golden Rule, unfortunately, is not a rule of law.

*Id.* at 1087.

137. Certainly a good cause contract is no guarantee that litigation will be avoided. For an interesting factual debate on the meaning of good cause, when interpreted in good faith, see Green v. City of Oceanside, 239 Cal. Rptr. 470, 121 Lab. Cas. (CCH) ¶ 56,873 (Ct. App. 1987).

able to provide a working definition of good cause.<sup>138</sup> Similarly, the drafters of the Model Employee Termination Act have managed to articulate a good cause standard that addresses both an employee's job performance and an employer's economic necessities.<sup>139</sup> On the other hand, despite the combined efforts of the scholars cited at the beginning of this Article and the case law that follows, a generalized understanding of good faith has not been forthcoming.

At first blush, a "good cause" requirement appears to be a drastic change in existing law,<sup>140</sup> but, actually, most of the industrialized workplace has long worked under such a system. Most collective bargaining agreements

138. See Grief Bros. Cooperage Corp., 42 Lab. Arb. 555 (1964) (Daugherty, Arb.). Arbitrator Daugherty listed a series of questions "for learning whether [the employer had just and proper cause for disciplining an employee." According to Arbitrator Daugherty:

A "no" answer to any one or more of the following questions normally signifies that just and proper cause [for termination] did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company's business?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

This list demonstrates how "fair dealing" which might also be known as "due process," is intertwined with good cause and good faith.

139. Section 1(4) reads:

"Good cause" means (i) a reasonable basis for termination of an employee's employment in view of relevant factors and circumstances, which include the employee's duties, responsibilities, conduct, job performance, and employment record, and the appropriateness of termination for the conduct involved, or (ii) the exercise of business judgment in good faith by the employer in setting its economic goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing or divesting operations or parts of operations, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

140. Schmedmann, *supra* note 79, at 1132-34.

allow only good cause terminations.<sup>141</sup> Federal and state statutory restrictions on "bad reason" terminations and the widely recognized public policy tort have caused most companies to revise their termination policies so that they can articulate why and how most employees were terminated. In other words, fear of lawsuits has created the desirable result of self-imposed fairness and "just cause" requirements.<sup>142</sup> Codifying these requirements will have the beneficial effect of letting all parties know where they stand.<sup>143</sup>

The United States is alone among industrialized nations not to provide the private workforce with generalized protection from unjust discharge.<sup>144</sup> It is time for the United States to come into the fold and provide employers with stable rules and workers with meaningful protection.

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141. On the federal level these include the NLRA, Title VII, the ADEA, ADA and various whistleblower protections. Most states have enacted counterparts to these rules.

142. See, e.g., *Special Report: Auditing the Termination Process*, INDIVIDUAL EMPLOYMENT RIGHTS NEWSLETTER (BNA) Vol. 6, No. 10, May 21, 1991, at 1; see also Perritt, *supra* note 72, at 708, Christopher Conte, *Who Fires?*, WALL ST. J., May 12, 1992, at A1 ("Some companies are giving up the right to dismiss employees at will."). On the other hand, a Rand study indicates that pro-employee rulings are resulting in fewer hirings. Milo Geyeliln & Jonathan M. Moses, *Rulings on Wrongful Firing Curb Hiring*, WALL ST. J., Apr. 7, 1992, at B3.

143. There are, of course, costs to every course of action. Meddling in the workplace and interference with employers decision-making may affect the demand for labor. Marginal workers may feel the pinch. See Jeffrey L. Harrison, *The Price of the Public Policy Modification of the Terminable-at-Will Rule*, 34 LAB. L.J. 581 (1983).

144. Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985). Those who are subjected to illegal termination in this country and who go on to win lawsuits are, however, often given much greater compensation than their foreign counterparts. In other words, in America fewer workers grab the golden ring but when they do it is of higher carat.

## Appendix: Survey of State Law

### *Alabama*

In *Hoffman-La Roche, Inc. v. Campbell*,<sup>1</sup> the Alabama Supreme Court reaffirmed the strong doctrine of at will employment in that state.<sup>2</sup> The only way to rebut the at will presumption is by establishing contrary express or implied-in-fact contractual provisions.

The employment relationship at issue in *Hoffman-La Roche* was governed by a handbook, which the court was willing to use to create implied-in-fact contractual provisions.<sup>3</sup> One of these provisions was that the "policies and practices expressed therein [in the handbook] would be 'applied fairly.'"<sup>4</sup> It was on this provision that the court rested its finding that the employer had an obligation to act fairly.<sup>5</sup>

The court went on to cite another reason why the employer should act fairly, namely the covenant of good faith and fair dealing, which Alabama law reads into every contract.<sup>6</sup> The court cited Corbin to define this "as simply 'the obligation to preserve the spirit of the bargain rather than the form,'"<sup>7</sup> and later "this principle of justice forbids attempts by the actor to get more for himself than the other party reasonably contemplated giving him at the time the contractual relationship was entered into, absent good cause."<sup>8</sup>

The employee in *Hoffman-La Roche* had a bone disease which caused his once-stellar work performance to deteriorate. Nonetheless, his supervisor apparently advised him to keep working rather than take sick leave. The employee was ultimately terminated for unacceptable work performance.<sup>9</sup> The court held that the employer violated the obligation of good faith and fair dealing "when it discharged [the employee] for unsatisfactory performance even though it was aware of his physical disability to perform satisfactorily."<sup>10</sup>

The reasoning of the court is unclear. Although the tone of the court's legal analysis is supportive of at will, the finding is strikingly pro-employ-

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1. 512 So. 2d 725, 2 Ind. Emp. Rights Cas. (BNA) 739 (Ala. 1987).

2. *Id.* at 728. The court even rejected the public policy tort. *Id.* at 728 n.1.

3. *Id.* at 733.

4. *Id.* at 737.

5. *Id.* at 739.

6. *Id.* at 738.

7. *Id.* (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 654A(A) (1984 Supp.)).

8. *Id.* (citing CORBIN, *supra* note 7, § 654E(A)). Corbin's language is striking in its idealism, especially if it is applied to one-time business dealings.

9. *Id.* at 727. The supervisor denied the employee's version of the facts at trial.

10. *Id.* at 738.

ee.<sup>11</sup> Taken to an extreme, it could result in numerous disabled employees being carried on the company rolls long after they could perform.<sup>12</sup>

### Alaska

In the 1983 case of *Mitford v. de Lasala*,<sup>13</sup> this jurisdiction recognized that the covenant exists in employment contracts,<sup>14</sup> citing sales commissions cases.<sup>15</sup> Breach of the covenant sounds in contract.<sup>16</sup> A 1986 case established that the covenant required an employer to treat like employees alike,<sup>17</sup> although a later case made the point that the implied covenant cannot change express terms of an agreement between employer and employee.<sup>18</sup> Another 1986 case acknowledged the public policy aspects of the covenant.<sup>19</sup>

Three years later, the Alaska Supreme Court explained that the covenant requires that neither party do anything that will injure the right of the other to receive benefits of the agreement, and that each party act honestly toward

11. The court appears to mean what it says, citing other cases allowing employee disability as an excuse for contractual performance. *Id.* (citing *Duff v. American Cast Iron Pipe Co.*, 362 So. 2d 886 (Ala. 1978), quoting *American Chain & Castle Co.*, 48 Lab. Arb. Rep. (BNA) 1369 (1967)).

12. For a more standard statement of the general practice regarding legitimate employee illness, see the words of Arbitrator Marlin M. Valz in *Louisville Water Co.*, 77 Lab. Arb. Rep. (BNA) 1049, 1052 (1981):

Illness, injury, or other incapacitation by forces beyond the control of the employee are mitigating circumstances, excuse reasonable periods of absence, and are important factors in determining whether absences are excessive. However, if an employee has demonstrated over a long period of time an inability due to chronic bad health or proneness to injury to maintain an acceptable attendance record, an employer is justified in terminating the relationship, particularly where it has sought through counselling and warnings to obtain an improvement in attendance.

Note that in *Louisville Water* the employee was reinstated because "he may well have been lulled into a false sense of job security." *Id.* at 1052 n.660. This may well have been the reasoning of the Alabama Supreme Court in *Hoffman*, but the court does not make it clear in its statements of either fact or law. The repeated failure of courts to be precise as to how the covenant is breached is the source of the author's conclusion that the covenant concept should be dropped for something that provides better guidance.

13. 666 P.2d 1000, 115 L.R.R.M. (BNA) 4254 (Alaska 1983).

14. *Id.* at 1007. In *Mitford*, an employee was fired when he asserted his rights under a written profit sharing agreement. *Id.*

15. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (Mass. 1977) is the classic commission salesman case.

16. *Walt v. State*, 751 P.2d 1345, 1354, 3 Ind. Emp. Rights Cas. (BNA) 649, 128 L.R.R.M. (BNA) 2635 (Alaska 1988); *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1153, 3 Ind. Emp. Rights Cas. (BNA) 808, 122 Lab. Cas. (CCH) ¶ 57,045 (Alaska 1988).

17. *Rutledge v. Alyeska Pipeline Serv. Co.*, 727 P.2d 1050, 1056, 105 Lab. Cas. (CCH) ¶ 55,622 (Alaska 1986) (citing *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241 (1989)).

18. *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 789, 4 Ind. Emp. Rights Cas. (BNA) 1204, 116 Lab. Cas. (CCH) ¶ 56,416 (Alaska 1989).

19. *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 792, 104 Lab. Cas. (CCH) ¶ 55,566 (Alaska 1986).



the other with respect to the contract.<sup>20</sup> Although the court stated that good faith and good cause were not the same thing, it also stated that managerial discretion was permitted as long as it was reasonable and exercised in good faith.<sup>21</sup> By adding "reasonableness" into this formulation, the court is inviting the jury to bring its judgment into the personnel office. The line between good cause and reasonable cause is hard to draw since any generous definition of good cause includes all rational reasons for termination. A reader of the opinion might well find this requirement tantamount to a good cause requirement, which is probably unavoidable in nearly any attempt to give meaningful content to the covenant.

### Arizona

The leading case of *Wagenseller v. Scottsdale Memorial Hospital*<sup>22</sup> is one of the best reasoned opinions addressing whether the covenant can or should be implied in the employment relationship. An employee, her female supervisor and others went on a rafting trip, during which the employee refused to enter into raucous group activities.<sup>23</sup> The court was not afraid to admit that it was limiting and modifying the at will doctrine. The court recognized that by allowing a cause of action for firings in violation of public policy, it had determined that an employee could be fired for "good cause or no cause, but not for 'bad' cause."<sup>24</sup> The court placed terminations in violation of the covenant within the category of "bad cause."<sup>25</sup>

The Arizona judges provided this oft-cited explanation of what the covenant means in the case of an at will contract:

[The covenant] protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into. . . . In the case of an employment-at-will contract, it may be said that the parties have agreed, for example, that the employee will do the work required by the employer and that the employer will provide the necessary working conditions and pay the employee for work done. What cannot be said is that one of the agreed benefits to the at will employee is a guarantee of continued employment or tenure. The very nature of the at will agreement precludes any claim for a prospective benefit. Either employer or employee may terminate the contract at any time.

. . . The covenant does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at will agreement. The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee, such as the sales commissions in *Fortune, supra*, but not the

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20. *Akers*, 753 P.2d at 1156-57.

21. *Id.* at 1157.

22. 710 P.2d 1025, 1 Ind. Emp. Rights Cas. (BNA) 526, 103 Lab. Cas. (CCH) ¶ 55,511, 119 L.R.R.M. (BNA) 3166 (Ariz. 1985).

23. *Id.* at 1029. These activities included "public urination, defecation, and bathing, heavy drinking, and 'grouping up' with other rafters," and "mooning" while performing "Moon River." *Id.*

24. *Id.* at 1033.

25. *Id.* at 1035.

tenure required to earn the pension and retirement benefits in *Cleary, supra*. Thus, plaintiff here has a right to receive the benefits that were a part of her employment agreement with defendant Hospital. To the extent, however, that the benefits represent a claim for prospective employment, her claim must fail.<sup>26</sup>

This court is commendable for its bravery. It unabashedly modified the at will relationship in Arizona and created a new rule on a clean slate. The new rule is a step toward balancing the social and economic concerns of business and workers.<sup>27</sup> Nonetheless, this court, like so many, was afraid to ring the bell loudly to proclaim its new rules; it muffled its resounding ruling by continuing to characterize employment relationships in Arizona as "at will."<sup>28</sup>

### Arkansas

Causes of action for breach of the covenant appear to be congruent with public policy suits, both sounding in contract.<sup>29</sup>

### California

California courts have been the home of much of the change and discussion regarding incursions on the at will doctrine, including the interjection of the covenant into the employment context.

Like several judicially created doctrines, the use of the covenant in the employment contract has its genesis in a footnote.<sup>30</sup> In *Tameny v. Atlantic Richfield Co.*,<sup>31</sup> Justice Tobriner wrote of a potential tort if an employee were discharged in violation of the employer's obligations of good faith and fair dealing. The court of appeals elevated this into the text in *Cleary v. American Airlines, Inc.*,<sup>32</sup> in which it overruled a demurrer in a case alleging various types of wrongful termination actions.<sup>33</sup> The court allowed a tort

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26. *Id.* at 1040.

27. *But see supra* text accompanying Article note 92.

28. *Wagenseller*, 710 P.2d at 1033. *See supra* text accompanying Article note 45.

29. *Smith v. American Greetings Corp.*, 804 S.W.2d 683, 684, 6 Ind. Emp. Rights Cas. (BNA) 1039, 121 Lab. Cas. (CCH) ¶ 56,815 (Ark. 1991); *Sterling Drug Inc. v. Oxford*, 743 S.W.2d 380, 384, 3 Ind. Emp. Rights Cas. (BNA) 1060 (Ark. 1988). *See also* *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1 Ind. Emp. Rights Cas. (BNA) 388, 101 Lab. Cas. (CCH) ¶ 55,474, 116 L.R.R.M. (BNA) 2744 (8th Cir. 1984).

30. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (Stone, J.).

31. 610 P.2d 1330, 1337 n.12, 1 Ind. Emp. Rights Cas. (BNA) 102, 121 Lab. Cas. (CCH) ¶ 56,822, 115 L.R.R.M. (BNA) 3119 (Cal. 1980).

32. 111 Cal. App. 3d 443, 448, 1 Ind. Emp. Rights Cas. (BNA) 122, 110 Lab. Cas. (CCH) ¶ 55,998, 115 L.R.R.M. (BNA) 3030 (1980).

33. The court allowed causes of action for estoppel based on longevity of plaintiff's service along with express employer policies, a public policy cause of action, and conspiracy causes of action regarding wrongful interference with business relationships and wrongful inducement of breach of contract. Indeed the covenant language in *Cleary* has been called an "alternative holding" of the case. *Croisier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 1137, 115 L.R.R.M. (BNA) 3585 (1983).

cause of action for breach of the covenant, citing Tobriner's *Tameny* footnote, Section 205 of the *Restatement (Second) of Contracts* and several earlier California cases which acknowledged the covenant. The *Cleary* court quoted language from a 1934 case:<sup>34</sup> "It is equally well settled that the employer must act in good faith; and where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury."<sup>35</sup>

By quoting this language, *Cleary* seems to equate good faith with a limited concept of good cause, for the employer is absolved only if its reason for dismissal was dissatisfaction with services. The *Cleary* court further confused the definition of the covenant by suggesting that the covenant imposes more and more weighty obligations on the employer with the passage of time. The court identified two factors of "paramount importance" which must be satisfied before equating the duty imposed by the covenant with a duty to fire only for cause: longevity of service by plaintiff<sup>36</sup> and express policies of the employer. The court also mentioned "the continuing trend toward recognition by the courts and the Legislature of certain implied contract rights to job security" and equitable concepts of estoppel.<sup>37</sup> Thus the public policy tort, the estoppel doctrine, and the covenant all converged in this decision.<sup>38</sup>

Four years later the appellate court in *Rulon-Miller v. International Business Machines Corp.*<sup>39</sup> spent considerable time listing the duties imposed by the covenant, including that parties "deal openly and fairly with each other." For employers this means treating like cases alike and following their own rules and regulations.<sup>40</sup> This interpretation, subsequently followed by

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34. *Cleary*, 111 Cal. App. 3d at 453 (citing *Communale v. Traders & Gen. Ins. Co.*, 328 P.2d 198 (Cal. 1958), quoting *Coats v. General Motors Corp.*, 39 P.2d 838 (Cal. Ct. App. 1934)).

35. *Coats* involved a situation similar to that of *Lady Duff-Gordon*, for the satisfaction contract involved "fancy, taste, sensibility and judgment." *Coats*, 111 Cal. App. 3d at 453 n.5. The California Supreme Court later referred to the *Coats* authority as providing merely a "hint that an employer may need to demonstrate good faith." *Foley v. Interactive Data Corp.*, 765 P.2d 373, 390-91, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988).

36. As California law developed, the longevity factor was no longer deemed essential to the cause of action. *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 262, 1 Ind. Emp. Rights Cas. (BNA) 1854, 120 L.R.R.M. (BNA) 2152 (1985); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 478-79, 1 Ind. Emp. Rights Cas. (BNA) 1803, 100 Lab. Cas. (CCH) ¶ 55,454, 119 L.R.R.M. (BNA) 2520 (1984).

37. *Cleary*, 111 Cal. App. 3d at 455.

38. *Id.* at 455-56. Or, in the words of a subsequent decision, "the concepts of ordinary breach of employment contract (i.e., breach of an implied promise not to terminate except for good cause), tortious discharge (i.e. discharge in violation of public policy), and "bad faith" (breach of the implied covenant of good faith and fair dealing) were rather badly admixed in *Cleary*." *Koehrer v. Superior Ct.*, 181 Cal. App. 3d 1155, 1168 (1986).

39. 162 Cal. App. 3d 241, 1 Ind. Emp. Rights Cas. (BNA) 405, 117 L.R.R.M. (BNA) 3309 (1984).

40. *Id.* at 247-48. See *DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 85 Daily J. 879

other appellate courts, apparently created tort liability for companies which did not follow their own policies, rules, regulations, and handbook procedures.<sup>41</sup> These courts were perilously close to creating tort liability for breach of implied-in-fact contract.

More thoughtful courts required plaintiffs to prove "bad faith action extraneous to the contract, combined with the obligor's intent to frustrate the enjoyment of contract rights."<sup>42</sup> Punitive damages could then be sought on top of the tort recovery, so that the proof was three tiered: first, breach of the policies, which might well amount to breach of express or implied-in-fact contract; second, bad faith; third, oppression, fraud or malice for the purposes of obtaining exemplary damages.<sup>43</sup>

Another California appellate court opinion sheds more light on the meaning of the covenant. In *Koehrer v. Superior Ct.*,<sup>44</sup> the court first discussed the role of the covenant in general business contracts. The court stressed that the obligations imposed by the covenant were "separate and apart from those consensually agreed to" and that they were "imposed by law as normative values of society."<sup>45</sup> These obligations govern "the manner in which the contractual obligations must be discharged—fairly and in good faith."<sup>46</sup> Again, the specific nature of the obligations depends not only upon "the nature and purpose of the underlying contract" but also upon the "legitimate expectations of the parties arising from the contract."<sup>47</sup> *Koehrer* reaffirmed *Cleary's* position that these expectations turned not only on who agreed to what but also on longevity and past practice.

*Koehrer* distinguished breach of contract from breach of the covenant:

It is sufficient to recognize that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists. [Examples include] . . . adopting a "stonewall" position ("see you in court") without probable cause and with no belief in the existence of a defense. . . . offend[ing] accepted notions of business ethics.<sup>48</sup>

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F.2d 459, 466, 4 Ind. Emp. Rights Cas. (BNA) 897 (9th Cir. 1989).

41. See, e.g., *Gray v. Superior Ct.*, 181 Cal. App. 3d 813, 821 (1986). Note the confusion here between the implied-in-fact contract and the implied-in-law covenant.

42. *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 263, 1 Ind. Emp. Rights Cas. (BNA) 1854, 120 L.R.R.M. (BNA) 2152 (1985).

43. CAL. CIV. CODE § 3294 (West 1969). See Michael H. Cohen, Comment, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing As a Tort*, 73 CAL. L. REV. 1291, 1325-26 (1985) for a position that punitive damages are inappropriate when tort recovery is allowed. See also *Foley v. Interactive Data Corp.*, 765 P.2d 373, 399 n.35, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988).

44. 181 Cal. App. 3d 1155 (1986).

45. *Id.* at 1168.

46. *Id.* at 1169.

47. *Id.*

48. *Id.* at 1170 (quoting *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 206 Cal. Rptr. 354, 363 (1984)).

In *Koehrer*, a written contract of employment had existed for a specified term of one year. Obviously, application of *Koehrer's* rules to the at will context becomes problematic.<sup>49</sup> In firing the employee, the employer is not denying the existence of the contract but is asserting its contractual rights, albeit presumed, to fire for any reason.

The second part of the *Koehrer* definition brings "accepted notions of business ethics" into the factual analysis. This leads to the question of whether the at will presumption is a fiction which does not reflect actual business ethics, personnel practice, or worker expectations, or whether the presumption is an accurate articulation of the intent of the parties.<sup>50</sup>

The *Koehrer* court then discussed the covenant specifically in the employment context, unfortunately using the very terms it was trying to define but apparently emphasizing "honesty in fact and law:"

If the employer merely disputes his liability under the contract by asserting in good faith and with probable cause that good cause existed for discharge, the implied covenant is not violated and the employer is not liable in tort. □ If, however, the existence of good cause for discharge is asserted by the employer *without probable cause and in bad faith, that is, without a good faith belief that good cause for discharge in fact exists*, the employer has tortiously attempted to deprive the employee of the benefits of the agreement, and an action for breach of the implied covenant of good faith and fair dealing will lie.<sup>51</sup>

After nearly a decade of uncertainty, the California Supreme Court finally spoke on the matter.<sup>52</sup> The *Foley* decision delineated the three theories of wrongful discharge recovery in California: public policy tort, implied-in-fact contract, and covenant. Regarding breach of the covenant claims, the decision greatly changed the stakes in the litigation by declaring that the action would sound in contract, not tort.<sup>53</sup> However, *Foley's* outcome was not entirely a

49. At least one subsequent decision refused to allow a claim based on the covenant where the written employment agreement contained an at will clause. Other courts did not bar such claims. Compare *Malmstrom v. Kaiser Aluminum & Chem.*, 86 Daily J. D.A.R. 3923 (Dec. 10, 1986) with *Ketchu v. Sears, Roebuck & Co.*, 86 Daily J. D.A.R. 3879 (Nov. 30, 1986).

50. See *supra* text accompanying Article notes 39-40.

51. *Koehrer*, 181 Cal. App. 3d at 1171 (emphasis added), *questioned in* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 390-91, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988).

52. For a survey of pre-*Foley* law on the covenant in California, see Edward Haggerty, *Breach of the Implied Covenant of Good Faith and Fair Dealing*, 14 W. ST. U. L. REV. 445 (1987).

53. *Foley*, 765 P.2d at 388. Until then, wrongful termination torts had been called the Torts of the 80s. Ever-rising jury verdicts had lit up the dreams of plaintiffs' lawyers and had darkened the nightmares of corporate CEOs. The *Foley* court called upon the legislature to impose tort liability if it wished. *Id.* at 401. The dissent's reaction to this suggestion reveals the markedly different political perspectives on the court. After *Foley*, objected Justice Broussard, "the burden of seeking legislative change, which was previously on employer and insurers, two well organized and financed groups, is now on the unorganized worker." *Id.* at 411-12 (Broussard, J., dissenting).

management victory for the court also reaffirmed that the covenant may be imposed in *all* contracts and disapproved *Cleary* and its progeny only so far as they permitted tort remedies for breach of the covenant.<sup>54</sup> The failure of several of those cases to reconcile the covenant with the at will presumption remains unremedied after *Foley*.

The majority of the *Foley* court adopted Arizona's language from *Wagenseller*<sup>55</sup> that the covenant "protects only the parties' right to receive the benefit of their agreement."<sup>56</sup> The *Foley* majority discussed the lack of a clear definition in other formulations of the covenant.<sup>57</sup> The majority did not share the view of some commentators that the flexibility of the definition is desirable, for it worried that jurors would impose "their own standards of fairness rather than the legal instructions provided by the judge . . . [¶] Jurors can easily identify with the worker who has received a pink slip."<sup>58</sup> The *Foley* majority was troubled by various formulations, including those offered by the *Koehrer* and *Khanna* courts.<sup>59</sup> The court rejected as too subjective a test whereby plaintiff would need to prove: "(1) assertion of a right or denial of an obligation (2) made in bad faith (with actual knowledge that the claim or denial has no foundation) and unreasonably (where a reasonable person under the circumstances would find the claim or denial groundless) (3) that obstructs the injured party's ability to receive the substitutionary value of the agreement."<sup>60</sup> The court agreed that the facts in *Cleary* provided an example of one way in which an employer might violate the covenant<sup>61</sup> and concurred with Summers that the term "good faith" is best understood as an excluder, taking on specific meaning in particular contexts.<sup>62</sup>

While it rejected several approaches to the covenant, the *Foley* majority provided little positive guidance regarding what the covenant adds to an at will contract. The majority implied that the covenant would be read into at will situations by explaining what the covenant would *not* mean in that context. The court wrote, "[W]ith regard to an at will employment relationship, breach of the implied covenant cannot logically be based on a claim that a discharge was made without good cause. . . . Because the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no argument to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty."<sup>63</sup>

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54. *Id.* at 401 n.42.

55. *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1 Ind. Emp. Rights Cas. (BNA) 526, 103 Lab. Cas. (CCH) ¶ 55,511, 119 L.R.R.M. (BNA) 3166 (Ariz. 1985).

56. *Foley*, 765 P.2d at 400 n.39.

57. *Id.* at 399.

58. *Id.* at 399 n.36 (quoting William B. Gould IV, *Stemming the Tide*, 13 EMP. REL. L.J. 404, 406-07 (1988)).

59. *Id.*

60. *Id.* at 399 n.35 (quoting Cohen, *supra* note 42, at 1305).

61. *Id.* at 400.

62. *Id.* at 400 n.39.

63. *Id.* A federal court has summarized *Foley* as saying that under California law "when

The *Foley* dissenters strongly urged that the bad faith tort existed and should continue to exist. Justice Broussard suggested the following test for determining when the covenant is breached:

[A] suitable test is simple to describe: an employer acts in bad faith in discharging an employee if and only if he does not believe he has a legal right to discharge the employee. . . .

The distinction between contract and tort is between a discharge done in good faith, where the employer believes he has a legal right to discharge the worker, and deliberate, arbitrary violation of the employee's rights.

. . . [T]he majority argument . . . makes no sense unless the majority believe[s] that there should be no distinction between innocent and malicious breach—that the employer who maliciously and arbitrarily fires a worker knowing that he has no right to do so should pay no more in damages than the employer who believed in good faith that he had a right to fire the worker—and in particular that the bad faith employer should not pay for the suffering he knowingly and deliberately caused.<sup>64</sup>

This "simple test" would lead to peculiar results if applied in an at will context, in which an employer has a legal right to discharge for good reason, bad reason, or no reason at all. The only exceptions to this are certain "bad" reasons prohibited by federal or state statutes or by state public policy tort common law rules. Obviously, if implied-in-fact or express contractual obligations exist, limiting the employer's right to fire, the contract is not at will. Therefore, the employer in an at will context should always and correctly believe it has a legal right to discharge. Would Justice Broussard say that the covenant then adds nothing to the employer's obligations?

