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At-Will Employment: Going, Going

Cheryl S. Massingale

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Cheryl S. Massingale*

I. INTRODUCTION

The doctrine of at-will employment is undergoing serious erosion. At-will employment has traditionally meant that either party in an employment relationship is free to terminate employment at any time for any reason. In recent years, however, court rulings have created many exceptions to the at-will rule, and the current status of the doctrine offers little certainty as to whether a particular dismissal decision will result in liability for wrongful termination.

The doctrine of at-will employment provides that where an employment contract does not specify a duration, employment is deemed to be for an indefinite period and may be terminated at the will of either party.1 The reason for termination is irrelevant under the at-will doctrine. The doctrine illustrates the prevailing principle that the parties are free to determine the terms of their own contract. Thus, when the parties in an employment contract have not specified a time period, neither is bound to continue the employment arrangement once either decides to terminate it.2

The current system, which has evolved through judicially created exceptions, is expensive, time consuming, and does not serve either party well. In addition to the uncertainty as to what termination actions will be deemed wrongful, employers are subject to huge damages that are disproportionate to the economic harm suffered by the terminated employee. At the opposite extreme, many wrongfully terminated employees are unable to seek legal redress for wrongful termination due to the high cost of employment litigation.

A new system for dealing with employee terminations is needed which will better balance the needs of both parties in the employ-

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* Assistant Professor, The University of Tennessee.
2. Id.
ment relationship. The new system should require a good cause standard for terminations and place limits on the potential liability for employers. Arbitration in lieu of litigation would reduce transaction costs and make recovery more readily available to wrongfully terminated employees.

II. HISTORICAL DEVELOPMENT OF AT-WILL EMPLOYMENT

In the United States, at-will employment has been recognized in every state for most of this century. However, until the latter part of the 19th century, an employment agreement that did not specify duration was presumed to be a contract for one year. If the employment continued even one day longer than a year, the contract was deemed to be renewed for another full year. This practice followed the English rule, based on England's Statute of Labourers. Although the statute was repealed in 1863, the principles underlying the statute continue to be followed by the English courts. In 1877, H.G. Wood's Treatise on the Law of Master and Servant proposed the rule that came to be known as the employment at-will doctrine. Wood proposed that where a servant was hired for an indefinite period, this was prima facie hiring at-will. Wood's rule presumed that where no employment period was specified, the parties were free to terminate the employment relationship at any time. Business managers welcomed this departure from the traditional rule. Changes in economic and social circumstances no longer favored the paternalistic view that the master should take care of servants. As America evolved into an industrialized nation, employers needed flexibility in hiring practices and freedom to adjust the size of the labor force to meet changing market demands. The principle underlying the right of the employer to terminate at-will is, in fact, based more on freedom of enterprise than freedom

3. Id.
4. Id. at 595.
5. The original Statute of Labourers was promulgated in 1349. 23 Edw. 3, ch. 1-7 (1349). A second Statute of Labourers was enacted in 1350. 25 Edw. 3, Stat. 1, ch. 1-7. In the 200 years which followed, the Statutes were modified and amended until 1562, when they were replaced by the Statute of Artificers. 5 Eliz., ch. 4 (1562). Masters hired servants for one year, and during that year the servants could be fired only for "reasonable and sufficient cause." 5 Eliz., ch. 4, § V (1562).
8. Id.
9. Id.
of contract.10 During this period employers enjoyed considerable power, and this power ultimately led to abuses in the treatment and working conditions of employees.11

Today’s work environment is very different from that of 1900. Public employees are protected through civil service, merit systems, and tenure. Workers in the private sector enjoy numerous protections through collective bargaining, regulations, statutes, and court decisions. Many changes in the law have contributed to the creation of the current employment environment. During the last twenty-five years, security for the worker has been encouraged by court decisions curtailing the unrestricted right of an employer to dismiss a worker arbitrarily. The process began slowly, but it has gained momentum as recent decisions clearly point to the erosion of the employment at-will doctrine.12

This article examines the legislation and cases that have influenced the erosion of the at-will doctrine. In light of the current uncertain status of the doctrine, the author suggests alternatives to the case-by-case, state-by-state decisions that leave both the em-


11. See Summers, Labor Law as the Century Turns: A Changing of the Guard, 67 Neb. L. REV. 7 (1988). Labor legislation in this country has been rooted in the premise that “individual workers lack the bargaining power in the labor market to protect their own interests and to obtain socially acceptable terms of employment.” Id.; see also J. COMMONS & J. ANDREWS, PRINCIPALS OF LABOR LEGISLATION (4th rev. ed. 1936). “[I]t is one of the fundamental disharmonies of present day industry that he [the worker] has little or no control over the conditions which there surround him, and which profoundly affect his well-being and even his life. Individual complaint frequently leads to loss of employment rather than to improvement of conditions.” Id. at 159.

