

THE COVENANT OF GOOD FAITH AND FAIR DEALING: A CONCENTRATED EFFORT TO CLARIFY THE IMPRECISION OF ITS APPLICABILITY IN EMPLOYMENT LAW

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INTRODUCTION

Although the covenant of good faith and fair dealing “does not lend itself to precise definition,”² several state courts have attempted to define parameters for applying this covenant in the employment context.³ This article summarizes the evolution of the covenant of good faith and fair dealing as one exception⁴ to the employment at-will doctrine,⁵ and discusses court decisions in a small minority of jurisdictions that currently recognize this exception. To do this, this article first analyzes the somewhat erratic and inconsistent definitions of the covenant of good faith and fair dealings adopted by the courts. Second, this article explores the different rationales given by the courts to validate and justify their decisions. Finally,

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² *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 789 (Alaska 1989).

³ *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002). The Alaska Supreme Court recognized two possible ways that an employer might breach the covenant of good faith and fair dealing. First, the court recognized a subjective breach, which included terminations “for the purpose of depriving him or her of one of the benefits of the contract.” *Id. quoting Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1286-87 (Alaska 2001). Second, the court recognized an objective breach, which “would include disparate employee treatment, terminations on grounds that were unconstitutional, and firings that violated public policy.” *Id. citing Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1224 (Alaska 1992).

⁴ In addition to the covenant of good faith and fair dealing, state courts commonly recognize two additional exceptions: the public policy exception and the implied-in-fact contract exception. See Mark D. Wagoner, Jr., *The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L.J. 1799, 1806 (1996).

⁵ The doctrine is commonly defined as “employment that is usually undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.” BLACK’S LAW DICTIONARY 545 (7th ed. 1999).

this article concludes by comparing and contrasting the minority and majority views concerning adoption of an exception.

I. EVOLUTION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING AS AN EXCEPTION TO THE EMPLOYMENT AT-WILL DOCTRINE

A. The Evolution of the Employment-at-Will Doctrine

The employment-at-will doctrine, as it exists today, emerged after the inception of the Industrial Revolution.⁶ Before that time, American courts applied the English rule,⁷ which presumed a one-year term of employment absent an agreement stating otherwise.⁸ According to the English rule, founded on traditional master servant principles, an employer could terminate an employee before the end of the one-year term only for reasonable cause.⁹ Notably, the English rule did not afford employees the same reciprocal right to terminate the working relationship.¹⁰

The Industrial Revolution changed the landscape of the workplace by transforming the once agrarian employment scheme into an industrialized, large-scale environment.¹¹ The newly industrialized environment increased significantly employers' demand for labor.¹² As such, employers desired more control over and

⁶ See Brian T. Kohn, *Contracts of Convenience: Preventing Employers From Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 806 (2003). As a result of the Industrial Revolution, employers' needs changed. *Id.* at 806 n.41. Workforces grew in number and employers needed more flexibility in dealing with their employees. *Id.* The employment at-will doctrine proved to be a viable solution to meet employers' needs. *Id.*

⁷ *Coman v. Thomas Mfg. Co., Inc.*, 381 S.E.2d 445, 446 (N.C. 1989).

⁸ Timothy R. Timmerman, *Legislative Attempts to Modify the Employment At-Will Doctrine: Will the Public Policy Exception Be the Next Step?*, 14 J. CORP. L. 241, 243 (1988).

⁹ Linda Forsythe, *Duration of Employment-At-Will*, 56 UMKC L. REV. 343, 344 (1988).

¹⁰ *Id.*

¹¹ Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996).

¹² Kohn, *supra* note 6, at 806 n.41.

flexibility in their workforce than afforded by the English rule.¹³ During the Industrial Revolution, employers found the English rule too rigid for the needs of the changing workplace. Subsequently, in his Master Servant treatise, Horace Wood proposed an alternative at-will rule, dubbed the American rule,¹⁴ (hereinafter, the “American rule” or the “Rule”). In articulating his rule, Wood stated:

[W]ith us the rule is inflexible, that a general or indefinite hiring is a prima facie hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, a week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.¹⁵

The adoption of the Rule by the courts,¹⁶ which was consistent with the theoretical framework of freedom of contract principles, was certainly a dramatic change from the English rule in that either party could terminate the employment relationship at any time for any reason.¹⁷ In recognizing that the American rule was premised on equality of rights for the employee and the employer, the Supreme Court of Tennessee stated:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even bad cause.... It is a right which an employee

¹³ Cathryn C. Dakin, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1047 (1995).

¹⁴ HORACE WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 134, at 272 (1877).

¹⁵ *Id.*

¹⁶ Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994). Commentators have suggested that seven jurisdictions recognized the at-will rule before Horace Wood's treatise was published.