Even in situations which are not at will, it is not clear what the bad faith tort adds to plaintiff's recovery besides tort damages. Believers in the separation of powers might be troubled at the embellishment of statutory remedies with common law tort recovery. Adherents to traditional jurisprudence would find even more shocking the addition of tort damage to any breach of contract case. If the employer knows that a contract—express or implied-in-fact—prohibits the termination and terminates the employee nonetheless, he acts without believing he has a legal right to terminate. Justice Broussard would find him liable for the bad faith tort. Justice Broussard rejected any concept of efficient breach in the employment context and attached a social/moral obligation to the employment contract. He also

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parties have agreed that their contract is terminable at the will of either of them, . . . , the implied covenant of good faith and fair dealing cannot be invoked by either party to prevent a court from enforcing the terms of the contract." *DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 466, 4 Ind. Emp. Rights Cas. (BNA) 897 (9th Cir. 1989). This summary was adopted and inaccurately broadened by defendants in a subsequent federal district court who asserted, "California courts have refused to find a breach of the covenant of good faith and fair dealing where the relationship between the employee and the employer is at will." *Siddoway v. Bank of Am.*, 748 F. Supp. 1456, 1460, 122 Lab. Cas. (CCH) ¶ 56,953 (N.D. Cal. 1990). The *Siddoway* defendant's statement overlooks that some breach of the covenant could be asserted with respect to another provision of the at will contract.

64. *Foley*, 765 P.2d at 409-10 (Broussard, J., dissenting).

equated "intentional" breach with "malicious and arbitrary" breach, when in fact each of those words has a distinct meaning.

The *Foley* dissents also highlight the variance in judicial tolerance levels for uncertainty. While the majority was troubled by the indeterminacy of the phrase "good faith," Justice Broussard pointed out that many words, like "reasonable," are used without undue discomfort in the law.<sup>65</sup> Similarly, Justice Kaufman considered that the appellate courts had provided guidelines sufficient to delineate a cause of action, and he went on to debunk the "flood of litigation" argument.<sup>66</sup>

After *Foley*, California law is in conformity with the most restrictive view of the covenant although, by giving some recognition to the covenant, the California high court has provided more protection to workers than they receive in the majority of states. But, the viewpoint of the dissenting judges and of the appellate courts continues to be instructive in determining the potential parameters of the covenant and its value in the workplace.

### Colorado

Strikingly little authority on the covenant exists. A court of appeals refused to recognize the covenant<sup>67</sup> without explanation other than citation to a pre-*Wagenseller* Arizona case<sup>68</sup> and Illinois' *Criscione*.<sup>69</sup>

### Connecticut

In *Magnan v. Anaconda Industries, Inc.*,<sup>70</sup> an erudite opinion covering four centuries of legal history, the Connecticut court accepted the concept of a covenant attaching to the employment relationship without committing itself to what the covenant would mean.<sup>71</sup> The judges expressed concern over the lack of precision in the concept, noting the defendant's criticism of the covenant as "too amorphous, permitting juries to police managerial decisions concerning control over the workforce guided by vague concepts of public morality rather than principles of law."<sup>72</sup> It can be inferred that the majority also worried that plaintiffs who evoke sympathy would be unduly rewarded.<sup>73</sup> The court devoted some time to explaining the definition supplied by its neighbor Massachusetts,<sup>74</sup> but did not itself adopt a definition other than

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65. *Id.* at 410 n.10 (Broussard, J., dissenting).

66. *Id.* at 417 (Kaufman, J., dissenting). In particular Justice Kaufman found the *Koehrer* standard "fully adequate." *Id.*

67. *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1385-86 (Colo. Ct. App. 1986).

68. *Daniel v. Magna Copper Co.*, 620 P.2d 699, 115 L.R.R.M. (BNA) 4326 (Ariz. Ct. App. 1980).

69. *Criscione v. Sears, Roebuck & Co.*, 384 N.E.2d 91, 115 L.R.R.M. (BNA) 4224 (Ill. App. Ct. 1978).

70. 479 A.2d 781, 101 Lab. Cas. (CCH) ¶ 55,485, 117 L.R.R.M. (BNA) 2163 (Conn. 1984).

71. *Id.* at 786-87.

72. *Id.* at 786.

73. *Id.* at 786-87 n.19.

74. *Id.* at 787-88 (citing *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 115 L.R.R.M. (BNA) 5127 (Mass. 1982)). The Connecticut court described the Massachusetts position as follows:



to insist that the covenant "cannot be predicated simply upon the absence of good cause for a discharge."<sup>75</sup> The court made clear that in essence the covenant's requirements amount to a public policy standard.<sup>76</sup>

One judge dissented from the majority's view of the covenant, finding it too restrictive.<sup>77</sup> He suggested focusing on the good faith aspect of the covenant, leaving the fair dealing factor for another day.<sup>78</sup> He suggested that the good faith covenant entitles parties to expect no bad faith<sup>79</sup> and further declared that an arbitrary dismissal is a bad faith dismissal.<sup>80</sup>

Subsequent decisions indicate that Connecticut has maintained the congruency between breach of the covenant and breach of an important public policy.<sup>81</sup>

### *Delaware*

Until very recently, Delaware was one of the most resoundingly at will states, but a 1991 decision opened the door to actions on the covenant. In a decision technically unreported but appearing in Lexis and Westlaw, the Delaware Court of Chancery approved actions on the covenant by at will employees.<sup>82</sup> Such suits will sound (1) when bad faith or malice is present in the firing, or (2) when it is clear from what was expressly agreed upon that the parties would have agreed to proscribe the act later complained of as breach of the implied covenant of good faith, had they thought to negotiate with respect to that matter.<sup>83</sup> It may well be that in describing this second situation the court was articulating an implied-in-fact covenant, but the court's language was extremely protective of inarticulate contractors.

In 1992 the Delaware Supreme Court made clear what the earlier court merely hinted at. In *Merrill v. Crothall-American, Inc.*,<sup>84</sup> the court stated that every employment contract made under Delaware law includes an implied covenant of good faith and fair dealing.<sup>85</sup> The court held that a fired employee stated a claim for breach of the covenant when the employer had

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"[A] breach of good faith implies an overreaching by the employer who takes advantage of its superior bargaining power and deprives the employee of 'compensation that is clearly identifiable and is related to the employee's past service.'" *Id.* at 788 (quoting *Cort*, 431 N.E.2d at 910). See also *infra* text accompanying notes 144-48.

75. *Magnan*, 479 A.2d at 788.

76. *Id.*

77. *Id.* at 792 (Parskey, J., concurring and dissenting).

78. *Id.*

79. *Id.*

80. *Id.* at 793.

81. See, e.g., *Morris v. Hartford Courant Co.*, 513 A.2d 66, 106 Lab. Cas. (CCH) ¶ 55,713 (Conn. 1986).

82. *Manchester v. Narragansett Capital, Inc.*, No. 10822, 1989 Del. Ch. Lexis 141, at \*27 (Del. Ch. Oct. 19, 1989).

83. *Id.* at \*27-29.

84. 606 A.2d 96, 7 Ind. Emp. Rights Cas. (BNA) 781, 121 Lab. Cas. (CCH) ¶ 56,900 (Del. 1992).

85. *Id.* at 101.

lied during the initial employment interview by representing that the position was permanent when it was only temporary.<sup>86</sup> The court explained that at will contracts could still be terminated for legitimate business reasons, even if highly subjective.<sup>87</sup> Rather the cause of action redresses terminations motivated by bad faith.<sup>88</sup>

### Florida

In another state which maintains a strict at will rule, the courts have refused to allow any "good faith" restriction on an employer's right to discharge employees.<sup>89</sup> One court found it "difficult and inappropriate to make civil action dependent on motive or intent of the defendant."<sup>90</sup> In a case where a written contract specified employment for a definite term conditioned upon the employer's satisfaction with the employee's performance during the term, an appellate court found that the employer had an obligation of good faith.<sup>91</sup>

Payment of commissions earned prior to termination was required when the claim was supported by an oral contract and when the jury found there was no recognized custom in the industry precluding such post-termination compensation.<sup>92</sup>

### Georgia

The courts of this state have firmly protected the legislative mandate of at will employment<sup>93</sup> and summarily foreclosed any argument that the covenant would mitigate this doctrine.<sup>94</sup>

### Hawaii

In the well-known and often-cited decision of *Parnar v. Americana Hotels, Inc.*,<sup>95</sup> the Hawaii Supreme Court created a public policy tort and declined to recognize the covenant in the employment context.<sup>96</sup> In one brief paragraph the court acknowledged the recent trend which reins in the

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86. *Id.* at 102.

87. *Id.* at 103.

88. *Id.*

89. *Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1989), *cert. denied*, 494 U.S. 1029 (1990). The court noted that this rule would be qualified if a statute granted a specific property right. *Id.*

90. *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980).

91. *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313, 316-17 (Fla. Dist. Ct. App. 1963). This is reminiscent of *Lady Duff-Gordon's* situation. *See supra* text accompanying Article notes 7-8.

92. *E.H. Crump of Florida, Inc. v. Aikin*, 571 So. 2d 1353, 1354, 119 Lab. Cas. (CCH) ¶ 56,691 (Fla. Dist. Ct. App. 1991).

93. GA. CODE ANN. § 34-7-1 (Harrison 1990).

94. *Id.*; *Gunn v. Hawaiian Airlines, Inc.*, 291 S.E.2d 779, 115 L.R.R.M. (BNA) 4203 (Ga. Ct. App. 1982).

95. 652 P.2d 625, 115 L.R.R.M. (BNA) 4817 (Haw. 1982).

96. *Id.* at 629-31.

employer's power of discharge, but rejected the covenant as the proper means to do so:

[T]o imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.<sup>97</sup>

### *Idaho*

The Supreme Court of Idaho has recognized and defined the covenant in every employment contract. In *Metcalf v. Intermountain Gas Co.*,<sup>98</sup> the court declared that an action for breach of the covenant sounds in contract.<sup>99</sup> The thrust of the covenant is to protect the parties' benefits in their employment contracts: "[A]ny action which violates, nullifies or significantly impairs any benefit or right which either party has in an employment contract, whether express or implied, is a violation of the covenant."<sup>100</sup> This puts Idaho in line with Arizona.<sup>101</sup>

The facts in *Metcalf* provide one of the clearest examples<sup>102</sup> of the value of the covenant so described. A woman was promised and paid sick leave benefits, but then she was fired for being sick. Thus, she had no breach of contract action, but the benefit of the sick leave pay was nullified by the fact that she was fired for collecting it.

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97. *Id.* at 629.

98. 778 P.2d 744, 4 Ind. Emp. Rights Cas. (BNA) 961, 113 Lab. Cas. (CCH) ¶ 56,136 (Idaho 1989).

99. *Id.* at 748-49. Idaho allows front pay and punitive damages in breach of contract suits. *O'Dell v. Basabe*, 810 P.2d 1082, 1101 (Idaho 1991).

100. *Metcalf*, 778 P.2d at 749.

101. *Id.* *Metcalf* relies a great deal on *Wagenseller*. *Id.* at 746-50. See *supra* text accompanying note 26.

102. See *supra* text accompanying Article notes 87-92.

*Illinois*

Illinois has refused to recognize the covenant as a source of a private action,<sup>103</sup> but the covenant aids in interpreting contractual language.<sup>104</sup> The covenant also played a role in a class action suit seeking adjudication of severance pay benefits.<sup>105</sup> The issue was which of two severance pay policies should apply. The earlier, more generous policy had been declared "rescinded" by a later policy. Two weeks after the later policy was issued, the company began laying off large numbers of employees. The employees claimed that the benefits from the earlier policy were vested. The court held that the earlier policy applied primarily because of promissory estoppel, but also cited commission cases<sup>106</sup> and other covenant cases.<sup>107</sup>

*Indiana*

Appellate courts in Indiana have declared that employers owe no duty of good faith and fair dealing to at will employees.<sup>108</sup> The courts do not engage in much discourse explaining their position. A quote from Corbin indicates some concern over lack of mutuality,<sup>109</sup> and subsequent language indicates that the employer "must be accorded wide latitude in determining whom it will employ and retain in employment."<sup>110</sup>

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103. *Foy v. City of Chicago*, 551 N.E.2d 310 (Ill. App. Ct. 1990); *Criscione v. Sears, Roebuck & Co.*, 384 N.E.2d 91, 115 L.R.R.M. (BNA) 4224 (Ill. App. Ct. 1978). In *Criscione* the court makes clear that an action may lie for bad faith breach of an employment contract, but not "simply for a bad faith dismissal of an employee at will." *Id.* at 94. At any rate the dismissal in that case was found to have been for poor performance. *Id.* See generally Joanne Sokachitich, *Good Faith and Fair Dealing in Illinois: An Application in the Employment Contract*, 1987 U. ILL. L. REV. 183.

104. *Harrison v. Sears, Roebuck & Co.*, 546 N.E.2d 248, 256, 115 Lab. Cas. (CCH) ¶ 56,311 (Ill. App. Ct. 1989); *Martin v. Federal Life Ins. Co.*, 440 N.E.2d 998, 1005, 115 L.R.R.M. (BNA) 4524 (Ill. App. Ct. 1982). For a thorough discussion of Illinois common law on employment, see Sokachitich, *supra* note 103.

105. *Kulins v. Malco, Inc.*, 459 N.E.2d 1038, 115 L.R.R.M. (BNA) 2575 (Ill. Ct. App. 1984).

106. *Id.* at 1044 (citing *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (Mass. 1977)).

107. *Kulins*, 459 N.E.2d at 1045.

108. *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1061, 115 L.R.R.M. (BNA) 4417 (Ind. Ct. App. 1980).

109. *Id.* at 1061-62 (quoting *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976)).

110. *Hamblen v. Danners, Inc.*, 478 N.E.2d 926, 929, 119 L.R.R.M. (BNA) 3470 (Ind. Ct. App. 1985). See also *Campbell*, 413 N.E.2d 1054 (example of restrictive language). Even the concurring opinion in *Campbell*, which would have further extended the public policy exception, rejected implication of the covenant into the employment relationship. *Id.* at 106. (Ratliff, J., concurring and dissenting in part).