12. Early adherence to the doctrine of at-will employment allowed few exceptions to the at-will rule. The exceptions which were recognized were based on specific violations of statutorily protected rights. One early statute which expressly limited the employer’s right to terminate was the National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1982). This act prohibits termination of employees due to union activity. Id. §§ 157-58. Subsequently, laws which created obligations for employers and rights for employees served as a basis for exceptions to the at-will doctrine if the termination was in violation of a statutorily protected right or obligation; see, e.g., Fair Labor Standards Acts of 1938, 29 U.S.C. §§ 201-219 (1982), which sets wage and hour standards; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976), which prohibits discrimination based on race, color, sex, religion, or national origin; Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982), which sets safety standards in the work place. Not until the 1980’s did the courts begin to recognize an action for wrongful termination arising under other theories; see DERTOUZOA, HOLLAND, AND EBENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION, Rand Report R-3602-ICJ 5 (1988). By 1985, 37 states recognized the public policy exception, 31 recognized the implied contract exception, and 5 recognized the covenant of good faith and fair dealing exception. Id. at 13.
ployer and the employee with considerable uncertainty as to the right to terminate an at-will employment agreement. These alternative approaches will provide greater balance between protecting the right of employers to address market conditions by maintaining a top quality work force and the right of employees to have reasonable protection for their interest in employment security.

A. Statutory and Judicially Created Exceptions

The erosion of the employer's sovereignty over the work place began with the imposition of state and federal statutes prohibiting termination of an employee in violation of a collective bargaining agreement. Approximately eighty percent of collective bargaining agreements require just cause for dismissal. Unfettered employer discretion to terminate was also curtailed by provisions of Title VII of the Civil Rights Act of 1964. As amended, this Act prohibits discrimination in employment based on race, color, sex, national origin, and religion. These prohibitions restrict the common law right to terminate and require instead legitimate and convincing business justifications for actions involving these classifications of personnel. Numerous other state and federal statutes prohibit discharges for activities such as service on a jury, garnishment of wages, filing workers' compensation claims, and refusal to submit to polygraph tests. Violation of these and other statutes prompted many employees, who believed they had been wrongfully discharged, to bring legal actions against their employers. Although these employees were typically employed under at-will employment contracts, which ostensibly allowed the employer to terminate for any reason, a number of courts responded by creating exceptions to the employment at-will doctrine.

16. Id.
17. Blumrosen, supra note 13, at 519.
20. Id.
B. Public Policy Exception

The three most successful theories in creating exceptions to the at-will doctrine are the public policy exception, the implied contract exception, and the breach of good faith and fair dealing exception. These exceptions have been developed on a case-by-case basis, and the exceptions vary widely from state to state.¹¹

Several courts have used public policy reasons for compensating employees deemed to have been wrongfully discharged.²² The concept of using public policy as a basis for overriding an at-will employment agreement poses an interesting challenge for the courts. The term “public policy” eludes precise definition.²³ The courts that have applied the public policy exception, therefore, have attempted to balance the importance of the policy to be protected against the burden created by the limitation of managerial discretion.²⁴ In most cases, the courts have required a clear mandate that a particular policy is necessary to protect the public interest.²⁵

Under the public policy rationale, some states have recognized a tort cause of action known as retaliatory discharge.²⁶ Retaliatory discharges have been held to violate public policy under three distinct categories: (1) exercise of a statutorily granted right; (2) refusal to obey employer demands to disobey the law; and (3) whistleblowing—the reporting of illegal or dangerous practices by employers.²⁷

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¹¹ Id.
²³ See Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Cal. App. 492, 497, 236 P. 210, 212 (1925). The court stated: “The question, what is public policy in a given case, is as broad as the question of what is fraud.” Id.; see also Noble v. City of Palo Alto, 89 Cal. App. 47, 51, 264 P. 529, 530 (1928) (the court described public policy as “anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy.”).
²⁴ See, e.g., Palmateer, 85 Ill. 2d at 124, 421 N.E.2d at 876. The court stated that “it is now recognized that a proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.” Id. at __, 421 N.E.2d at 878.
²⁵ See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 180 (1975) (stating that an employee has no right of action for wrongful discharge where no clear mandate of public policy is violated); see also Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975).
²⁷ Id.
1. Statutory Right

A common cause of action for retaliatory discharge is based on the termination of an at-will employee pursuant to the exercise of a statutorily granted right, such as filing a workers' compensation claim. In Frampton v. Central Indiana Gas Co., the injured employee filed and received a settlement under a workers' compensation claim and was subsequently discharged. In an action brought by plaintiff against his employer for retaliatory discharge, the Indiana Supreme Court held that a retaliatory discharge for filing a workers' compensation claim was "a wrongful, unconscionable act" that was actionable in a court of law. The court stated that "under ordinary circumstances, an employee at-will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule must be recognized."

Other courts have used similar reasoning to protect rights conferred on employees by statute. The Third Circuit, in deference to a Pennsylvania law prohibiting an employer from requiring a polygraph test as a condition for continuation of employment, ruled that a cause of action exists when an employee at-will is discharged for refusal to submit to a polygraph examination. In Nees v. Hocks, the employee was discharged for serving on a jury over the employer's objections. In an action in tort, the court reasoned that not only had the plaintiff's individual statutory rights been infringed, but the termination also violated community purpose and societal interest. In each of the above cases, the courts were willing to recognize an exception to the at-will doctrine. The exceptions are based on a clear policy mandate that when employees exercise certain statutory rights or rights clearly sanctioned in public policy, these rights must not be frustrated by the threat of loss of employment.