¹⁷ Wagoner, *supra* note 4, at 1806 n.11.

may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.¹⁸

Although the American rule lacked any significant legal foundation, the courts were becoming more intolerant with the traditional English rule; they quickly began adopting the American rule as the framework by which all at-will employment relationships would be governed.¹⁹ Currently, the Rule remains the default rule in American employment law.²⁰

B. Erosion of the Employment At-Will Rule

Even though the American rule was theoretically based on the equality of rights between the employee and employer, the broad sweeping adherence by the courts to the at-will doctrine²¹ caused some to criticize the Rule for its harshness, perceived imbalance, and unfairness.²² Critics of the at-will rule argued that the rule had a disparate impact on employees by conferring absolute power upon the employer to discharge employees.²³ They argued that because the employer had significantly greater economic resources than the employee, the separation of an employee from the workforce would be much more detrimental to the employee than the employer.²⁴ Recognizing a need for an exception to the Rule, the Supreme

¹⁸ *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds by* *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915).

¹⁹ *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1030 (Ariz. 1985). The Supreme Court of Arizona noted, "none of the four cases cited by Wood actually supported the rule." *Id.* See also Kelly McWilliams, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335, 338 (1986) (arguing the new rule that Wood proposed had little legal analysis to support it).

²⁰ Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 199 (1990).

²¹ Richard H. Winters, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 198 (1985).

²² Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 329 (1991).

²³ See *infra* note 20 at 198.

²⁴ See *infra* note 6 at 807.

Court of New Jersey stated, “[t]he twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule.”²⁵ The court continued by recognizing the existence of criticism that focused on the “compatibility of the traditional at will doctrine with the realities of modern economic and employment practices.”²⁶ Similarly, the Supreme Court of Illinois, in referring to the Rule stated, “[r]ecent analysis has pointed out the shortcomings of the mutuality theory. With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.”²⁷

With several courts and commentators agreeing that the Rule was inherently unfair because of differing levels of bargaining power, coupled with the fact that the doctrine afforded a wrongfully discharged employee absolutely no remedy,²⁸ gradual erosion transpired to effectually impose limitations upon the applicability of the doctrine. First, Congress initiated the movement towards eroding the doctrine with the passage of the National Labor Relations Act.²⁹ Several other legislative enactments followed, such as the passage of the Fair Labor Standards Act,³⁰ the

²⁵ *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 509 (N.J. 1980). Ortho Pharmaceutical Corporation employed the Plaintiff, Dr. Pierce. She had been a member of a project team that was developing a liquid drug known as lopermide. The formulation of this drug, as it was proposed, contained saccharin, which Dr. Pierce believed to be potentially harmful. Due to the controversial nature of saccharin, she believed that continuing to work on the project would violate the Hippocratic oath that she had taken. Therefore, she submitted a letter of resignation. The Supreme Court of New Jersey upheld a motion for summary judgment granted to the employer.

²⁶ *Id.*

²⁷ *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981), *as modified on denial of rehearing* (Ill. 1981). In arguing retaliatory discharge, the Plaintiff in this case alleged that he had been terminated from his managerial position with International Harvester Company for providing information to authorities regarding another employee's possible criminal violation. Based on public policy, the court held that the Plaintiff had stated a cause of action for retaliatory discharge.

²⁸ Michael D. Strong, *Personnel Policy Manuals as Legally Enforceable Contracts: The Implied-In-Fact Contract – A Limitation on the Employer's Right to Terminate At Will*, 29 WASHBURN L.J. 368, 371 (1990).

²⁹ 29 U.S.C. § 151 (1988).

³⁰ 29 U.S.C. §§ 201-219 (1988).

Occupational Safety and Health Act,³¹ and Title VII of the Civil Rights Act of 1964,³² to effectuate a significant encroachment upon the at-will doctrine. These statutes limited the absoluteness of an employer's ability to terminate an employee. No longer was the employer able to terminate an employee "for any reason."³³ In addition to the statutory exceptions to the at-will rule, judicial exceptions emerged that contributed to the continuous erosion of the doctrine. Courts have recognized three general exceptions to the at-will rule: termination that violates public policy, termination where an implied-in-fact contract was breached, and termination where a covenant of good faith and fair dealing was breached by the employer.³⁴ Although the first two exceptions are more widely recognized by American courts,³⁵ this article focuses on the third exception.

*C. Implied Covenant of Good Faith and Fair Dealing as an
Exception to the Employment At-Will Rule*

This cause of action is predicated on the existence of a contract between the employee and employer, albeit at-will.³⁶ Section 205 of the Restatement (Second) of Contracts states that *every* contract contains an implied covenant that both parties are compelled to act in accordance with good faith and fair dealing.³⁷ The Supreme Court of New Jersey expounded on this principle by examining a comment to the Restatement stating, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of

³¹ 29 U.S.C. §§ 651-678 (1994).