*Iowa*

In *Fogel v. Trustees of Iowa College*,<sup>111</sup> the Iowa Supreme Court expressly avoided deciding whether to apply the covenant in the employment context.<sup>112</sup> Since then, the court has used that avoidance as precedent for declaring that the covenant has not been recognized in the state.<sup>113</sup>

*Kansas*

In the carefully researched opinion of *Morriss v. Coleman Co.*,<sup>114</sup> the Kansas Supreme Court rejected the covenant in employment at will situations.<sup>115</sup> The opinion acknowledged that the legislature had adopted the UCC which imposes a duty of good faith in commercial transactions and that the court itself had imposed the duty in construction cases.<sup>116</sup> Nonetheless, the majority wrote:

After a careful consideration of these various cases, pro and con, the majority of the court has concluded that the principle of law stated in Restatement (Second) of Contracts § 205, that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement, is overly broad and should not be applicable to employment-at-will contracts.<sup>117</sup>

This conclusion was not reached without objection. Justice Herd thought that the Restatement's duty should be adopted in the workplace.

Employment contracts are the most sensitive of all contracts. They determine the standard of living and the quality of education for children, and affect the general welfare of all the people in this country. It is ludicrous that the covenant of good faith and fair dealing has been adopted pertaining to commercial transactions (*see* K.S.A. 84-1-203) but has not been adopted for transactions involving human working conditions.<sup>118</sup>

Justice Herd then discussed the unequal bargaining positions of employers and employees and pointed out that the at will doctrine is not absolute, citing various laws enacted to balance out the unequal bargaining positions.<sup>119</sup>

Justice Herd's opinion gave him an opportunity to define bad faith: a termination which has "nothing to do with the worker's job performance or

111. 446 N.W.2d 451, 6 Ind. Emp. Rights Cas. (BNA) 313, 317-18, 117 Lab. Cas. (CCH) ¶ 56,454 (Iowa 1989).

112. *Id.* at 456-57.

113. *Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991).

114. 738 P.2d 841, 2 Ind. Emp. Rights Cas. (BNA) 844, 107 Lab. Cas. (CCH) ¶ 55,825 (Kan. 1987).

115. *Id.* at 851.

116. *Id.* at 849-51.

117. *Id.* at 851.

118. *Id.* at 851-52 (Herd, J., concurring).

119. *Id.* at 852.

the employer's employment needs."<sup>120</sup> The example he gave is a retaliatory discharge for filing a workers' compensation claim.<sup>121</sup> He did not recognize that his example failed to fit his definition. Management's most basic employment need is for cheap labor. Workers' compensation claimants are more expensive in both the short and long run; therefore, firing a claimant has a great deal to do with the employer's bottom-line needs. Perhaps what Justice Herd considered unfair was firing someone for exercising statutorily granted and commonly expected rights,<sup>122</sup> other legal doctrines like the public policy tort and implied-in-fact contract protect such plaintiffs.

Justice Herd would apply the covenant in the case where the employer "acquiesced in the actions of its supervisory employees in discharging appellants in retaliation for their off-duty conduct—conduct which apparently deviated from one supervisor's private code of morality. For the law to permit such vindictive retaliation is improper and has broad ramifications."<sup>123</sup> Such terminations are in bad faith and violate the covenant of fair dealing.<sup>124</sup>

This analysis also falls short of his own definition. The employer needs to have employees who work well together. If one worker is sufficiently repelled by another, something must be changed. It is standard practice for employer to favor and retain more senior and higher echelon employees over underlings.

### *Kentucky*

In *Grzyb v. Evans*,<sup>125</sup> the Kentucky Supreme Court dismissed a covenant claim without much comment.<sup>126</sup> An appellate court in another case made the following statement:

The issue here is one of public policy which is first and foremost a matter for legislative determination. The legislature has not seen fit to establish any policy in this area, and we are not convinced that this is a proper area for the exercise of judicial activism.<sup>127</sup>

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120. *Id.* See *supra* text accompanying Article notes 109-23.

121. *Morriss*, 738 P.2d at 852 (Herd, J., concurring).

122. In fact protection of workers' compensation claimants came one year later when the public policy tort was created in *Chrisman v. Philips Industries, Inc.*, 751 P.2d 140, 3 Ind. Emp. Rights Cas. (BNA) 181 (Kan. 1988).

123. *Morriss*, 738 P.2d at 852 (Herd, J., concurring). A married but separated male employee and a single female employee took a trip together. She took a day off work for it. *Id.* at 843-45. "There is evidence in the record . . . that [the supervisor] had strong religious beliefs and values . . . and that he terminated plaintiffs simply because he disapproved of their taking a trip together without being married." *Id.* at 845. They were otherwise excellent employees. *Id.* at 842-43.

124. *Id.*

125. 700 S.W.2d 399, 1 Ind. Emp. Rights Cas. (BNA) 1125, 103 Lab. Cas. (CCH) ¶ 55,538, 115 L.R.R.M. (BNA) 4769 (Ky. 1985).

126. *Id.* at 400-01.

127. *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811, 812, 115 L.R.R.M. (BNA) 4769 (Ky. Ct. App. 1977).

### Louisiana

While not using "covenant" language, one Louisiana court has stated in dicta that employment terminations may not be arbitrary and capricious.<sup>128</sup> According to the court, this protection from unjust discharge has its origins in the Louisiana Civil Code which provides protection for those applying for workers' compensation and for those working under a fixed term:

If, *without any serious ground of complaint*, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.<sup>129</sup>

### Maine

The Maine Supreme Court has refused to find the covenant implied in law.<sup>130</sup> The court has declined to usurp the tasks of the legislative branch<sup>131</sup> and has expressed its dislike for overriding the at will presumption without clear statements of the parties' intent to do so.<sup>132</sup>

### Maryland

Maryland has apparently refused to recognize a cause of action on the covenant, choosing instead to include such causes of action in tort suits brought for termination in contravention of public policy.<sup>133</sup>

128. *Wiley v. Missouri Pac. R.R.*, 430 So. 2d 1016, 1020, 115 L.R.R.M. (BNA) 5170 (La. Ct. App. 1982). *Wiley* involved a fixed term employee, but in dictum the court wrote: "This court has heretofore recognized, in other contexts, that a contract terminable at will is nevertheless subject to limitation on the exercise of that will, to wit: that such termination not be arbitrary and capricious." *Id.* At that point the *Wiley* court cited *Gautreau v. Southern Farm Bureau Casualty Insurance Co.*, 410 So. 2d 815 (La. Ct. App.), *writ granted*, 414 So. 2d 392 (La. 1982), *rev'd*, 429 So. 2d 866 (La. 1983). *Gautreau* involved an alleged bad faith failure to renew an insurance policy.

129. LA. CIV. CODE ANN. art. 2749 (West 1952), *quoted in Wiley*, 430 So. 2d at 1021 (emphasis added). Of course this is a codification of the standard common law rule that employment for a specified term is *not* terminable at will, but rather is terminable only for cause. The *Wiley* court perhaps sought to soften the edges of history, for it continued: "the article's humane purpose of preventing abusive discharge has at times been thwarted by a narrow, limited construction of the term 'hired for a certain time.'" *Wiley*, 430 So. 2d at 1021.

130. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156, 6 Ind. Emp. Rights Cas. (BNA) 721, 121 Lab. Cas. (CCH) ¶ 56,884 (Me. 1991).

131. *Poirier v. Sears, Roebuck & Co.*, 116 L.R.R.M. (BNA) 2086, 2087 (Me. 1983).

132. *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99-100, 104 Lab. Cas. (CCH) ¶ 55,577, 118 L.R.R.M. (BNA) 2489 (Me. 1984).

133. *See generally Vasques v. National Geographic Soc'y*, 115 L.R.R.M. (BNA) 4181 (D. Md. 1982); *Beye v. Bureau of Nat'l Affairs*, 477 A.2d 1197, 1200-01, 2 Ind. Emp. Rights Cas. (BNA) 1893 (Md. Ct. Spec. App.), *cert. denied*, 84 A.2d 274 (Md. 1984).

*Massachusetts*

Massachusetts is the home of the seminal case of *Fortune v. National Cash Register Co.*,<sup>134</sup> which provides the textbook example of an "I know it when I see it" breach of the covenant by an employer who takes advantage of a commission salesman.<sup>135</sup> Plaintiff was a cash register salesman, terminable at will. A contract provided that plaintiff would receive a weekly salary plus a bonus for sales made within his sales territory. The amount of bonus was to be determined on the basis of bonus credits. The key to the case is that bonus credits turned on which territory the salesman was working in. The salesman would receive a seventy-five percent bonus if the territory was assigned to him at the date of the order, twenty-five percent if the territory was assigned to him at the date of delivery and installation, or 100% if the territory was assigned to him at both times.

Plaintiff made a superlative sale of 2,008 cash registers for a purchase price of \$5 million. His bonus credit should have been \$92,079.99. The deal closed November 29, 1968. On January 6, 1969, plaintiff found a termination notice addressed to his home dated December 2, 1968. Although the notice officially fired him, it also told him to "stay on" and "[k]eep on doing what [he was] doing right [then]."<sup>136</sup> He collected seventy-five percent of his bonus. The remaining twenty-five percent was paid to some other salesman, contrary to the company's own policy. Eighteen months after the termination notice, plaintiff asked to retire and was finally fired in June 1970. The company had paid him all it was obliged to under the expressly at will commission contract described above.

The highest state court held that while it was legitimate for an employer to be motivated by its own legitimate business interests, and while an employer was entitled to wide latitude in deciding whom to employ, the employer must act with good faith.<sup>137</sup> The statement of the rule of the case is fairly narrow, for the court shied away from the broad assertion<sup>138</sup> that the covenant attaches to every employment contract:

It is clear, however, that, on the facts before us, a finding is warranted that a breach of the contract occurred. Where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent. The same result obtains where the principal attempts to deprive the agent of any portion of a commission due the agent.<sup>139</sup>

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134. 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (Mass. 1977). See *supra* text accompanying Article notes 59-63.

135. *Fortune*, 364 N.E.2d at 1253-55. See text accompanying Article notes 74-75.

136. *Fortune*, 364 N.E.2d at 1254.

137. *Id.* at 1257.

138. The court read New Hampshire's *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 552, 115 L.R.R.M. (BNA) 4755 (N.H. 1974), to embrace the idea that every employment contract carries the covenant with it, and declined to go as far as its sister state. *Fortune*, 364 N.E.2d at 1257.

139. *Fortune*, 364 N.E.2d at 1257 (citing RESTATEMENT (SECOND) OF AGENCY § 454 &



Subsequent Massachusetts courts have attempted to articulate breach of the covenant. Mere absence of good cause to discharge does not give rise to a breach of the covenant, unless the employee can show that the discharge involved an intent by the employer to benefit financially at the employee's expense or that the employer's reason was contrary to public policy.<sup>140</sup> Terminations which are "bad, unjust, and unkind," without good cause, and contrary to the employee's expectations do not give rise to a cause of action.<sup>141</sup> Otherwise, a "new practical definition [would] be given to employments theoretically terminable at will."<sup>142</sup> In an important limitation on *Fortune*, the court held that the covenant is not breached if the employee is deprived merely of "future compensation for future services . . . not 'specifically related to a particular past service.'"<sup>143</sup>

*Cort v. Bristol-Myers Co.*,<sup>144</sup> decided in 1982, shed some light on what constitutes actionable bad faith.<sup>145</sup> The employer had given a pretextual reason for firing three workers, charging them with poor work performance when the real reason for termination was their refusal to answer a questionnaire asking about such personal information as "business experience, education, family, home ownership, physical data, activities and aims" and medical histories including "serious illnesses, operations accidents, or nervous disorders, [ ] smoking and drinking habits, [ ] off-the-job problems, [ ] principal worries."<sup>146</sup> The court declined to find liability for breach of the covenant.

We decline to impose liability on an employer simply because it gave a false reason or a pretext for the discharge of an employee at will. Such an employer has no duty to give any reason at the time of discharging an employee at will. Where no reason need be given, we impose no liability on a employer for concealing the real reason for an employee's discharge or for giving a reason that is factually insupportable. As a kindness to an employee in his seeking future employment, an employer may well not state its reasons fully and accurately. Here, of course, [the employer's] motivation may not have been so noble. We conclude, however, that an at will employee discharged without cause does not have a claim for damages simply because the employer gave him a false reason for his discharge.

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cmt. a (1958)).

140. *Siles v. Travenol Lab. Inc.*, 433 N.E.2d 103, 106, 115 L.R.R.M. (BNA) 4178 (Mass. App. Ct. 1982).

141. *Richey v. American Auto. Ass'n, Inc.*, 406 N.E.2d 675, 678 (Mass. 1980).

142. *Id.*

143. *Cataldo v. Zuckerman*, 482 N.E.2d 849, 855 (Mass. App. Ct. 1985) (quoting *McCone v. New Eng. Tel. & Tel. Co.*, 471 N.E.2d 47, 50, 102 Lab. Cas. (CCH) ¶ 55,488, 118 L.R.R.M. (BNA) 2406 (Mass. 1984), and discussing *Gram v. Liberty Mut. Ins. Co.*, 461 N.E.2d 796, 798, 118 L.R.R.M. (BNA) 2401 (Mass. 1984)).

144. 431 N.E.2d 908, 115 L.R.R.M. (BNA) 5127 (Mass. 1982).

145. *Id.* See *supra* note 74.

146. *Cort*, 431 N.E.2d at 913.

The balance of public policy considerations does not support the allowance of recovery of damages in such a case.<sup>147</sup>

The court's conclusion that the employer did not violate public policy by discharging a worker for the incompleteness of his responses to a questionnaire is at least partially explained by its factual determination that this particular questionnaire was not so intrusive as to be unreasonable.<sup>148</sup> The reader of the *Cort* decision can extrapolate that the court was more concerned with scrutinizing *motivation* for firing than the *manner* of the firing. The court seems to ignore the "fair dealing" aspect of the covenant.