30. Id. at ___, 297 N.E.2d at 428.
31. Id.
32. Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d. Cir. 1979). The district court dismissed the case on summary judgment, and the Third Circuit reversed and remanded. Id. The court reasoned that even when an issue of public policy is involved, an employee can be discharged for legitimate reasons, "but when the fact finder can infer one conclusion which violates public policy and one which is plausible and legitimate, invasion of jury's province is improper." Id. at 1366.
33. 272 Or. 210, 536 P.2d 512 (1975).
34. Id. at ___, 536 P.2d at 516.
2. Refusal to Disobey Law

The second basis for a public policy exception involves the employee’s refusal to follow unlawful directives by management. Several states have recognized an action for retaliatory discharge for employees fired for refusing to disobey the law. The first case to recognize this exception was *Petermann v. International Brotherhood of Teamsters*, in which the employee was terminated for refusing to lie to a government investigation committee. The court reasoned that public interest would not be served where continuation of employment was made contingent upon the commission of an illegal act. The Tennessee Court of Appeals held in two separate cases that a cause of action for retaliatory discharge would stand where an employee is terminated for lack of willingness to become involved in unlawful conduct mandated by the employer. In *Williams v. Tennessee In-Home Health Services, Inc.*, plaintiff claimed that she was fired for her refusal to falsify health services reports at the request of her employer. In *Watson v. Cleveland Chair Co.*, plaintiff truck drivers argued that they were terminated for refusing employer demands to violate certain Interstate Commerce Commission (“I.C.C.”) regulations and highway speed limits. In each case, the court determined that if plaintiffs could prove their charges, the circumstances were sufficient to create an exception to the employment at-will rule.

In *Wagenseller v. Scottsdale Memorial Hospital*, the Arizona Supreme Court recognized a public policy exception to employment at-will under circumstances that did not actually violate a statute but involved a refusal to take part in activity that was personally and morally offensive. This decision clearly expanded the kind of management behaviors the courts may be willing to prohibit. Wagenseller was a nurse at Scottsdale Memorial Hospital.

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36. *Id.*
38. *Id.* at ___, 344 P.2d. at 27.
41. *Id.* at ___.
42. 122 L.R.R.M. (BNA) 2076, 2077 (M.D. Tenn. 1985).
43. *See* 122 L.R.R.M. (BNA) at 2078; 122 L.R.R.M. (BNA) at 2353.
44. ___ Ariz. ___, 710 P.2d 1025 (1985).
She declined to take part in a skit in which the performers “mooned” the audience. Her refusal apparently annoyed her supervisor, who subsequently began to give her unfavorable performance evaluations and ultimately terminated her. The court, in deciding to recognize the public policy exception, reasoned that society would be better served if employers were prohibited from discharging employees for a cause that was morally offensive.

3. Whistleblowing

A third form of protection under the public policy exception has been recognized for employees who report certain illegal, fraudulent, or dangerous activities. A number of states recognize an employee’s right of action for wrongful discharge under the whistleblowers exception. These states have recognized the desirability of protecting workers who are willing to speak out against dangerous conditions and illegal activity carried on by co-workers or employers. The Supreme Court of Kansas held for the plaintiff in a case involving Medicaid fraud. The plaintiff, a probationary medical technician at a private medical facility, reported that a physician was billing Medicaid for laboratory work that had not been done. After reporting this activity, the employee was fired. The Kansas Supreme Court held that termination under such circumstances would create an exception to the employment at-will rule and stated that “[p]ublic policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or law . . . .”

In Cerracchio v. Alden Leeds, Inc., the court held that an employee could maintain an action in tort or contract for retaliatory discharge as a result of filing an Occupational Safety and Health

45. Id. at __, 710 P.2d at 1024.
46. Id. at __, 710 P.2d at 1033.
49. Id. at __, 752 P.2d at 686.
50. Id. at __, 752 P.2d at 689.
Act ("OSHA") complaint.52 Cerracchio, a maintenance mechanic for Alden Leeds, was injured at work by exposure to chlorine gas. The injury required hospitalization, and subsequently Cerracchio exercised his rights to medical coverage under workers' compensation and reported the incident to OSHA. When he attempted to return to work two weeks later, the plaintiff was informed that he had been terminated.53 Cerracchio then brought an action for retaliatory discharge. Concerning the right of action for filing the OSHA claim, the New Jersey court stated that the reporting of unsafe conditions by an employee furthered strong public policy favoring safety in the workplace.54 The court observed that retaliation against the reporting employee would operate as a deterrent to others and was contrary to the policy favoring safety.55