³² 42 U.S.C. §§ 2000e to 2000e-17 (1988).

³³ *See, e.g.*, 42 U.S.C. §2000e-2 (prohibiting, among other things, the termination of an employee based on race, color, religion, national origin, or gender).

³⁴ *See supra* note 21, at 204.

³⁵ *See supra* note 4, at 1806.

³⁶ *Id.*

³⁷ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

decency, fairness or reasonableness.”³⁸ Consequently, because the employee and employer have formed a contractual relationship, the obligation prescribed in the Restatement (Second) of Contracts is applicable to the parties. Hence, the duty is one that is imposed by law. One court’s interpretation of the duty is, “[i]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”³⁹ In essence, courts are simultaneously imposing the at-will doctrine, which states that either party may terminate the relationship for *any* reason, and the contractual principle of good faith and fair dealing, which effectually asserts, in part, the notion that the parties are prohibited from terminating the relationship for *any* reason. Because of this, many courts refuse to recognize this exception and declare that employment at-will contracts are exempt from the rule governing all other contracts.⁴⁰ Summarizing this position, the Supreme Court of Kansas stated that the rule pronounced in Restatement (Second) of Contracts section 205, “is overly broad and should not be applicable to employment-at-will contracts.”⁴¹ To

³⁸ *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1126 (N.J. 2001) *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

³⁹ *Id.* at 1126-27. *See also* CORBIN ON CONTRACTS, § 654A(A), Kaufman supp. (1984) (stating that “the obligation [is] to preserve the spirit of the bargain rather than the form,” and “[i]t is moreover a group of specific rules which evolved to insure that the basic purpose of contract law is carried out, the protection of reasonable expectations of parties induced by promise.”).

⁴⁰ *See, e.g., Breen v. Dakota Gear & Joint Co.*, 433 N.W.2d 221 (S.D. 1988). This was a wrongful discharge case before the Supreme Court of South Dakota whereby the Plaintiff had been discharged by his employer after approximately ten years of service. The Plaintiff had just taken four days of sick leave and upon returning to work, he was discharged. Allegedly, he had been terminated in violation of his implied contract and in violation of an implied covenant of good faith and fair dealing. In providing a justification as to why the court should recognize the breach of covenant claim, the Plaintiff argued that the termination was “not in the best interest of the economic system or the public good.” Despite this argument, however, the court refused to recognize this as an exception to the at-will doctrine.

⁴¹ *Morriss v. Coleman Co.*, 738 P.2d 841, 851-52, (Kan. 1987). Randy Morriss, production supervisor, and Debra White, secretary, brought this wrongful discharge case against their former employer. Morriss was asked by his supervisor to retrieve a car from Greenville, South Carolina, to which he agreed. Unbeknownst to management, White decided to take time off of work and take the trip with Morriss. White paid all of her own expenses for the trip. Subsequently, both parties were terminated due to “dishonesty, breach of trust, and for increasing the company’s insurance liability.” In addition, there was evidence of the supervisor’s strong religious beliefs and values and how this trip contradicted those values because the couple was not married. The Plaintiffs argued that this termination was a breach of the implied covenant of good faith and fair dealing. Even though the

the contrary, another court noted, “[w]e do not feel that we should treat employment contracts as a special type of agreement in which the law refuses to imply the covenant of good faith and fair dealing that it implies in all other contracts.”⁴²

The first enunciation of the Covenant can be found in the case of *Monge v. Beebe Rubber Co.*⁴³ In *Monge*, the Supreme Court of New Hampshire faced a scenario in which an employer terminated its employee because she had refused to date her foreman.⁴⁴ In recognizing an exception, the court stated, “[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 interests of the economic system or the public good and constitutes a breach of the employment contract.”⁴⁵

Compare the variant application in the *Monge* decision to that of the application in *Fortune v. National Cash Register Co.*⁴⁶ Fortune, the plaintiff, was a 61 year-old at-will salesman for National Cash Register (“NCR”).⁴⁷ According to his contract, Fortune was to receive, in addition to a fixed salary, a commission on all sales made in his assigned territory, regardless of whether he made the sale or not.⁴⁸ Prior to his termination, Fortune was credited with a significant sale, which resulted

Court did recognize that the implied covenant was recognized in commercial transactions under the Uniform Commercial Code and certain construction contracts, they refused to apply the same contractual principle to employment contracts. Interestingly, the concurring opinion stated that “[i]t 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.”