To summarize,<sup>149</sup> Massachusetts finds breach of the covenant when there has been a deprivation of benefits attributable to past services or a serious breach of public policy.<sup>150</sup>

### Michigan

No cause of action will lie in this state for breach of the covenant,<sup>151</sup> even in the *Fortune*-type situation of a commission salesman.<sup>152</sup> "In

147. *Id.* at 911. The court went on: "[t]he fact that whatever reason was given by the employer was false might, however, be relevant if the employer was attempting to conceal the real reason for the discharge and the real reason was contrary to public policy." *Id.* at 911 n.6.

148. *Id.* at 913. The court explained:

In public policy terms, it is the degree of intrusion on the rights of the employee which is most important. In measuring the nature of the intrusion, at least as to its reasonableness (but perhaps as well as to its substantiality and seriousness), the nature of the employee's job is of some significance. The information that a high level or confidential employee should reasonably be expected to disclose is broader in scope and more personal in nature than that which should be expected from an employee who mows grass or empties waste baskets. A salesman responsible for the sale of drug products to hospitals, doctors, and pharmacists falls in the middle of this range, but toward its upper side. The temperament and dedication of a salesman are important factors in his effectiveness, and questions bearing on these subjects are certainly reasonable and should be expected.

*Id.*

149. For an excellent summary of pivotal Massachusetts law, see *Magnan v. Anaconda Industries Inc.*, 479 A.2d 781, 787-88, 101 Lab. Cas. (CCH) ¶ 55,485, 117 L.R.R.M. (BNA) 2163 (Conn. 1984).

150. In Massachusetts the public policy cause of action sounds in contract, and is predicated on breach of the covenant. *Mello v. Stop & Shop Cos.*, 524 N.E.2d 105, 3 Ind. Emp. Rights Cas. (BNA) 1105, 122 Lab. Cas. (CCH) ¶ 56,932 (Mass. 1988). In other words, breach of public policy cases are a subset of breach of the covenant cases. *Glaz v. Ralston Purina Co.*, 509 N.E.2d 297, 299, 2 Ind. Emp. Rights Cas. (BNA) 497 (Mass. App. Ct.), *review denied*, 513 N.E.2d 1289 (Mass. 1987) (citing *DeRose v. Putnam Management Co.*, 496 N.E.2d 428, 1 Ind. Emp. Rights Cas (BNA) 1672, 105 Lab. Cas. (CCH) ¶ 55,659 (Mass. 1986)).

151. *Otis v. Zayre Corp.*, 703 F. Supp. 634, 4 Ind. Emp. Rights Cas. (BNA) 33, 123 Lab. Cas. (CCH) ¶ 57,106 (W.D. Mich. 1988), *aff'd*, 884 F.2d 580 (6th Cir. 1989).

152. *Cockels v. International Bus. Expositions, Inc.*, 406 N.W.2d 465, 468, 3 Ind. Emp. Rights Cas. (BNA) 764 (Mich. Ct. App. 1987). The employee was found to have another avenue of recovery, namely wrongful discharge in violation of public policy as embodied in the state

Michigan, an employer may terminate an employee arbitrarily and capriciously absent a violation of public policy or an agreement to the contrary."<sup>153</sup>

#### Minnesota

In *Hunt v. IBM Mid-America Employees Federal Credit Union*,<sup>154</sup> the Minnesota Supreme Court refused to recognize an implied-in-law covenant for the reasons stated by a Hawaii court in *Parnar* and by a Washington court in *Thompson v. St. Regis*.<sup>155</sup> Appellate courts have found implied-in-fact obligations of good faith.<sup>156</sup> In the years before *Hunt* rejected the covenant, appellate courts had made use of it, but its definition was uncertain. Deborah Schmedemann summarized Minnesota law on the covenant as follows: "bad faith may be equated with malice, or with lack of good cause, or with ulterior motives, or with shoddy behavior."<sup>157</sup>

#### Mississippi

*Perry v. Sears, Roebuck & Co.*<sup>158</sup> established that the Mississippi Supreme Court protects workers by means of the public policy tort rather than by using the covenant.<sup>159</sup> The concurring judge found appealing an interpretation of the covenant whereby "an employee's longevity of service might give rise to an implied right beyond mere terminable at will status," but the judge hesitated to change the *status quo* before reviewing financial data.<sup>160</sup>

#### Missouri

In *Neighbors v. Kirksville College*<sup>161</sup> Missouri rejected use of the covenant to "circumvent" at will status.<sup>162</sup> A federal court, interpreting Missouri law, best explained the common law of Missouri:

Regarding Count III, alleging a violation of the duty of good faith and fair dealing, insofar as this is asserted to be a qualification on *all* employment relationships, limiting the harshness of the "at will" doctrine, this is clearly inconsistent with the recent vigorous reaffirmation of the "at will" doctrine.

Wages and Fringe Benefits Act. *Id.* at 467.

153. *Id.* at 468.

154. 384 N.W.2d 853, 1 Ind. Emp. Rights Cas. (BNA) 1087, 104 Lab. Cas. (CCH) ¶ 55,556, 122 L.R.R.M. (BNA) 2627 (Minn. 1986).

155. *Id.* at 858. For a discussion of *Parnar*, see *supra* text accompanying notes 95-97 and for discussion of *Thompson* see *infra* text accompanying notes 266-69.

156. *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 1 Ind. Emp. Rights Cas. (BNA) 1092 (Minn. Ct. App. 1984). See generally Deborah A. Schmedemann, *Working Backwards: The Covenant of Good Faith and Fair Dealing in Employment Law*, 16 WM. MITCHELL L. REV. 1119 (1990).

157. Schmedemann, *supra* note 156, at 1129 (emphasis added).

158. 508 So. 2d 1086, 2 Ind. Emp. Rights Cas. (BNA) 805, 107 Lab. Cas. (CCH) ¶ 55,812 (Miss. 1987).

159. *Id.* at 1089.

160. *Id.* at 1090 (Robertson, J., concurring).

161. 694 S.W.2d 822 (Mo. Ct. App. 1985).

162. *Id.* at 824.

It was there ruled that the doctrine could not be avoided by the "cloaking" of claims in the "misty shroud of prima facie tort." It would be equally forbidden, surely, to rule that the termination of all at will employment must occur in a manner that a trier of fact would say was consistent with "good faith and fair dealing." The Missouri courts have rejected such a contention.<sup>163</sup>

In contrast to this sound reaffirmation of the at will doctrine, or perhaps in mitigation thereof, Missouri statutory law requires that under certain circumstances a corporate employer must, upon written request from a former employee, send the employee a letter explaining why the employment relationship was terminated.<sup>164</sup> This rule amounts to a statutory "fair dealing" requirement.

Finally, insofar as an express or implied-in-fact contract exists, the covenant has been implied to prevent circumvention of contractual terms.

### *Montana*

The eyes of the country have turned to Montana because it was the first—and so far the only—state to enact a wrongful discharge statute. The legislation codifies a rule that, after a probationary period, good cause must be shown for termination. Relief sounds in contract. Nonetheless, for the purposes of this Article, it is instructive to review some of the earlier covenant cases which provided the catalyst for the legislature to enact clearer rules.<sup>165</sup>

The Montana courts in the early 1980s were concerned with employee reliance on employer assurances<sup>166</sup> and were willing to impose the covenant into the employment relationship. It was unclear whether the covenant was implied in law<sup>167</sup> or in fact.<sup>168</sup>

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163. *Fink v. Revco Discount Drug Ctrs., Inc.*, 666 F. Supp. 1325, 1328-29, 3 Ind. Emp. Rights Cas. (BNA) 115, 108 Lab. Cas. (CCH) ¶ 55,876 (W.D. Mo. 1987) (citations omitted).

164. MO. REV. STAT. § 290.140 (1986). The letter must be written if the employer has seven or more employees, if the employee was employed for at least 90 days, and if the employee makes a written request for the letter. The letter must be signed by the superintendent or manager, and must set forth "the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service." *Id.*

165. The legislature sought to throw a bone to both workers and management by enacting the good cause requirement but limiting damages. The statute applies to situations where the employee received notice of termination after the effective date of the statute. *Martin v. Special Resource Management, Inc.*, 803 P.2d 1086, 1089, 6 Ind. Emp. Rights Cas. (BNA) 440 (Mont. 1990).

166. *See, e.g., Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067, 118 L.R.R.M. (BNA) 2071 (Mont. 1982). The employer had promulgated a handbook, which "presumably sought to secure an orderly, cooperative and loyal work force by establishing uniform policies. The employee, having faith that she would be treated fairly, then developed the peace of mind associated with job security. If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done." *Id.*

167. In *Gates v. Life of Montana Insurance Co.*, 668 P.2d 213, 214, 98 Lab. Cas. (CCH) ¶ 55,399, 115 L.R.R.M. (BNA) 4350 (Mont. 1983), the court held that the covenant existed "apart from, and in addition to, any terms agreed to by the parties."

Montana precedent best falls in the line with the implied-in-fact contract cases, despite the courts' continued use of the phrase "covenant of good faith and fair dealing."<sup>169</sup> Apparently, the court originally used this language to avoid the appearance of "amending" the then-existing at will statute,<sup>170</sup> even though one justice on the Montana Supreme Court found no tension between good faith and at will. To reconcile the two, this same justice cautioned against going too far in equating good faith with good cause in *Dare v. Montana Petroleum Marketing Co.*<sup>171</sup>

[T]he [good faith] obligation recognized by this Court must be reconciled with the "at will" statute. I think this can easily be done. An employer, under the "at will" statute, has the right to terminate. However if the employer violates the legal obligation to treat the employee fairly and in good faith, then a separate and independent tort action can be instituted by the injured employee against the offending employer. Damages, not reinstatement, is the remedy.

We are treading on thin ice as we attempt to construct new protections for employees. There is an indication in the majority opinion that the plaintiff can only be terminated "for cause." Such a determination certainly conflicts with the "at will" statute. We must not confuse the "term of employment" with the right of the employee to be dealt with fairly and in good faith.<sup>172</sup>

The *Dare* majority certainly implied that the covenant basically guaranteed that the employee could be terminated only for cause.<sup>173</sup> Two

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168. In *Dare v. Montana Petroleum Marketing Co.*, 687 P.2d 1015, 1020, 104 Lab. Cas. (CCH) ¶ 55,596, 117 L.R.R.M. (BNA) 2442 (Mont. 1984), the court wrote:

Whether a covenant of good faith and fair dealing is implied in a particular case depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly. The presence of such facts indicates that the term of employment has gone beyond the indefinite period contemplated in the at will employment statute, section 39-2-503, MCA, and is founded upon some more secure and objective basis. In such cases, the implied covenant protects the investment of the employee who in good faith accepts and maintains employment reasonably believing their [sic] job is secure so long as they perform their duties satisfactorily. Such an employee is protected from bad faith or unfair treatment by the employer to which the employee may be subject due to the inherent inequality of bargaining power present in many employment relationships. The implied covenant seeks to strike a balance between the interest of the employer in controlling the work force and the interests of the employee in job security.

(citation omitted).

169. See, e.g., *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 491, 104 Lab. Cas. (CCH) ¶ 55,590, 118 L.R.R.M. (BNA) 2075 (Mont. 1984).

170. *Dare*, 687 P.2d at 1021 (Morrison, J., specially concurring).

171. 687 P.2d 1015, 104 Lab. Cas. (CCH) ¶ 55,596, 117 L.R.R.M. (BNA) 2442 (Mont. 1984).

172. *Id.* at 1021-22 (Morrison, J., specially concurring).

173. *Id.* at 1020.

years later the Montana Supreme court again attempted to define the covenant in *Flanigan v. Prudential Federal Savings & Loan Ass'n*.<sup>174</sup>

The covenant, in a long-term employment situation, only requires the employer to have a fair and honest reason for termination. An employee's incompetence or lack of loyalty certainly constitute sufficient reasons under this standard. However, as in this case, an employer may recognize by company policy an obligation to provide warnings and an opportunity for change.<sup>175</sup>

The facts of *Flanigan* demonstrate the petty complexity of workplace relations and highlight the difficulty of pinpointing what behavior amounts to violation of the covenant. Plaintiff, a twenty-eight-year employee, was terminated. The first reason given was that the employer was obliged to undertake a reduction in force because of economic downturns. Other reasons for her termination came from her superior, Ogolin. Ogolin asserted that plaintiff performed poorly, but admitted that plaintiff "was never warned, reprimanded or counseled about her performance."<sup>176</sup> Ogolin had testified that plaintiff was marked for termination before she was transferred to another city and underwent a teller training program, but that testimony was later recanted. Plaintiff alleged that the discharge was motivated by Ogolin's vindictiveness because her seniority allowed her to have better vacation time than his. Plaintiff further implied that she was terminated because of her age and because the employer wanted to cut pension costs.

Students of this case may be puzzled over exactly why the jury found the employer had breached the covenant in this case—because Ogolin told conflicting stories to plaintiff and to the court, because the court believed that Ogolin was vindictive, because the court believed that the company was an ageist and impermissibly money-grubbing, or because of totality of the circumstances? Perhaps a line buried in the supreme court opinion is most telling. The court wrote: "A long-term employee has an expectation of continued employment provided that the employee's work performance is satisfactory."<sup>177</sup> In other words, the covenant for long-term employees amounted to a just cause requirement. The high stakes in *Flanigan*—affirmed damages added up to \$1,494,170<sup>178</sup>—explain the desire in the state legislature to clear up the confusion left by the case as to the rule of law.

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174. 720 P.2d 257, 1 Ind. Emp. Rights Cas. (BNA) 1410, 104 Lab. Cas. (CCH) ¶ 55,589, 122 L.R.R.M. (BNA) 2597 (Mont.), *appeal dismissed*, 479 U.S. 980 (1986).

175. *Id.* at 262.

176. *Id.* at 261.

177. *Id.* (citing *Dare*, 687 P.2d at 1020).

178. *Id.* at 258. The jury returned a verdict for plaintiff awarding economic damages of \$94,170, emotional distress damages of \$100,000 and punitive damages of \$1,300,000. Three justices considered the punitive damages to be excessive. *Id.* at 266-67 (Weber, J., dissenting in part).