C. Implied Contract Exception

In addition to the availability of recovery by wrongfully terminated employees under the public policy exceptions to the at-will rule, several states have recognized exceptions based on contract theories.56 These contract exceptions are independent of public policy considerations. The implied contract is one contract theory that has been used to challenge terminations of at-will employees.57 An implied contract may be found in the terms of an employee handbook, policy manual, memorandum, and oral statements made by the employer. Under this theory, the courts have found that the circumstances, facts, or certain assertions by the employer have either implied a contract for permanent employment or modified the existing at-will agreement to one of permanent employment, terminable only for good cause.58

It is well recognized in law that contracts may be implied by circumstances, words, or conduct.59 The rationale for the implied

52. Id. at ___, 538 A.2d at 1298-99.
53. Id. at ___, 538 A.2d at 1295.
54. Id. at ___, 538 A.2d at 1298.
55. Id.
56. Hershizer, supra note 26, at 105 n.45.
57. Id. at 104.
58. Id. at 104-06.
59. RESTATEMENT (SECOND) OF CONTRACTS § 4 (1986). "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." Id.; see also CALAMARI, CONTRACTS § 1-12 (1977). "When the parties manifest their agreement by words the contract is said to be express. When it is manifested by conduct it is said to be implied in fact . . . both are true contracts formed by a mutual manifestation of assent." Id.
contract exception is based on the premise that statements or acts indicating that an employee will be terminated only for good cause or otherwise giving assurances of job security, create in the employee the expectation of permanent employment. Recognizing that protection of the parties' expectations is a primary goal of contract, courts have held that statements or acts by an employer which promise job security create legally enforceable commitments by employers.60

The leading case illustrating breach of implied contract theory is *Toussaint v. Blue Cross & Blue Shield of Michigan*.61 In conversations with the plaintiff prior to hiring, the defendant employer stated that the plaintiff would be with the company "as long as he did his job."62 The Michigan Supreme Court found that the oral statements made by the employer when the plaintiff was hired were binding.63

The New Mexico Supreme Court determined that language in an employee handbook could modify the at-will status of an employment agreement.64 The plaintiff was hired under an oral at-will agreement, but the employer subsequently issued an employment handbook which included new employee duties and obligations and termination procedures to be followed by the employer.65 The New Mexico Supreme Court held that the handbook, which employees were required to sign, modified the original employment agreement.66 The court reasoned that the handbook did not contain any disclaimers or other language which would alert the employee against placing reliance on any statement.67

Do the rulings in the above cases imply that anytime an employer issues policy guidelines or makes statements concerning company policy that these assertions will be contractually binding? Perhaps not. Several courts have rejected the handbook exception. The Missouri Supreme Court reasoned that the employment hand-

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60. Hershizer, *supra* note 26, at 106.
62. *Id.* at ____, 292 N.W.2d at 884.
63. *Id.* at ____, 292 N.W.2d at 885.
65. *Id.* at ____, 748 P.2d at 508.
66. *Id.* at ____, 748 P.2d at 510.
67. *Id.* at ____, 748 P.2d at 509. The court stated: "However, if an employer does choose to issue a policy statement in a manual or otherwise . . . encourag[ing] reliance thereon, the employer cannot be free to only selectively abide by it." *Id.* (quoting Leikvold *v.* Valley View Community Hosp., 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984)).
book was a self-imposed statement of policy and not a contract with employees. With similar reasoning, the Tennessee Court of Appeals rejected the contention that language in an employee handbook created binding commitments for the employer sufficient to transform at-will employment into a promise for lifetime employment.

If an employer intends to maintain an at-will employment agreement and does not want to be bound by policy statements, the best means to protect the at-will status is through clear and direct statements or disclaimers. In *Bachelor v. Sears, Roebuck & Co.*, the employment application signed by the plaintiff contained express language providing that the employer had the right to discharge at-will. The court observed that since policy statements had been held to bind the employer, policy statements should also make it possible for an employer to protect itself. Although a number of courts have thus far refused to recognize the implied contract exception to employment at-will, it should be noted that twenty-five states have found that the terms of an employee handbook may create binding obligations for the employer, and that number appears to be growing.

Under certain circumstances, the courts may employ a promissory estoppel theory to enforce oral assurances made by an employer. In *Martin v. Federal Life Insurance Co.*, the plaintiff rejected another offer when he decided to accept the position with Federal Life. During the negotiations prior to employment, the employer gave oral assurances of permanent employment that the Illinois Court of Appeals later held to be enforceable by estoppel. The court reasoned: “We believe that when an employee gives up another offer in exchange for and in reliance upon the employer’s promise of permanent employment, the contract, if proven, is

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68. Johnson v. McDonnell Douglas Corp., Mont., 745 S.W.2d 661 (Mo. 1988) (en banc). The handbook provided that the rules therein were subject to change at any time. The court reasoned that, due to the general language of the handbook and the reservation of right to modify at any time, a reasonable at-will employee would not interpret the handbook provisions as an offer to alter the at-will employment status. *Id.*


71. *Id.* at 1484; see Mallor, supra note 18, at 458 n.45.


enforceable.”