⁴² *Wagenseller*, 710 P.2d at 1040. The court was explicit in defining the parameters in which this exception would be recognized. The opinion outlined that the covenant “protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into.”

⁴³ *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

⁴⁴ *Id.*

⁴⁵ *Id.* at 551.

⁴⁶ *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

⁴⁷ *Id.* at 1253.

⁴⁸ *Id.*

in a bonus commission of \$92,079.99.⁴⁹ After only receiving a portion of that commission, NCR terminated Fortune's employment. Following his termination, Fortune brought suit arguing that NCR had breached the implied covenant of good faith and fair dealing. In its decision, the court stated, "we believe that where, as here, commissions are to be paid for work performed by the employee, the employer's decision to terminate its at will employee should be made in good faith."⁵⁰ In agreeing with the jury, the court continued, "the termination of Fortune's twenty-five years of employment as a salesman with NCR the next business day after NCR obtained a \$5,000,000 order from First National was motivated by a desire to pay Fortune as little of the bonus credit as it could."⁵¹ As a result, the court found in this situation that the termination was not made in good faith, and that NCR was liable to Fortune for a breach of contract.⁵²

In addition to Massachusetts, several other jurisdictions have adopted the implied covenant of good faith and fair dealing exception, thus gradually eroding the at-will doctrine. As one court summarized, "[t]he covenant [of good faith and fair dealing] requires cooperation in carrying out the contract and honesty in creating or settling disputes."⁵³

II. JUSTIFICATIONS FOR THE ADOPTION OF THE COVENANT

The cause of action for a breach of the implied covenant of good faith and fair dealing has been often complex and difficult for courts to define. Some critics, such as Justice Stein of the New Jersey Supreme Court, argue that the covenant has been applied inconsistently and has proven to be unpredictable. In *Noye v. Hoffmann-LaRoche Inc.*,⁵⁴ Justice Stein noted "concepts such as good faith and fair dealing are

⁴⁹ *Id.* at 1254.

⁵⁰ *Id.* at 1256.

⁵¹ *Id.* at 1258.

⁵² *Id.* at 1255-56.

⁵³ *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (Cal. 1990) (citations omitted).

⁵⁴ *Noye v. Hoffmann-LaRoche Inc.*, 570 A.2d 12 (N.J. Super. Ct. App. Div. 1990).

chameleonlike in character, necessarily assuming the colorings of the surroundings in which they find themselves.”⁵⁵

In examining the variable interpretations of the covenant, several definitions and corresponding justifications emerge that effectually set out circumstances where the court might read the covenant into the contract.

A. When Earned Benefits are Denied Due to Termination

Several courts have permitted the application of the covenant of good faith and fair dealing in at-will employment when there has been a denial of benefits earned by the employee.⁵⁶ This fairly broad sweeping category encompasses the denial of numerous forms of benefits including commission due,⁵⁷ wages earned,⁵⁸ profit share,⁵⁹ pension benefits,⁶⁰ and severance benefits.⁶¹ In addition to these

⁵⁵ *Id.* at 18.

⁵⁶ *But see* J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to Demarginalize Employment Law*, 81 IOWA L. REV. 347, 365 (1995). The author suggests that these courts have “floundered and misapplied” the implied covenant of good faith and fair dealing.

⁵⁷ *Fortune*, 364 N.E.2d at 1256. *But see* *Sands v. Ridefilm Corp.*, 212 F.3d 657, 663 (1st Cir. 2000) (“[Under Massachusetts law,] litigants may not recover damages for future, prospective benefits not earned by past services.”).

⁵⁸ *Cook v. Alexander and Alexander of Conn., Inc.*, 488 A.2d 1295, 1297 (Conn. 1985) (This court, “has thus expressed a willingness to allow an action for the breach of good faith and fair dealing when the challenged discharge is allegedly related to the withholding of wages.”). *See also* *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781 (Conn. 1984); *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908 (Mass. 1982); *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21 (Mass. 1981).

⁵⁹ *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983) (employee denied a ten percent profit sharing arrangement). *But see* *Pollen v. Aware, Inc.*, 762 N.E.2d 900 (Mass. 2002) (employer not liable for breach of the covenant of good faith and fair dealing after attempt was made to retroactively deprive employee stock options).

⁶⁰ *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987).