*Nebraska*

*Jeffers v. Bishop Clarkson Memorial Hospital*<sup>179</sup> reaffirmed that the Nebraska courts have remained wedded to at will "except in those cases where employees are deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without 'just cause.'"<sup>180</sup> According to dictum in a non-employment case, if an employment contract requires good cause for termination, the covenant is implicated.<sup>181</sup>

*Nevada*

Nevada's case law is somewhat inconsistent, but apparently this state is alone in recognizing *tort* liability for bad faith in the employment context. In the 1987 case of *K-Mart Corp. v. Ponsock*,<sup>182</sup> the court recognized tortious discharge in violation of the covenant. Plaintiffs, K-Mart employees, had "tenured" positions, but the employer fired them to circumvent contractual retirement benefits. The court stated that breach of a "good cause" contract is not a tort, but if the jury finds malice and oppression on the part of the employer, the employer may be liable for the tort of bad faith.<sup>183</sup> The court's bad faith holding recognizes the workers' significantly lower bargaining power; tort liability may only have been intended when a mega-corporation is the defendant. The court stated: "[W]e now recognize a bad faith discharge case in this fact-specific instance of discharge by a large, nationwide employer of an employee in bad faith for the improper motive of defeating contractual retirement benefits."<sup>184</sup>

While the *K-Mart* court correctly identified some of the problems that workers face and engineered a result that may well be laudable from a social

179. 387 N.W.2d 692, 1 Ind. Emp. Rights Cas. (BNA) 621, 105 Lab. Cas. (CCH) ¶ 55,651 (Neb. 1986).

180. *Id.* at 695 (citing *Alford v. Life Savers, Inc.*, 315 N.W.2d 260, 115 L.R.R.M. (BNA) 4066 (Neb. 1982)).

181. *Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 774 (Neb. 1991).

182. 732 P.2d 1364, 2 Ind. Emp. Rights Cas. (BNA) 56, 106 Lab. Cas. (CCH) ¶ 55,683 (Nev. 1987).

183. *Id.* at 1368 n.3.

184. *Id.* at 1370. The main reason for tort liability, according to the court, is to "protect the weak from the insults of the stronger." *Id.* at 1376. The court went on:

The reality of [plaintiff's] dependency and economic vulnerability is high-lighted by the following expression taken from F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951):

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.

*Id.* at 1372.

perspective,<sup>185</sup> the opinion failed to differentiate between legal theories. Liability turns on a "malice/oppression" finding, which harkens to punitive damage requirements;<sup>186</sup> however, the court allowed the award of punitive damages on top of the tort damages. What additional finding was required?

Also, the court evidently misunderstood the at will doctrine, for it blithely wrote that its creation of the public policy tort (and, presumably, the covenant action) did not erode the at will doctrine.<sup>187</sup> The court apparently forgot that at will means that a person can be fired for good reason, for no reason, or even for bad reason.

Two years later the court was confronted with casino employees who had no express contract and certainly no tenure agreement. In *Sands Regent v. Valgardson*,<sup>188</sup> the plaintiff employees were terminated allegedly for being too old. They sought tort and punitive damages in addition to state and federal age discrimination recovery. The court distinguished the *K-Mart* case because here there was no contract. The court also found that age-based firing did not compel tort recovery because it was not in violation of a sufficiently strong and compelling public policy.<sup>189</sup>

Recently the Nevada Supreme Court has explained more about its conception of the covenant. In early 1991, the court again attempted to "set the record straight" on the availability of the bad faith tort.<sup>190</sup> The tort is only recognized when a contractual right to continued employment exists. The tort provides a remedy designed to be "accessory" to contract remedies, used to "fill gaps and do justice where the terms of a contract are literally carried out, but the spirit of the agreement and the intentions of the parties are not."<sup>191</sup> The court wrote:

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185. For language approving the result in *K-Mart*, see *Noye v. Hoffmann-LaRoche, Inc.*, 570 A.2d 12, 5 Ind. Emp. Rights Cas. (BNA) 352, 115 Lab. Cas. (CCH) ¶ 56,273 (N.J. Super. Ct. App. Div.) (Stein, J., concurring), *cert. denied*, 584 A.2d 218 (N.J. 1990). Judge Stein candidly writes, "I am not sure that my colleagues and I would have been content to let this [K-Mart] plaintiff recover the obviously inadequate damages available as a contract remedy, given the conduct of this employer." *Id.* at 19.

186. In Nevada exemplary and punitive damages are allowed upon a finding of "oppression, fraud or malice, express or implied." NEV. REV. STAT. ANN. § 42.005(1) (Michie 1991).

187. *K-Mart*, 732 P.2d at 1396. The court wrote:

The public policy torts in general and the tort of retaliatory discharge in particular cannot be seen as erosions of the so-called at-will doctrine. An employer still has in the typical at will employment situation the absolute right to dismiss an employee at-will or at-whim; the employer just cannot do-so for reasons which offend public policy, such as the rightful filing of an industrial insurance claim. Of course, the plaintiff in this case was not at will because of his tenure arrangement.

*Id.*

188. 777 P.2d 898, 5 Ind. Emp. Rights Cas. (BNA) 381 (Nev. 1989).

189. *Id.* at 900. This language was called into question by *D'Angelo v. Gardner*, 819 P.2d 206, 217 n.10, 123 Lab. Cas. (CCH) ¶ 57,099 (Nev. 1991) (Steffen, J., dissenting).

190. *Western States Minerals Corp. v. Jones*, No. 19697, slip op. (Nev. Mar. 7, 1991). This bad faith tort was distinguished from tortious discharge in violation of public policy. *Id.* at 2-3.

191. *Id.* at 11.



The essence of the bad faith tort action is betrayal; and, when a high degree of trust and reliance between a stronger and a weaker party is violated, tort liability may be incurred. Two elements of the tort must, however, be established by the offended party: 1) a relationship involving a high degree of trust, reliance and dependency, and 2) an act of bad faith and betrayal by the trusted party. Mere breach of an employment contract does not give rise to tort damages.<sup>192</sup>

The court cited *K-Mart* and then articulated some of the factors which "might bear on the degree of fiduciary reliance and cohesiveness in the employer-employee relationship," including longevity of employment; "age, health, employability of the employee and other incidents that bear on relative dependency of an employee and vulnerability in the event of wrongful discharge;" employee reliance and expectancy that employment "will continue indefinitely based on good conduct and sound performance," as evidenced by changing residences or going into debt; employer's financial strength; and employer's knowledge of the employee's reliance and dependency.<sup>193</sup> Later the court stressed that plaintiff must establish contractual rights. "[B]y its nature this kind of employer-employee relationship cannot develop in an at-will employment."<sup>194</sup>

The court found that plaintiff's relationship with the employer in *D'Angelo* had not sufficiently "ripened" to justify recovery in tort. "[Plaintiff] was a relatively young man, forty-one, who, as a truck driver, had considerably more occupational 'bargaining strength and marketability' than did [the *K-Mart* plaintiff]."<sup>195</sup>

A month later, in *Hilton Hotels Corp. v. Butch Lewis Productions*,<sup>196</sup> the court took its most limited position on the covenant:

Where the terms of a contract are literally complied with but one party to the contract deliberately contravenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.<sup>197</sup>

\* \* \*

The tort remedy is necessarily a narrow one found, for example, in insurance cases and certain highly restricted wrongful discharge cases.<sup>198</sup>

\* \* \*

When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith.<sup>199</sup>

192. *Id.* at 17.

193. *Id.* at 18-20.

194. *Id.* at 2.

195. *Id.* at 21.

196. 808 P.2d 919 (Nev. 1991).

197. *Id.* at 922-23.

198. *Id.* at 923 n.4 (citations omitted).

199. *Id.* at 923.

To conclude, Nevada departs from other states by allowing an action on the covenant to sound in tort and by stressing the psychological and financial vulnerability of the plaintiff. The Nevada court is more moralistic in its language than others, like the Arizona court in *Wagenseller*.<sup>200</sup> But Nevada is somewhat in line with those states which recognize a covenant only when other express or implied contractual terms are being circumvented and not when the relationship is at will.<sup>201</sup> Still, after emphasizing the plight of unprotected workers facing down monolithic employers, the Nevada court exposes itself to criticism when it distinguishes between contractually protected employees and at will employees. By allowing tort recovery to the former and nothing to the latter, the court gives the most to the workers who were already sufficiently able to protect themselves as to obtain a contract and leaves the unempowered worker at the mercy of the employer.

### *New Hampshire*

New Hampshire is the home of the *Monge*<sup>202</sup> case, one of the first cases in the nation to limit the at will doctrine. In 1974 the New Hampshire court acknowledged that the employer "has long ruled the workplace with an iron hand by reason of the prevailing [at will] rule."<sup>203</sup> In keeping with a growing modernization of the state law,<sup>204</sup> the court unabashedly altered the at will rules in New Hampshire. Noting the public interest in maintaining a proper balance between the employer's interest in running business and the employee's interest in maintaining employment, the court wrote: "We hold 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."<sup>205</sup> The gravamen of the tort turned on malice.

Although subsequent dicta from the New Hampshire Supreme Court limited *Monge* to situations where the employer violated public policy,<sup>206</sup> more recent pronouncements of the court made clear that the employment tort is a hybrid. Plaintiffs must meet a two-part test involving both bad faith and violations of public policy.<sup>207</sup>

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200. For a discussion of *Wagenseller*, see *supra* text accompanying notes 22-28.

201. This was recently reaffirmed in *D'Angelo v. Gardner*, 819 P.2d 206, 6 Ind. Emp. Rights Cas. (BNA) 1545, 123 Lab. Cas. (CCH) ¶ 57,099 (Nev. 1991).

202. *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 115 L.R.R.M. (BNA) 4755 (N.H. 1974).

203. *Id.* at 551.

204. The court cited recent changes in "ancient feudal" landlord/tenant rules. *Id.* at 551.

205. *Id.*

206. *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274, 115 L.R.R.M. (BNA) 4578 (N.H. 1980).

207. *Vandegrift v. American Brands Corp.*, 572 F. Supp. 496, 498, 115 L.R.R.M. (BNA) 2317 (D.N.H. 1983) (citing *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 96 Lab. Cas. (CCH) ¶ 55,378, 115 L.R.R.M. (BNA) 4329 (N.H. 1981)). Various courts make the overboard statement that New Hampshire has abandoned the covenant. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 391, 3 Ind. Emp. Rights Cas. (BNA) 1729, 110 Lab. Cas. (CCH) ¶ 55,978 (Cal. 1988).

*New Jersey*

The general rule in New Jersey is that no covenant will be read into the at will employment relationship<sup>208</sup> with one exception.<sup>209</sup> If an employer has terminated an employee in order to avoid payment of vested commissions, an action on the covenant will lie. The remedy is only payment of those commissions, not "all the commissions the worker would have earned had he remained in employment, and certainly not reinstatement of any kind. Otherwise the jury would be allowed to import "notions of wrongful discharge into the implied obligation of good faith and thus [impose] upon [the employer] a generalized duty not to discharge wrongfully, a duty which does not exist under New York or New Jersey law."<sup>210</sup>

This exception has been extended so that the covenant applies not only to commission cases but also to "those aspects of the employer-employee relationship which are governed by some contractual terms, regardless of whether that relationship is characterized generally as being 'at will.'"<sup>211</sup>

*New Mexico*

New Mexico takes the interesting position that "at will" means that a worker is employed pursuant to a satisfaction contract, which may be terminated upon the employer's good faith dissatisfaction. Thus, the *Wood v. Lucy, Lady Duff-Gordon*<sup>212</sup> line of cases applies here. No separate cause of action for tortious breach of the implied covenant will lie.<sup>213</sup> According to a federal court applying New Mexico law, "the New Mexico court considered

208. *Noye v. Hoffman-LaRoche*, 570 A.2d 12, 5 Ind. Emp. Rights Cas. (BNA) 352, 115 Lab. Cas. (CCH) ¶ 56,273 (N.J. Super. Ct. App. Div.) (Stein, J., concurring), *cert. denied*, 584 A.2d 218 (N.J. 1990). The court agreed that a covenant existed in specifically express or implied-in-fact contracts. The concurrence agreed that the covenant had not been breached in this case, but thought that tort damages should be available in some cases. After noting that "[c]oncepts such as good faith and fair dealing are chameleonlike in character, necessarily assuming the colorings of the surroundings in which they find themselves," Judge Stein offered "a definition appropriate to the employer-employee relationship." *Id.* at 18. Breach of the covenant should sound in tort when "the employer, without an honest belief that good cause for discharge in fact exists, attempts to deprive the employee of the benefit of the employment agreement." *Id.* Judge Stein sided with Judge Kaufman who concurred in part and dissented in part to California's *Foley*. *Id.* (Stein, J., concurring).

Note that the New Jersey Supreme Court remarked that the public policy tort could be viewed as "predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. . . ." *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512, 1 Ind. Emp. Rights Cas. (BNA) 109, 101 Lab. Cas. (CCH) ¶ 55,477, 115 L.R.R.M. (BNA) 3044 (N.J. 1980).

209. *Wakefield v. Northern Telecom*, 769 F.2d 109, 1 Ind. Emp. Rights Cas. (BNA) 1762, 120 L.R.R.M. (BNA) 2080 (2d Cir. 1985).

210. *Id.* at 114.

211. *Nolan v. Control Data Corp.*, 579 A.2d 1252, 1256, 5 Ind. Emp. Rights Cas. (BNA) 1570 (N.J. Super. Ct. App. Div. 1990).

212. 118 N.E. 214 (N.Y. 1917).