D. Good Faith and Fair Dealing Exception

Another contract-based doctrine which has been successfully used by some plaintiffs in employment cases, is the implied covenant of good faith and fair dealing. Several states have held that the parties to a contract have an implied duty to exercise good faith and fair dealing in the performance of contracts. Failure to exercise good faith constitutes bad faith, and such conduct may give rise to the application of tort remedies. Traditionally the covenant of good faith has not been imposed to address arbitrary conduct by contracting parties. The covenant required instead that neither party do anything to interfere with the other’s performance of its contractual obligations or the other’s right to receive benefits under the contract. Many of the jurisdictions that recognize the good faith exception to employment at-will base the requirement of good faith on the long standing concept that at common law there “exists an implied covenant of good faith and fair dealing” in every contract.

Perhaps the most influential case to use the theory was Cleary v. American Airlines. Cleary had been employed by American Airlines for eighteen years when he was fired. The company alleged that the reason for dismissal was theft, but Cleary claimed that his firing was due to his union activities. Although this case could have been decided on public policy determinations, the California Court of Appeals held instead that the discharge was wrongful in that it violated an implied covenant of good faith and fair dealing that is present in every contract, including at-will employment. The court concluded that when employers act to deprive employees of the benefits of employment without just cause, this demonstrates a lack of good faith and thus constitutes a breach of the covenant. The court based its finding of a covenant primarily on two factors, long term employment and the existence of an internal

74. Id. at 602-03, 440 N.E.2d at 1004.
78. Id. at 447, 168 Cal. Rptr. at ___.
79. Id. at 455, 168 Cal. Rptr. at ___.
80. Id. at 453, 168 Cal. Rptr. at ___.
Subsequent cases in California and elsewhere have varied the factors required to find the existence of a covenant. Although the existence of a covenant is founded in contract, the Cleary decision entitled the employee to tort damages, including damages for emotional distress and punitive damages, thus creating a hybrid theory containing elements of both contract and tort. However, the availability of punitive damages for wrongful termination cases based on bad faith dismissals was subsequently denied by the California Supreme Court. The court reasoned that because the action was based on contract, recovery should be limited to contract damages.

In another leading case, the Supreme Judicial Court of Massachusetts recognized the covenant of good faith and fair dealing in at-will employment. In Fortune v. National Cash Register Co., the plaintiff, a twenty-five year employee, was fired shortly after closing a five million dollar order. The jury found that the employer had exercised bad faith in terminating the employee in an effort to deprive him of the full commission due from the sale.

The New Hampshire Supreme Court recognized the good faith exception in Monge v. Beeke Rubber Co. In this case, the employee was harassed, demoted, and ultimately fired after she refused to accept a date with her foreman. The court held that the termination constituted a retaliatory act motivated by bad faith. The court reasoned that the interest of neither the employee nor the public is well served when employers are able to make employment contingent upon bad faith manipulation by the employer. It is important to note, however, that subsequent New Hampshire cases have restricted the holding of Monge to requiring both bad faith and a violation of public policy for wrongful discharge.

81. Id. at 455, 168 Cal. Rptr. at ___
83. Id. at ___, 765 P.2d at 401, 254 Cal. Rptr. at ___
85. Id. at ___, 364 N.E.2d at 1258.
87. Id. at ___, 316 A.2d at 551. The court noted that “a termination by an employer of a contract of employment at-will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract." Id. at ___, 316 A.2d at 551. (quoting Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)).
88. Id. at ___, 316 A.2d at 551.
In a recent Montana case, *Stark v. Circle K Corp.*, the supreme court upheld a sizable award for the plaintiff based on breach of covenant of good faith and fair dealing. The court relied on a 1982 decision in *Gates v. Life of Montana Insurance Co.*, which held that a covenant of good faith and fair dealing in employment contracts may be "implied as a matter of law based on public policy." The court further noted that good faith is not subject to contractual waiver, express or implied. Thus, it is clear that while a disclaimer may be sufficient to prevent the terms of an employment manual or handbook from creating a binding contract, a disclaimer or other language will not relieve the employer of the duty to exercise good faith in the employment relationship.

III. NEED FOR EMPLOYMENT PROTECTION

There are unquestionably terminations that involve outrageous conduct by an employer or circumstances underlying a discharge that are so egregious that the legal system cannot and should not condone the discharge of the wronged employee. Traditionally, there has been considerable disparity between the bargaining positions of the employer and employee, with the employer enjoying the upper hand. The employer has generally been able to pick and choose not only who will be hired, but also virtually all of the terms of employment as well. Even the balance between the mutual right of the employer and employee to terminate is tipped in favor of the employer because "in the real world of industrial relations, employees seldom quit voluntarily." The effects of a sud-

91. Id. at __, 751 P.2d at 169. Plaintiff was awarded $200,000 in compensatory damages and $70,000 in punitive damages. The punitive damages were justified on the basis that defendant had demonstrated a "lack of candor" during the trial. Id. at __, 751 P.2d at 169.
93. Id.
94. Id.
95. See Feinman, *The Development of the Employment At-Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) for a discussion of the social and economic climate which nurtured the at will rule.

Employment at-will is the ultimate guarantor of the capitalist's authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at-will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.