⁶¹ *Kulins v. Malso, a Microdot Co., Inc.*, 459 N.E.2d 1038 (Ill. App. Ct. 1984); *Bolling v. Clevepak Corp.*, 484 N.E.2d 1367, 1367 (Ohio Ct. App. 1984).

monetary benefits, the exception encompasses other benefits, such as the denial of sick leave⁶² and job security.⁶³

B. Termination Contrary to Public Policy

Some jurisdictions have found that a termination in violation of public policy may establish a breach of the covenant of good faith and fair dealing implied in an at-will relationship. Retaliatory discharge, for example, is one such violation of public policy that has recently emerged in this context. In *Norcon, Inc. v. Kotowski*,⁶⁴ the Alaskan Supreme Court faced such a claim when an employee of Norcon alleged that her discharge was due to the investigation and subsequent reporting of certain safety violations regarding a “zero-tolerance alcohol-free workplace.”⁶⁵ The court recognized that “a retaliatory discharge gives rise to a cause of action for breach of the duty of good faith and fair dealing.”⁶⁶ A similar fact pattern was again presented in 2001 when a collections officer for a public housing authority reported occurrences of mismanagement practices.⁶⁷ The court not only reiterated the holding in *Norcon*, but also expounded on the decision by outlining the requirements necessary to prove a retaliatory discharge claim.⁶⁸

⁶² *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 737-38 (Ala. 1987); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 749 (Idaho 1989).

⁶³ *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982) (The court stated, “[t]he employee, having [] faith that she would be treated fairly, then developed the peace of mind associated with job security.”). *See also* *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992); *Sheets v. Knight*, 779 P.2d 1000, 1001 (Or. 1989).

⁶⁴ *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (Alaska 1999).

⁶⁵ *Id.* at 166. The Plaintiff, Mary Kotowski, was formerly employed by Norcon, Inc. to assist in cleaning up the Exxon Valdez oil spill. While aboard a barge, she investigated employee conduct that violated Norcon’s policy which “prohibit[ed] the consumption of alcohol by anyone working on the spill or living in contract housing.” *Id.* at 161.

⁶⁶ *Id.* at 167. The court emphasized the immateriality of the fact that this was a private workplace policy, as opposed to a violation of law. The breach of the implied covenant of good faith and fair dealing was still available for the Plaintiff to use as a cause of action.

⁶⁷ *Lincoln v. Interior Reg’l Hous. Auth.*, 30 P.3d 582, 584 (Alaska 2001).

⁶⁸ *Id.* at 586. Noting the similarity between the requirements based on the Whistleblower Act and the requirements based on retaliatory discharge, the court stated the following elements for retaliatory

Another example of a public policy violation that can lead to a breach of the covenant is when an employer allegedly terminates an employee for refusing to yield to sexual harassment.⁶⁹ In recognizing this exception the court stated:

Our recognition of this compelling necessary exception in no way constitutes an overbroad application of the implied covenant of good faith and fair dealing that could thereby swallow the at-will employment doctrine and effectively end at-will employment. We merely recognize a common law cause of action that provides employees with an important weapon to advance Delaware's avowed policy to assure civilized conduct in the workplace.⁷⁰

C. Breach Where There Exists a Special Relationship of Trust and Reliance

In order to “serve to redress the inherent imbalance between corporations and individual employees,”⁷¹ Wyoming jurisprudence has evolved to encompass the recognition of the breach of the implied covenant of good faith and fair dealing. Jurisprudence involving the breach of the implied covenant of good faith and fair dealing requires that “[i]n order for a duty to arise, there must be a showing of a special relationship of trust and reliance between the employee seeking to recover and the employer.”⁷² According to the Supreme Court of Wyoming, evidence of a

discharge: 1) plaintiff engaged in a protected activity; 2) employer subjected the plaintiff to some adverse action such as termination; and 3) there exists a causal connection between the activity and the adverse action.

⁶⁹ Schuster v. Derocili, 775 A.2d 1029 (Del. 2001).

⁷⁰ *Id.* at 1039. For examples of other public policy exceptions, *see also* Wayte v. Rollins Int'l, Inc., 215 Cal. Rptr. 59 (Cal. Ct. App. 1985) (allowing exception for bad faith denial of medical benefits); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981) (finding a cause of action if public policy concerns are articulated); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (establishing an exception for termination motivated by bad faith and malice).

⁷¹ Garcia v. UniWyo Fed. Credit Union, 920 P.2d 642, 646 (Wyo. 1996).