213. *Vigil v. Arzola*, 699 P.2d 613, 2 Ind. Emp. Rights Cas. (BNA) 377 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984).

tortious breach of the covenant of good faith and the tort of wrongful discharge as two ways of looking at the same thing."<sup>214</sup>

### *New York*

In the leading case of *Murphy v. American Home Products Corp.*,<sup>215</sup> the New York Court of Appeals refused to recognize "a cause of action in tort for abusive or wrongful discharge of an employee[,] for prima facie tort, or for breach of contract."<sup>216</sup> The court demonstrated a firm understanding of the reasons for modifying the traditional at will rules, but yielded to the legislature with its "infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability."<sup>217</sup> The court also declined to create employment causes of action piecemeal, but suggested that the legislature address the matter in its totality.<sup>218</sup>

Regarding the covenant, the court refused to find that it runs to "all" contracts. Rather, "New York does recognize that *in appropriate circumstances* an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced . . . ."<sup>219</sup> The court continued, focusing on the crux of the issue:

No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination.<sup>220</sup>

New York does use the covenant to aid and further interpret the express terms of an employment contract.<sup>221</sup>

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214. *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1409, 2 Ind. Emp. Rights Cas. (BNA) 696 (D.N.M. 1986). See also *Melnick v. State Farm Mut. Auto Ins. Co.*, 749 P.2d 1105, 3 Ind. Emp. Rights Cas. (BNA) 730 (N.M.), cert. denied, 488 U.S. 822 (1988).

215. 448 N.E.2d 86, 98 Lab. Cas. (CCH) ¶ 55,407, 115 L.R.R.M. (BNA) 4953 (N.Y. 1983).

216. *Id.* at 87.

217. *Id.* at 89-90.

218. *Id.* at 92 n.2.

219. *Id.* at 91 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); *Pernet v. Peabody Eng. Corp.*, 248 N.Y.S.2d 132 (App. Div. 1964)).

220. *Id.*

221. *Id.*; *Leniger v. Gibbs & Hill, Inc.*, 730 F.2d 903, 115 L.R.R.M. (BNA) 3687 (2d Cir. 1984); *Naylor v. CEAG Elec. Corp.*, 158 A.2d 760 (N.Y. App. Div. 1990). The court is fairly strict on what it considers to be an express contract term. See *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 2 Ind. Emp. Rights Cas. (BNA) 150 (N.Y. 1987).

*North Carolina*

In *Coman v. Thomas Manufacturing Co.*,<sup>222</sup> the North Carolina Supreme Court allowed a cause of action for bad faith discharge without basing the suit on the covenant.<sup>223</sup> The majority created a new tort of abusive discharge which prohibits bad faith firing as contrary to public policy.<sup>224</sup> The court was able to cite a provision of bad faith discharge of servants dating back to 1874.<sup>225</sup> The court offered no definition of bad faith, leading the dissent to point out that the majority had "outraced even the California court"<sup>226</sup> by allowing such a vague and unpredictable standard to muck up business dealings.

The standard was applied recently by a lower court in a case involving an employer who was allegedly indifferent to the plaintiff worker's difficulties in dealing with a belligerent co-worker.<sup>227</sup> Plaintiff ultimately was fired for hitting the co-worker in self-defense. The appellate court found no bad faith on the employer's part, and stated, "The conduct of defendants in this case, in its worst light indifferent and illogical, does not demonstrate the kind of bad faith that prompted our courts to recognize a cause of action in . . . *Coman*."<sup>228</sup> An action for breach of the covenant of good faith and fair dealing exists if the contract is of definite duration.<sup>229</sup>

*North Dakota*

In *Hillesland v. Federal Bank Ass'n of Grand Forks*,<sup>230</sup> the North Dakota Supreme Court declined to imply the covenant into at will relationships for the reasons articulated by Hawaii's *Parnar* case.<sup>231</sup>

222. 381 S.E.2d 445, 4 Ind. Emp. Rights Cas. (BNA) 987, 113 Lab. Case ¶ 56,135 (N.C. 1989).

223. *Id.* at 448 (citing *Haskins v. Royster*, 70 N.C. 601 (1874)). One commentator has stated, "The bad faith exception to employment-at-will, like the public policy exception, is a component of a wrongful discharge tort action. Confusion exists in this area because courts often refer to 'bad faith discharge' as if it were a separate cause of action in tort." Kimberly A. Huffman, Salt v. Applied Analytical, Inc.: *Clarifying the Confusion in North Carolina's Employment-At-Will Doctrine*, 70 N.C. L. REV. 2087, 2088 n.9 (1992).

224. For an attempt to further define the tort, see J. Wilson Parker, *North Carolina Employment After Coman: Reaffirming Basic Rights in the Workplace*, 24 WAKE FOREST L. REV. 905 (1989).

225. *Haskins v. Royster*, 70 N.C. 601 (1874).

226. *Coman*, 381 S.E.2d at 453 (Meyer, J., dissenting).

227. *McLaughlin v. Barclay's Am. Co.*, 382 S.E.2d 836, 840, 113 Lab. Cas. (CCH) ¶ 56,148 (N.C. Ct. App.), *cert. denied*, 385 S.E.2d 498 (N.C. 1989).

228. *Id.* at 840. The appellate court went out of its way not to "close [the] doors to plaintiffs who are able to show bad faith by the employer." *Id.*

229. *Trought v. Richardson*, 338 S.E.2d 617, 619, 1 Ind. Emp. Rights Cas. (BNA) 750 (N.C. Ct. App.), *rev. denied*, 344 S.E.2d 18 (N.C. 1986).

230. 407 N.W.2d 206, 2 Ind. Emp. Rights Cas. (BNA) 321 (N.D. 1987).

231. *Id.* For discussion of *Parnar*, see *supra* text accompanying notes 95-97.

*Ohio*

Ohio has refused to apply the covenant to employment relationships.<sup>232</sup> The courts have not explained their resistance to the covenant other than to reaffirm the strong at will rule in Ohio.<sup>233</sup> "At will employees are subject to termination for cause or no cause, at any time, 'even if done in gross or reckless disregard of any employee's rights.'<sup>234</sup> In a much earlier commission case, the Ohio court held that unless fraud or "other unlawfulness" were present, the court could not save competent people from the deals that they make.<sup>235</sup>

*Oklahoma*

*Burk v. K-Mart Corp.*<sup>236</sup> establishes that the covenant does not apply in employment contracts in Oklahoma for the reasons cited in Hawaii's *Parnar*.<sup>237</sup>

*Oregon*

In *Sheets v. Knight*,<sup>238</sup> the Oregon Supreme Court established that, in the absence of an express or implied agreement to limit the at will relationship, no covenant will be imposed in Oregon "because it is not appropriate to imply the duty if it is inconsistent with a provision of the contract."<sup>239</sup>

232. *Kuhn v. St. John & W. Shore Hosp.*, 552 N.E.2d 240, 5 Ind. Emp. Rights Cas. (BNA) 439 (Ohio Ct. App. 1989). See also *Fawcett v. G.C. Murphy & Co.*, 348 N.E.2d 144, 148 (Ohio 1976) ("Malice makes a bad case worse, but does not make wrong that which is lawful.") (quoting *Johnson v. Aetna Life Ins. Co.*, 147 N.W. 32 (Wis. 1914)).

233. Ohio has recognized a public policy tort for discharge in violation of statute. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 551 N.E.2d 981, 5 Ind. Emp. Rights Cas. (BNA) 257, 115 Lab. Cas. (CCH) ¶ 56,231 (Ohio 1990).

234. *Kuhn*, 552 N.E.2d at 242 (citing *Phung v. Waste Management, Inc.*, 491 N.E.2d 1114, 1116, 2 Ind. Emp. Rights Cas. (BNA) 786, 104 Lab. Cas. (CCH) ¶ 55,602, 122 L.R.R.M. (BNA) 2163 (Ohio 1986), quoting *Peterson v. Scott Constr. Co.* (1982), 451 N.E.2d 1236, 1239, 115 L.R.R.M. (BNA) 4473 (Ohio Ct. App. 1982)). It is interesting that the court refers to "rights" while denying a remedy.

235. *Ullmann v. May*, 72 N.E.2d 63, 67 (Ohio 1947).

236. 770 P.2d 24, 4 Ind. Emp. Rights Cas. (BNA) 182, 113 Lab. Cas. (CCH) ¶ 56,100 (Okla. 1989).

237. *Id.* at 24 n.3. An earlier case, *Hall v. Farmers Insurance Exchange*, 713 P.2d 1027, 4 Ind. Emp. Rights Cas. (BNA) 189, 113 Lab. Cas. (CCH) ¶ 56,099 (Okla. 1985), indicated that the covenant did apply to an insurance company's termination of a sales agent. That case has since been limited to agency contracts. *Hinson v. Cameron*, 742 P.2d 549, 4 Ind. Emp. Rights Cas. (BNA) 266, 108 Lab. Cas. (CCH) ¶ 55,849 (Okla. 1987). For a discussion of *Parnar*, see *supra* text accompanying notes 95-97.

238. 779 P.2d 1000, 4 Ind. Emp. Rights Cas. (BNA) 1196, 115 Lab. Cas. (CCH) ¶ 56,267 (Or. 1989).

239. *Id.* See also *Elliott v. Tektronix, Inc.*, 796 P.2d 361, 118 Lab. Cas. (CCH) ¶ 56,553 (Or. Ct. App. 1990).

### *Pennsylvania*

While there is no implied covenant limiting the employer's right to discharge an at will employee<sup>240</sup> and no general duty of fairness in the employment context,<sup>241</sup> some Pennsylvania authority recognizes a cause of action for "discharge intended specifically to cause harm."<sup>242</sup> Thus, an action for wrongful discharge may lie wherever an employer's decision to terminate is motivated by "disinterested malevolence" or by "ulterior purpose."<sup>243</sup> The existence of this cause of action has been called into question; perhaps it is best understood as a category of public policy cases.<sup>244</sup> Even if the cause of action exists, at will plaintiffs seldom recover.<sup>245</sup>

### *Rhode Island*

Rhode Island is a stalwart bastion of at will.<sup>246</sup> The court has stated in dicta that it is disinclined to alter the legislature's desired at will scheme.<sup>247</sup>

### *South Carolina*

No case in South Carolina has given serious attention to the covenant, and none has recognized an obligation of good faith and fair dealing in employment contracts.<sup>248</sup>

240. *Galbraith v. Philips Info. Sys., Inc.*, 116 L.R.R.M. (BNA) 2519 (E.D. Pa. 1984).

241. *Butz v. Hertz Corp.*, 554 F. Supp. 1178, 115 L.R.R.M. (BNA) 4044 (W.D. Pa. 1983).

242. *Foley v. Presbyterian Ministers' Fund*, 749 F. Supp. 109, 5 Ind. Emp. Rights Cas. (BNA) 1551 (E.D. Pa. 1990); *Geary v. United States Steel Corp.*, 319 A.2d 174, 180, 115 L.R.R.M. (BNA) 4665 (Pa. 1974).

243. *Tourville v. Inter-Ocean Ins. Co.*, 508 A.2d 1263 (Pa. Super. Ct. 1986), *appeal denied*, 521 A.2d 933 (Pa. 1987). *But see Redick v. Kraft, Inc.*, 745 F. Supp. 296, 5 Ind. Emp. Rights Cas. (BNA) 1841 (E.D. Pa. 1990) (holding that the only exception to at will is "narrow and limited circumstances where the discharge violates a significant and recognized public policy") (citation omitted).

244. *McWilliams v. AT & T Info. Sys., Inc.*, 728 F. Supp. 1186, 1192-94, 5 Ind. Emp. Rights Cas. (BNA) 295 (W.D. Pa. 1990); *Paul v. Lankenau Hosp.*, 569 A.2d 346, 5 Ind. Emp. Rights Cas. (BNA) 534, 118 Lab. Cas. (CCH) ¶ 56,569 (Pa. 1990). See Dolores Jacobs Krawec, *Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 DUQ. L. REV. 477 (1983), for a treatment of *Geary*.

245. See, e.g., *Paul*, 569 A.2d at 348 (limiting *Geary*).

246. *Blanchette v. Stone*, 591 A.2d 785 (R.I. 1991).

247. *Salisbury v. Stone*, 518 A.2d 1355, 1359 (R.I. 1986). The employee at issue was an unclassified civil service employee of the state police whose employment was covered by statute.

248. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359, 1363-64 (D.S.C. 1985) ("It is not surprising that plaintiffs can cite no South Carolina cases which support their contention in an at will employment context. For the concept of at-will employee/employer relations, with the attendant right to quit or to fire at any time, for any reason or for no reason at all, is antithetical to the concept of an implied covenant of good faith and fair dealing.") (citations omitted); *Allan v. Sunbelt Coca-Cola Bottling Co.*, 4 Ind. Emp. Rights Cas. (BNA) 1453, 116 Lab. Cas. (CCH) ¶ 56,396 (S.C. Ct. C.P. 1989).

### South Dakota

No cause of action on the covenant exists in the general employment context<sup>249</sup> for the reasons cited by Kansas' *Morriss* case,<sup>250</sup> namely that the covenant should not be "transplant[ed] . . . into the foreign soil of the employment at will doctrine."<sup>251</sup>

### Tennessee

The battle over at will employment in Tennessee has been carried out in the state courts of appeal because the supreme court has not ruled on the issue. No action on the covenant in a purely at will relationship has been allowed, for the appellate courts have deferred to the state supreme court or, preferably, to the legislature.<sup>252</sup> The appellate courts understand both management's and workers' sides of the debate.<sup>253</sup> Where a manual creates an enforceable contract, "[t]his contract, as all contracts, impliedly provides for good faith and fair dealing between the parties. All parties are bound by law to 'act in word and deed, in a responsible manner' and the triers of fact in assessing damages would hold the parties to this standard."<sup>254</sup>

### Texas

The court of appeals has had the final word to date and has refused to create a covenant without the approval from the higher court or the legislature.<sup>255</sup>

249. *Peterson v. Glory House*, 443 N.W.2d 653, 655, 4 Ind. Emp. Rights Cas. (BNA) 912, 112 Lab. Cas. (CCH) ¶ 56,078 (S.D. 1989); *Breen v. Dakota Gear & Joint Co.*, 433 N.W.2d 221, 224, 4 Ind. Emp. Rights Cas. (BNA) 92 (S.D. 1988).