Id. at 132-33.
96. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full
AT-WILL EMPLOYMENT

At-will termination would usually, though not always, work a far greater hardship on an employee when involuntarily terminated than on the employer when the employee voluntarily resigns.

The United States is the only major Western industrialized nation not requiring statutory protections against arbitrary dismissals. The United States worker, like those in other civilized nations, has a strong interest in employment security and should reasonably be able to expect continued employment where the worker does the job expected within reasonable legal, moral, and ethical limits. Society is better served when job security for America's work force is not linked to unreasonable employer expectations. The current system of redress for wrongful termination works against all parties and especially to the disadvantage of low income employees. One commentator observes that "[f]or the vast majority of nonunion employees, a court suit is still not an effective or readily available avenue for relief [since] [t]he court system is too cumbersome, expensive, and time consuming for most cases."

The effects of termination encompass far more than economic hardship for the terminated employee. Both psychological and economic effects on individuals who lose their jobs can be easily documented. The strain on the individual may also have far reaching effects for society in that numerous health problems, increased suicides, mental breakdowns, and family discord all have been associated with loss of employment. These repercussions may be unavoidable under certain circumstances when an employee is released for good cause, but individual and social costs are so high that the legal system can no longer afford to protect or countenance arbitrary or bad faith dismissals.

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97. Id. at 68.
99. Id. at 181. Tobias observed:

After World War II . . . [t]he job became the prime source of identity for millions of Americans. For many, career and workplace was the focus of their lives. 'Discharge' was labeled as the capital punishment of the industrial world. The average American has less than three months pay in savings. The loss of income causes severe economic hardship . . . . The discharged employee suffers intense emotional distress. He has been labeled a failure. His self-esteem, which is wrapped up in his job is gone.

Id.; see also Comment, A Common Law Action for the Abusively Discharged Employee, 26 Hastings L.J. 1435, 1444-45 (1975) [hereinafter A Common Law Action].
100. See Tobias, supra note 98, at 181-82.
IV. Need to Protect Employer Rights

Most literature discussing employment rights strongly advocates the rights of workers and admonishes employers for abuses.\(^\text{101}\) However, abuses have occurred in both directions. Employees can take advantage of employers or quit their jobs, leaving employers with little or no notice. Where employees hold key positions in a company, a sudden and unexpected departure may cause considerable hardship on the employer. These cases, however, seldom end up in court. The reality for the employer is that there is little or nothing to be gained from taking action against an employee, and there is a considerable amount to lose in terms of employee morale, company image, and public relations.

In spite of the duality of employment abuses, very little print is dedicated to the need for protecting employers and their rights.\(^\text{102}\) It has been argued that power itself protects employers.\(^\text{103}\) However, as the power of the employer is whittled away by numerous statutory protections for workers, judicially imposed exceptions to at-will employment, and endless regulatory requirements covering the gamut of employment practices, it cannot be seriously argued that the employer today is all powerful. Given the current legal environment, the employer’s ability to make sound economic decisions is impaired by fear of inviting litigation. As courts demonstrate greater willingness to find for the plaintiff and impose contract and tort damages, the employer is forced to weigh every termination decision against potential exposure to litigation. Even in wrongful discharge cases in which the employer prevails, the defense fees and expenses are typically in the $50,000 to $100,000 range.\(^\text{104}\) There are also significant costs incurred in implementing policies to avoid litigation, including administrative costs for documentation, record keeping, evaluation procedures, and loss of managerial discretion.


\(^{103}\) See, e.g., Foley v. Interactive Data Corp., 47 Cal.3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1989).

Where the employee prevails in a wrongful discharge suit, the employer may be exposed to virtually unlimited damage awards. There appears to be a growing willingness on the part of the courts to award injured plaintiffs both contract damages as well as punitive damages and damages for emotional distress. Tort remedies added to the traditional contract remedies have accounted for awards of up to eight million dollars. These large awards are causing a knee jerk reaction in a number of jurisdictions. Recognizing the potential overexposure of employers, the California Supreme Court recently attempted to cap the huge damages awarded to wrongfully terminated employees. Although California has traditionally been a stronghold for worker protection, in *Foley v. Interactive Data Corp.*, the court limited damages to lost pay and related economic damages. Foley, a branch manager with six years of work experience with Chase Manhattan Bank's Interactive Data Corp., claimed that he had consistently received praise, salary increases, bonuses, awards, and superior performance evaluations during his employment. These positive actions by management led Foley to believe that his performance was satisfactory and his job secure, but he was fired after reporting to his employer that a new supervisor was under FBI investigation for allegedly embezzling funds from a former employer. The court found that Foley had been wrongfully terminated but stated that the employment relationship was "fundamentally contractual" and therefore, recovery should be limited to contract damages. The court reasoned that limiting damages to contract remedies would promote stability in the business community by establishing parameters for damage awards and eliminating the uncertainty inherent in exposure to tort damages.