⁷² Life Care Ctrs. of Am., Inc. v. Dexter, 65 P.3d 385, 394 (Wyo. 2003) *citing* Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 220 (Wyo. 1994). The issue of whether or not there exists a special relationship is a question of fact that must be decided by the trier of fact. Worley v. Wyo. Bottle Co., 1 P.3d 615, 624 (Wyo. 2000).

special relationship includes “separate consideration, common law, statutory rights, or rights accruing with longevity of service.”⁷³ In *Trabing v. Kinko’s, Inc.*,⁷⁴ the court stated:

With regard to longevity of service, this court has stated that the mere longevity of service is not sufficient to create the special relationship leading to tort remedy. “Usually, the special relationship . . . stems from a long term employment relationship coupled with a discharge calculated to avoid employer responsibilities to the employee, e.g., benefits or commissions.”⁷⁵

As the case law unfolds, the Wyoming court is gradually contouring the definition of “long term employment.” For example, the Wyoming Supreme Court found that a hospital employee, with thirty years of service, terminated in order to deny the employee a scheduled pay raise, constituted a genuine issue of material fact.⁷⁶ Subsequent cases have emerged in Wyoming whereby employment terms of eight

⁷³ *Life Care Ctrs. of Am., Inc.*, 65 P.3d at 394. The Plaintiff was employed as an activities director at Sheridan Nursing Center. *Id.* at 388. After six years of employment she was terminated. *Id.* She claimed that the termination was a breach of the implied covenant of good faith and fair dealing, arguing that her six years of service established the special relationship that was required. *Id.* at 394. The court, in refusing to hold the employer liable, stated that a breach only exists in “rare and exceptional cases” and pointed out that longevity of service alone was insufficient to constitute a special relationship. *Id.*

⁷⁴ *Trabing v. Kinko’s, Inc.*, 57 P.3d 1248, 1256 (Wyo. 2002) *citing* *VanLente v. Univ. of Wyo. Research Corp.*, 975 P.2d 594, 598 (Wyo. 1999).

⁷⁵ *Id. quoting Garcia*, 920 P.2d at 646. In *Trabing*, the employee had dedicated eight years to Kinko’s, Inc., working as a branch manager. The employee argued that a special relationship existed between the parties due to the additional consideration of being dedicated to outstanding customer service. In rejecting that a special relationship had been established, the court stated that dedication to customer service was “merely performing the duties of her job” as branch manager. *Id. quoting Worley*, 1 P.3d at 626.

⁷⁶ *Jewell v. N. Big Horn Hosp. Dist.*, 953 P.2d 135, 139 (Wyo. 1998). Former hospital employee argued that her thirty years of service coupled with a termination motivated to deny her a scheduled pay raise and other benefits would support her claim for a breach of implied covenant of good faith and fair dealing by establishing a special relationship. The court found that summary judgment was inappropriate and that the actual motivation for termination was a genuine issue of material fact. *Id.*

years⁷⁷ and six years⁷⁸ have been deemed to lack the special relationship requirement, primarily due to lack of evidence of a “discharge calculated to avoid employer responsibilities to the employee,” such as payment of benefits.⁷⁹

Separate consideration may provide additional evidence of the existence of a “special relationship,” according to the Supreme Court of Wyoming.⁸⁰ In defining the principle, the court stated, “a generally accepted definition of consideration is that a legal detriment has been bargained for and exchanged for a promise.”⁸¹

⁷⁷ *Trabing*, 57 P.3d at 1251.

⁷⁸ *Life Care Ctrs. of Am., Inc.*, 65 P.3d at 388.

⁷⁹ *Garcia*, 920 P.2d at 646.

⁸⁰ *Worley*, 1 P.3d at 625. “The rule that permanent employment arrangements are indefinite and hence unenforceable created serious inequities when the clear intent of the parties was to bind the employer. To correct this situation the courts recognized an exception to the rule when an employee gave extra consideration for the job.” *Id.* quoting J. Peter Shapiro & James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351 (1974). This extra consideration has been divided into two categories: 1) benefits to the employer such as surrender of tort claims, contributions to the business, and job training; and 2) special reliance by the employee, such as changing jobs, moving, and reliance induced by recruitment techniques. *Id.* The court continued by stating:

[A] contract for “permanent employment” will be construed to be terminable at the will of either party except in compelling circumstances, such as where the employee in effect purchases the permanent employment by giving a valuable consideration other than his customary daily services or otherwise giving up more than one normally gives when he agrees to take on new employment.

Id. quoting *Bussard v. Coll. of Saint Thomas, Inc.*, 200 N.W.2d 155, 161 (1972). The court concluded that Wyoming jurisprudence is consistent with the aforementioned definition of separate consideration. In addition, the court concluded that the analysis to be used in order to determine if separate consideration exists will be the same analysis that is used in determining if additional consideration exists to constitute an express contract as the court had previously discussed in *Wilder*, 868 P.2d at 211.