250. For a discussion of *Morriss*, see *supra* text accompanying notes 114-17.

251. *Breen*, 433 N.W.2d at 224. The dissent took the position that there would be no need to transplant, that the legislature had planted the seed by adopting the Uniform Commercial Code and its obligations of good faith. *Id.* at 224-25 (Sabers, J., dissenting). Judge Sabers has quite a line of dissent in this area, all in favor of imposing a meaningful covenant. See *Peterson*, 443 N.W.2d at 656; *Butterfield v. Citibank of S.D.*, 437 N.W.2d 857, 860, 4 Ind. Emp. Rights Cas. (BNA) 304, 113 Lab. Cas. (CCH) ¶ 56,133 (S.D. 1989); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 228, 3 Ind. Emp. Rights Cas. (BNA) 1767 (S.D. 1988); *French v. Dell Rapids Community Hosp.*, 432 N.W.2d 285, 292 (S.D. 1988); *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833, 835 (S.D. 1988); *Blote v. First Fed. Sav. & Loan Ass'n of Rapid City*, 422 N.W.2d 834, 838, 4 Ind. Emp. Rights Cas. (BNA) 311 (S.D. 1988).

252. *Randolph v. Dominion Bank*, 826 S.W.2d 477 (Tenn. Ct. App. 1991); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 115 L.R.R.M. (BNA) 4599 (Tenn. Ct. App. 1981).

253. Compare *Whittaker*, 621 S.W.2d 395 with *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 4 Ind. Emp. Rights Cas. (BNA) 1779, 118 Lab. Cas. (CCH) ¶ 56,538 (Tenn. Ct. App. 1989).

254. *Williams v. Maremont Corp.*, 776 S.W.2d 78, 109 Lab. Cas. (CCH) ¶ 55,919 (Tenn. Ct. App. 1988).

255. *Winograd v. Willis*, 789 S.W.2d 307, 310, 116 Lab. Cas. (CCH) ¶ 56,368 (Tex. Ct. App. 1990). For a discussion of Texans' general hostility to the theory of good faith and fair dealings as "contrary to the long-established adversary system which has ably served Texas for over 150 years," see generally Evelyn T. Ailts, *A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing*, 18 ST. MARY'S L.J. 1295 (1987).



*Utah*

Evidently, the existence of the covenant in the employment context is supported by only a minority on the high bench in Utah. In the recent case of *Berube v. Fashion Centre Ltd.*,<sup>256</sup> a worker was fired when she refused to take a third polygraph test. A handbook expressly provided that refusal to take the test was grounds for firing, and the court found an implied-in-fact contract.

Two judges opined that the covenant is recognized in all contracts, including employment contracts.<sup>257</sup> Their opinion, which appears first in the official record and is referred to as the "lead opinion," attempted to define what the covenant requires. "The duty of good faith is 'unconditional and independent in nature' and requires the parties to deal fairly with each other and to avoid any act which will injure the right of the other to receive the benefits of the agreement."<sup>258</sup> These justices included the disclaimer: "Admittedly, the concept of good faith and fair dealing is not susceptible to bright-line definitions and tests. It should therefore be used sparingly and with caution. Where true injustice has occurred, relief should be provided. Care must be exercised to avoid eclipsing the rule by expanding the exception."<sup>259</sup>

The concurring opinion, joined by three of the five on the bench,<sup>260</sup> charged:

[T]he lead opinion completely fails to establish predictable guidelines for determining what that duty is and when an employer can be found to owe such a duty to an employee. The result would be to give finders of fact a license to determine the duty's content and to impose their version of the duty, after the fact, on virtually any employer. I can understand the desire to assure that justice is done to individual employees, but the cost of uncertainty for employers is simply too great to justify creation of the cause of action proposed by the lead opinion.<sup>261</sup>

The concurring justices would nevertheless have sent the matter to the jury on the implied-in-fact contract claims. They were willing to infer a "reasonableness" qualifier into the contract:

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256. 771 P.2d 1033, 1042-43, 4 Ind. Emp. Rights Cas. (BNA) 353, 111 Lab. Cas. (CCH) ¶ 56,061 (Utah 1989). See also Justin Olsen, *The Course of the Employment At Will Doctrine in Utah: Berube v. Fashion Centre, Ltd.—A Turning of the Tide*, 5 B.Y.U. J. PUB. L. 249 (1991).

257. *Berube*, 771 P.2d at 1046.

258. *Id.* at 1047 (citing *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 728, 1 Ind. Emp. Rights Cas. (BNA) 122, 110 Lab. Cas. (CCH) ¶ 55,998, 115 L.R.R.M. (BNA) 3030 (Ct. App. 1980)).

259. *Id.*

260. Despite the numerical imbalance, the concurrence referred to the two-person opinion as the "lead opinion."

261. *Berube*, 771 P.2d at 1051-52 (Zimmerman, J., concurring).

Fashion Centre would not discharge Berube for a refusal to take a polygraph examination unless that refusal was unreasonable. And, construing the facts in the light most favorable to Berube, a jury could also find that Fashion Centre breached this implied term by requiring Berube to take a third lie detector test when there were no unexplained indications of false testimony in the first two tests regarding the same shortages.<sup>262</sup>

The debate on the court may appear to turn on semantics, but the word choice may bespeak more substantive differences. The concurrence prefers the more objective "reasonableness" standard, while the lead opinion is comfortable with the arguably more subjective "good faith" language. Neither standard provides much practical guidance to a jury.

Subsequent Utah decisions have indicated that a cause of action for violation of the covenant is not recognized.<sup>263</sup>

#### *Vermont*

While Vermont recognizes causes of action arising out of terminations in violation of public policy, it has refused to expand this category to include firings motivated by bad faith, malice or retaliation.<sup>264</sup>

#### *Virginia*

No reported cases consider the availability of a covenant action in the employment context. The supreme court has found error in instructing a jury to award punitive damages to a former employee upon a finding of "malicious motives."<sup>265</sup>

#### *Washington*

In *Thompson v. St. Regis Paper Co.*,<sup>266</sup> the Washington Supreme Court refused to adopt the bad faith exception to at will, stating that such an exception would not strike a proper balance between the employer's interest in running its business and the employee's interest in maintaining employment.<sup>267</sup> The Washington court also echoed Hawaiian courts' concern<sup>268</sup>

262. *Id.* at 1052-53 (Zimmerman, J., concurring).

263. *Loose v. Nature-All Corp.*, 785 P.2d 1096, 1097-98, 4 Ind. Emp. Rights Cas. (BNA) 1882, 116 Lab. Cas. (CCH) ¶ 56,390 (Utah 1989). Oddly, this opinion was written by Justice Durham, who also wrote the "lead opinion" in *Berube*. See also *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55, 6 Ind. Emp. Rights Cas. (BNA) 881, 122 Lab. Cas. (CCH) ¶ 56,939 (Utah 1991) ("in the absence of express terms limiting the right of an employer to discharge for any or no reason and in the absence of provisions establishing procedures by which a discharge should be effectuated, it would be inconsistent to hold that an employer, on the basis of the implied covenant of good faith, is bound to a substantive limitation on the employer's right to discharge.") (citing *Murphy v. American Home Products Corp.*, 448 N.E.2d 86, 91, 98 Lab. Cas. ¶ 55,407, 115 L.R.R.M. (BNA) 4953 (N.Y. 1983)).

264. *Jones v. Keogh*, 409 A.2d 581, 582, 115 L.R.R.M. (BNA) 4193 (Vt. 1979).

265. *Kamlar Corp. v. Haley*, 299 S.E.2d 514, 518 (Va. 1983).

266. 685 P.2d 1081, 1 Ind. Emp. Rights Cas. (BNA) 392, 105 Lab. Cas. (CCH) ¶ 55,616, 116 L.R.R.M. (BNA) 3142 (Wash. 1984).

267. *Id.* at 1086.

over subjecting "each discharge to judicial incursions into the amorphous concept of bad faith."<sup>269</sup>

The Washington court has stuck fast to *Thompson*, even refusing to allow recovery of sales commissions denied in allegedly bad faith.<sup>270</sup> The court was swayed by the existence of a contractual clause setting out how the commissions would be paid in the case of termination. This demonstrated that the parties had considered termination and had declined to disturb the at will presumption. The court was apparently hesitant to impose any good faith obligation. "Whether it would be applicable in cases of egregious employer abuse where discharge was for the purpose of defeating accrued commissions and the contract is silent on compensation is not before us."<sup>271</sup> The Washington court, like the New York court in *Murphy*,<sup>272</sup> was troubled that implication of the covenant would be inconsistent with other existing contract terms.<sup>273</sup>

On the other hand, the Washington court did not hesitate to employ a good faith standard when interpreting existing contractual terms.<sup>274</sup> Where an implied-in-fact contract was created by a manual which provided that an employer could discharge only for just cause, the jury should have been instructed:

"[J]ust cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. . . . [A] discharge for "just cause" is one based on facts (1) supported by substantial evidence, (2) reasonably believed by the employer to be true and (3) which are not for any arbitrary, capricious, or illegal reason.<sup>275</sup>

#### *West Virginia*

*Harless v. First National Bank in Fairmont*<sup>276</sup> established that in West Virginia the only limitation of the employer's "absolute right to discharge an employee at will" is the public policy principle.<sup>277</sup>

268. For a discussion of Hawaii's approach in *Parnar v. Americana Hotel, Inc.*, see *supra* text accompanying notes 95-97.

269. *Thompson*, 685 P.2d at 1086 (quoting *Parnar v. Americana Hotel, Inc.*, 652 P.2d 625, 629 (Haw. 1982)).

270. *Willis v. Champlain Cable Corp.*, 748 P.2d 621, 625, 3 Ind. Emp. Rights Cas. (BNA) 187 (Wash. 1988) (certified question from the Ninth Circuit).

271. *Id.*

272. For discussion of New York's *Murphy v. American Home Products Corp.*, see *supra* text accompanying notes 215-20.

273. *Willis*, 748 P.2d at 626.

274. *Baldwin v. Sisters of Providence in Wash., Inc.*, 769 P.2d 298, 303, 4 Ind. Emp. Rights Cas. (BNA) 208 (Wash. 1989).

275. *Id.* at 304.

276. 246 S.E.2d 270, 115 L.R.R.M. (BNA) 4380 (W. Va. 1978).

277. *Id.* at 275. See also *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 680 (W. Va. 1981).

*Wisconsin*

In *Brockmeyer v. Dun & Bradstreet*,<sup>278</sup> Wisconsin declined to read the covenant into an otherwise at will employment contract, citing Hawaii's *Parnar*.<sup>279</sup> The court expressed its desire to keep narrow the exceptions to at will, otherwise

the next complaint would be based on the employer's failure to exercise due process in the discharge or failure to grant equal rights to the employee in the discharge. That Pandora's box would have no limits to claims not susceptible to a motion for summary judgment and would eliminate any distinction between private and governmental employment.<sup>280</sup>

Wisconsin courts have since rejected attempts to make exceptions to *Brockmeyer*, reaffirming that no action on the covenant will sound in either at will or "definite" employment relationships<sup>281</sup> again because of dislike of the amorphous standard, fear of restricting employers' managerial discretion, and rejection of the idea that an employment relationship involves a fiduciary duty which warrants a duty of good faith.<sup>282</sup>

Wisconsin law leaves room for the covenant to be implied-in-fact like any contract term. "In such a case the court would not be imposing a duty on the employer to terminate in good faith. Rather, the employer would be imposing that duty on itself."<sup>283</sup> Certainly, bad faith breach of an express term is actionable.<sup>284</sup>

*Wyoming*

In *Hatfield v. Rochelle Coal Co.*,<sup>285</sup> the Wyoming Supreme Court reaffirmed the general rule that no covenant is imposed into an at will relationship<sup>286</sup> although it left open the possibility of imposing the covenant in the "right" at will situation.<sup>287</sup> Wyoming takes the interesting position

278. 335 N.W.2d 834, 98 Lab. Cas. (CCH) ¶ 55,398, 115 L.R.R.M. (BNA) 4484 (Wis. 1983).

279. For a discussion of *Parnar*, see *supra* text accompanying notes 95-97.

280. *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172, 105 Lab. Cas. (CCH) ¶ 55,621 (Wis. 1986).

281. *Hale v. Stoughton Hosp. Ass'n, Inc.*, 376 N.W.2d 89, 93, 1 Ind. Emp. Rights Cas. (BNA) 1774 (Wis. Ct. App. 1985).

282. *Id.*

283. *Funk v. Sara Lee Corp.*, 699 F. Supp. 1365, 1367, 3 Ind. Emp. Rights Cas. (BNA) 853 (E.D. Wis. 1988).

284. *Dvorak v. Pluswood Wis., Inc.*, 358 N.W.2d 544, 595, 118 L.R.R.M. (BNA) 2043 (Wis. Ct. App. 1984). Obviously this action would sound in contract with no punitive damages available. *Id.* at 546.

285. 813 P.2d 1308, 6 Ind. Emp. Rights Cas. (BNA) 1057, 122 Lab. Cas. (CCH) ¶ 56,962 (Wyo. 1991).

286. *Id.* at 1309. See also *Ware v. Converse County Sch. Dist. No. 2*, 789 P.2d 872, 874-75, 5 Ind. Emp. Rights Cas. (BNA) 399 (Wyo. 1990).

287. *Hatfield*, 813 P.2d at 1309.

that the covenant will *not* apply if the situation is not at will.<sup>288</sup> Apparently, the conception of the covenant here is as a gap filler. If any enforceable contract terms apply, they will be enforced without reference to the covenant.<sup>289</sup>

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288. *Id.* See also *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1064, 1 Ind. Emp. Rights Cas. (BNA) 864, 105 Lab. Cas. (CCH) ¶ 55,648 (Wyo. 1986); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 704, 709-10, 1 Ind. Emp. Rights Cas. (BNA) 1341, 103 Lab. Cas. (CCH) ¶ 55,520 (Wyo. 1985) (Rose, J., concurring specially).

289. *Hatfield*, 813 P.2d at 1309.