The *Foley* holding illustrates that while workers need protection, employers, too, must be protected. It is widely recognized that American productivity, job pride, and worker loyalty are becoming endangered. As society shifts from a manufacturing to a service

105. Id. at 26.
107. Id. at __, 765 P.2d at 375, 254 Cal. Rptr. at __.
108. Id.
109. Id. at __, 765 P.2d at 401, 254 Cal. Rptr. at __.
110. Id.
111. See L. IACOCCA, IACOCCA 321 (1984) (comparing an American worker's attitude of that
society and from a society that demands many unskilled laborers to one that requires highly skilled and educated specialists, the pendulum of power will inevitably shift in favor of the employee. As workers become better educated and more specialized, competition for specialized skills will create an employment market that will be much more favorable to the employee. The early part of the century saw the rise of labor unions and collective bargaining as the means of protecting worker interests. During the second half of the century, there has been a decline in the size and influence of labor unions as only about twenty-five percent of private employment is protected by collective bargaining.11 Today workers enjoy considerably more regulatory and judicially imposed protections. The next century will inevitably witness another shift. As court dockets become more backlogged and the cost of litigation becomes more prohibitive, American society must find a better means for striking a balance between the needs of the employee and those of the employer.

V. PROPOSAL FOR CHANGE

The once impenetrable fortress of at-will employment is no longer a reality. The demise itself may not be bad, but one must question whether the current method of change is the best approach. The time is right to abandon the concept of at-will employment and institute instead a policy which permits dismissal only for good cause. As one assesses the growing number of cases brought and won by terminated employees and the increasing willingness of courts to override the right of the employer to terminate at-will, there is a legitimate argument that in many states there is now a de facto good cause requirement, in spite of continued lip service to the concept of employment at-will. The requirement of good cause termination would not, however, entirely eliminate the problem. Termination for good cause means a "fair and honest cause or reason regulated by good faith on the part of the party exercising the power."113 There will always be legitimate disputes as to what constitutes good cause, and there will continue to be claims, some well founded, some not, that the stated cause for ter-

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112. Summers, supra note 11, at 10.
mination is simply a pretext and that the real reason for dismissal would not satisfy the requirement of good cause. The economic circumstances of the employer must be incorporated within the definition of good cause. While cuts in the work force for economic reasons unquestionably work hardship on terminated employees, employers cannot lose the flexibility to make adjustments where the long term viability of the company is at risk. Lack of such management discretion places all workers at risk.

A good cause requirement would lend more certainty to the employment arrangement for both the employer and employee. It would eliminate or reduce the necessity for implied contract exceptions and automatically incorporate the requirement of good faith and fair dealing within the meaning of good cause. This arrangement would not necessarily require a term of employment, and there would be no need for a one year implied term. The presumption would be that employment duration was indefinite but could be terminated for good cause. Summers argues that:

Limitation of the employment at-will doctrine requires only fairness; it does not require keeping unproductive employees. Indeed, fairness and job security may improve employee morale, and with it, increase productivity. At the very least, requiring fair procedures and good cause may prevent hasty, ill-considered, and unnecessary loss of potentially valuable employees in whose training the employer has a substantial investment.\(^{114}\)

New employees should undergo a probationary period of six months to a year, during which time the employment relationship could be terminated even without the good cause requirement. The rationale behind this policy is that an employer could terminate an employee if it appeared that for whatever reason the employee would not be satisfactory. Allowing the employer to terminate with greater latitude in the early stages of employment makes sense in that the employer is not likely to terminate the employee arbitrarily or the employee would not have been hired in the first place. Secondly, the employee does not have a large investment in terms of time and benefits in a particular job during the first year. The probationary period gives both the employer and employee an opportunity to assess one another to determine if the relationship is right for long-term employment relationship. Terminations during

\(^{114}\) Summers, *supra* note 11, at 17.
the probationary period for reasons violating public policy would be subject to redress. If the employment relationship is continued beyond the probationary period, a good cause standard would be in effect.

The question of how to deal with disputes must also be addressed. Martin proposes an administrative system of dispute resolution for wrongful termination claims. This system would provide for disputes to be decided by arbitration rather than litigation. Martin argues that both employers and employees would be better served in that the system would provide for limited damages but speedy dispute resolution. Under this system, the remedy for wrongful termination would be limited to back pay with no reinstatement and no compensation for emotional distress.

Many of these suggestions have been incorporated in the Montana wrongful discharge statute. Montana is the only state thus far that has adopted a wrongful discharge statute. The statute encourages voluntary arbitration, but it does not prohibit an aggrieved employee from litigating. The statute has served as a model for at least a dozen other states considering similar statutes. There is also a pronounced movement toward the development of a model law containing provisions similar to the Montana statute.

The Montana statute, while broadly prohibiting termination without good cause, outlines three basic causes of action for wrongful termination. These causes of action include: (1) an action for retaliatory discharge for employee refusal to violate public policy or reporting of violations of public policy; (2) action by non-probationary employees where discharge has not been for good cause; and (3) an action for employees discharged in violation of express provisions of written personnel policies. The statute lim-

116. Id. at 170.
117. Id. at 163.
119. See id. § 39-2-914.
121. St. Antoine, supra note 96, at 58.
123. Id. § 32-2-904(2).
124. Id. § 32-2-904(3).
its available remedies to lost wages and benefits, plus interest, for a period not to exceed four years from date of discharge. The statute also limits punitive damages to circumstances involving terminations in violation of public policy incorporating fraud or actual malice on the part of the employer. Additionally, the statute imposes on the terminated employee the duty to mitigate damages and does not provide for reinstatement of the terminated employee.