⁸¹ *Loghry v. Unicover Corp.*, 927 P.2d 706, 712 (Wyo. 1996) citing *Moorcroft State Bank v. Morel*, 701 P.2d 1159, 1161-62 (Wyo. 1985). The employee was discharged after turning over documents that implicated her supervisor as a violator of the trade secret policy. *Id.* at 709. The court stated, “detriment means giving up something which immediately prior thereto the promisee was privileged to keep.” *Id.* at 712. In this case the employee was required to turn over the company documents; therefore, the court concluded that there was no legal detriment and thus, did not establish a separate consideration. *Id.*

Although precisely defined, the standard has apparently been difficult for employees to establish. In one case, for example, a human resource manager contended that her employment relationship was “special” due to the “extremely sensitive human resource policy and employment matters.”⁸² In refusing to characterize this relationship as special, the court pointed out that the confidentiality and nature of the position were merely “inherent in the duties of a human resource manager.”⁸³

D. Longevity of Service

While longevity of service has emerged *as a factor* for most courts in the decision of whether or not to recognize a breach of the covenant of good faith and fair dealing,⁸⁴ length of employment serves as a validation *on its own* to constitute a breach in others.⁸⁵ One employee’s tenure proved to be sufficient to support a claim in *Flanigan v. Prudential Fed. Savings & Loan Assoc.*⁸⁶ In *Flanigan*, the court stated that “[r]espondent’s 28 years of employment by Prudential gave her a secure and objective basis for believing that, if her work was satisfactorily performed, her employment would continue.”⁸⁷ Therefore, the fact that the employee had been employed for 28 years was alone enough to support her claim for a breach of the implied covenant.⁸⁸

⁸² *VanLente*, 975 P.2d at 598.

⁸³ *Id.*

⁸⁴ *Trubing*, 57 P.3d at 1255-56 (listing the factors that give rise to a “special relationship”).

⁸⁵ *Flanigan v. Prudential Fed. Sav. & Loan Assoc.*, 720 P.2d 257, 261 (Mont. 1986).

⁸⁶ *Id.* at 262. The Plaintiff in this case was employed as a teller for twenty-eight years at which time she was terminated due to a reduction in work force. She sued her former employer for wrongful termination, arguing that the employer lacked a fair and honest reason for her discharge. The court recognized that the evidence supported the submission of the case to a jury.

⁸⁷ *Id.* at 262.

⁸⁸ *Id.*

E. Employer's Conduct Constitutes Fraud, Deceit, or Misrepresentation

Merrill v. Crothall-American, Inc.,⁸⁹ articulated the application of the covenant as it pertains to fraud, deceit, or misrepresentation. The court, in examining the conduct of the employer, held that an “aspect of fraud, deceit, or misrepresentation” must be present in order for the covenant to be considered breached.⁹⁰ The court further articulated such conduct by stating that, “[a]n employer acts in bad faith when it induces another to enter into an employment contract through actions, words, or the withholding of information, which is intentionally deceptive in some material way to the contract.”⁹¹ The employee in *Merrill* alleged that, although he was merely a “warm body” to fill the position until the employer could find a replacement that was better qualified, the employer intentionally misled him to believe that he had employment of an indefinite duration.⁹² In defeating the motion for summary judgment, the court recognized the presence of fraud in this situation.⁹³

In another case, the court analyzed a situation where an employer persuaded an employee to remain with the company, despite an offer from a competitor.⁹⁴ Approximately four months later, however, the employer terminated the employee.⁹⁵ The Supreme Court of Delaware stated, “the employer is liable for misrepresenting some important fact, most often the employer’s present intentions, and the employee relies thereon either to accept a new position or remain in a present one.”⁹⁶

⁸⁹ *Merrill v. Crothall-Am., Inc.*, 606 A.2d at 96.

⁹⁰ *Id.* at 101.

⁹¹ *Id.*

⁹² *Id.* at 102.

⁹³ *Id.* See also *Bailey v. City of Wilmington*, 766 A.2d 477 (Del. 2001). The Plaintiff, a police officer for the city, was terminated after violating several regulations. After a hearing, the city terminated his employment. The Plaintiff argued that the city manipulated the record, and thus, the procedure was improper. The court noted that the grounds of dismissal must be fraudulent as opposed to the procedure that the employer followed. Therefore, the Plaintiff failed to establish a breach of implied covenant of good faith and fair dealing.

⁹⁴ *Shebar v. Sanyo Bus. Sys. Corp.*, 526 A.2d 1144 (N.J. 1987), *affirmed in* 544 A.2d 377 (N.J. 1988).

⁹⁵ *Id.*

⁹⁶ *E. I. Dupont de Nemours and Co. v. Pressman*, 679 A.2d 436, 442 (Del. 1996).

3. RATIONALE OF JURISDICTIONS WHO DECLINE TO RECOGNIZE THE COVENANT OF GOOD FAITH AND FAIR DEALING IN AN AT-WILL CONTEXT

As this article demonstrates, the breadth of the application of the covenant of good faith and fair dealing in an employment context is multi-faceted. With an abundance of criticism by courts and commentators,⁹⁷ it is understandable that only a minority of jurisdictions recognize the implied covenant of good faith and fair dealing as an exception to the at-will rule.