The section of the statute dealing with damages has been challenged under the claim that it unconstitutionally limits the right to full legal redress. Earlier this year, a trial court ruled that the restriction of awards violates the Montana Constitution's guarantee of "full legal redress for injury." However, the Montana Supreme Court recently ruled that the limitation on remedies neither violates individual rights to full legal redress nor equal protection. The opinion upholding the Montana statute is expected to generate numerous attempts by other state legislatures to cap awards. St. Antoine, one of the chief drafters of the model law, asserts that the Montana law provides a trade-off between basic protection to workers and reasonable limits on awards.

There would be considerable benefit to having a model law or uniform statute adopted by all states. Adoption on a state-by-state basis would allow for minor variations for local preferences and some degree of experimentation, but it would give broad protection to workers, eliminate state-by-state ad hoc decisions, and help promote fairness and rights of due process in the workplace. While employers may groan at the thought of one more area of regulation governing the workplace, a survey of recent cases for wrongful termination and appraisal of some recent damage awards may give cause to rethink this issue. In a recent article, Whitehall describes some of the damages that may be sought in employment cases.

125. Id. § 32-2-905(1).
126. Id. § 32-2-905(2).
127. Id. § 32-2-905(1).
128. See supra note 117.
130. Barrett, supra note 120, at B1, col. 3.
131. Meech, ___ Mont. at ___, 776 P.2d at 488.
132. See Barrett, supra note 120, at col. 5.
133. Id.
These include lost wages (including salary, bonuses, lost profits and commissions), lost benefits (including medical, life, and disability insurance, pension benefits, lost experience and reputation, personal use of company car, and employee discounts), reliance damages, and compensatory damages. Litigation for wrongful terminations amounts to millions of dollars in damages and attorneys' fees annually without affording broad protection to all workers. Summers argues that "[m]ost workers do not have the price of admission to the legal system. They cannot afford a lawyer, and most claims are too small to produce a viable contingent fee." 

In addition to the numerous types of damage awards traditionally available in contract actions, there is an increasing willingness by courts to award punitive damages in cases involving wrongful discharge. Most wrongful discharge cases involving punitive damages come under the public policy exception brought in tort actions. However, courts have shown increasing willingness to supersede traditional prohibitions against awarding punitive damages in contract actions where "a serious wrong, tortious in nature, has been committed . . . ." This language was used by the Indiana Supreme Court in an insurance case reasoning that "the public interest will be served by the deterrent effect punitive damages will have upon future conduct. . . ." There is little reason to doubt that, given the right set of facts, courts will use a similar rationale to award punitive damages in employment contract cases. The courts have already awarded punitive damages in cases involving breach of implied covenants of good faith, as in Stark, discussed above.

Mallor argues that there is some justification for punitive damages in wrongful discharge cases as a means of correcting "the imbalance of power which results from the practical inability of unorganized employees to bargain individually for job security" and to deter "abuse of power in the employment context." While the threat of punitive damages specifically and court actions in general do have a deterrent effect on wrongful discharges, they may also

135. Id.
136. Summers, supra note 11, at 25.
137. See generally Mallor, supra note 18.
139. Id. at 608, 349 N.E.2d at 180.
141. Mallor, supra note 18, at 489.
have a chilling effect on business decision making. The current system of court imposed exceptions to employment at-will, with an ever increasing risk of new and different exceptions combined with ever enlarging damage awards, gives employers little certainty in advance as to whether a particular termination decision will be deemed lawful. Under a uniform statute, damages would be limited to actual economic injury for a limited period. Punitive damages would not be allowed or would be limited to extremely egregious circumstances.

A new standard, which would require good cause to terminate and dispute resolution by arbitration, would afford a number of advantages—greater certainty for both parties, greater consistency in awards, increased judicial economy via the removal of numerous cases from the already overburdened court system, and rapid recovery for wrongfully terminated employees at a fraction of the cost of litigation.

VI. Conclusion

Litigation of employee rights has become big business in the 1980's. Case law illustrates numerous examples of abuse. Good conscience dictates that the legal system must not support, if only by inaction, circumstances where employment is contingent upon carrying on illegal activities, succumbing to improper advances by an employer, or foregoing rights that were statutorily instituted to protect workers.

Wrongful termination cases have monumental monetary and social costs. The reality of the current employment environment is that an employer no longer has an unfettered right to fire employees, and if an employee is fired, the employer must be able to show, if not good cause, at least the absence of bad cause. Neither party to an employment contract is well served by the current system. The courts are finding implied contracts where no contract was intended, the express right of employers to terminate at-will is riddled with exceptions, and the reality for employees who want and need redress for wrongful termination is that redress via the court system may take years and the cost may be prohibitive. The interests of both parties must be balanced and a new system for addressing disputes must be developed if America is to remain competitive in the world market during the next century.