One commentator argued that the perception that an employment relationship, absent an agreement to the contrary, will be presumed to be at will is incompatible with the implied covenant of good faith and fair dealing applied to that at-will relationship.⁹⁸ When the covenant is imposed in the employment relationship, the employer's absolute prerogative to terminate an employee for any reason or no reason at all, as defined by the at-will rule, dissipates. Interestingly, as one court noted, not only are the two principles irreconcilable, but also, "such a claim cannot be made by an at-will employee because there is no contract to provide a basis for the covenant."⁹⁹ In combating this argument, one court has stated that "[t]hese two concepts can coexist if careful attention is paid to the objectively reasonable expectations of the parties to a contract of employment at-will."¹⁰⁰ Currently, in refusing to recognize the covenant, the majority of jurisdictions are, "rejecting transplantation of the covenant of good faith and fair dealing into the foreign soil of the employment-at-will doctrine."¹⁰¹

⁹⁷ See *supra* note 56.

⁹⁸ Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1241 (Fall 1992). The author suggests that the employment at-will presumption and the covenant of good faith and fair dealing may not coexist harmoniously.

⁹⁹ Paul v. Howard Univ., 754 A.2d 297, 310 (D.C. 2000) *citing* Kerrigan v. Britches of Georgetowne, Inc., 705 A.2d 627 (D.C. 1997).

¹⁰⁰ *E. I. DuPont de Nemours and Co.*, 679 A.2d at 449.

¹⁰¹ *Breen*, 433 N.W.2d at 224, *citing* *Morris*, 738 P.2d at 851. Interestingly, in his dissent, Justice Sabers stated, "[i]t is the employment-at-will doctrine which is on foreign soil when it is superimposed onto

In rejecting the implied covenant argument, the majority of jurisdictions typically justify the decision by stating, as one court did:

An employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and this exception does not strike the proper balance. . . . [T]o imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of good faith.¹⁰²

In addition to rejections based on the above referenced reasons, refusal to recognize the covenant is also due to redundancy with other principles of law that already exist to remedy the situation. For example, when courts find that the employer's behavior contravenes public policy, the majority of jurisdictions allow an exception to the at-will rule, finding an additional claim based on the implied covenant superfluous.¹⁰³

Other principles of law that provide remedies are the notions of unjust enrichment and quasi-contract.¹⁰⁴ When an employee has been deprived a benefit, such as wages or commissions earned, remedies based on unjust enrichment and quasi-contracts become available for the employee. Arguably, the existence of the claim for a breach of the implied covenant is again superfluous.

In addition to the majority of jurisdictions not recognizing the covenant,¹⁰⁵ several authors writing commentaries on the subject agree that the covenant of good

an employment relationship of ten years where justified expectations of continued employment have arisen." *Id.*

¹⁰² *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984).

¹⁰³ *See supra* note 56; *see also supra* note 3.

¹⁰⁴ *See supra* note 3.

¹⁰⁵ Although some courts decline to adopt the covenant of good faith and fair dealing as an exception to the at-will rule, they also recognize that it may be a possibility in the future. For example, in *Trimble v. Wash. State Univ.*, 993 P.2d 259, 263 (Wash. 2000), the court stated, "Washington courts have declined to broadly adopt such a covenant in an at will contract. However, under some egregious circumstances an implied covenant of good faith may be appropriate." *Id. citing Willis v. Champlain Cable Corp.*, 748 P.2d 621 (Wash. 1988).

faith and fair dealing should not be applied to an at-will relationship. One critic, in recognizing this proposition, referred to the Covenant as a “miracle cure for employment law disputes”¹⁰⁶ whereby the “implied covenant analysis [should] be abandoned.”¹⁰⁷ Further, a Washington court suggested that the legislature would be a more appropriate entity to encroach upon the employment relationship.¹⁰⁸

CONCLUSION

Even though traditional notions of the employment at-will relationship continue in the majority of jurisdictions, courts have recently engaged in a closer judicial scrutiny of these notions than ever before. One exception that courts have recognized is a breach of the implied covenant of good faith and fair dealing. A review of the cases suggests that courts are struggling with the adoption of a precise and consistent definition. Definitions and applications of the exception have run the gamut from being pertinent in public policy cases to those involving “special relationships.” Undoubtedly, the debate will continue as to whether the judicial exception should be recognized. In the meantime, employers must be cognizant of stated specific rules and the potential for the implementation of new rules. The definitions and applications summarized in this article are intended to increase awareness of the current variable state of the exception and to provide clarification for practitioners and employers alike.

¹⁰⁶ See *supra* note 56.

¹⁰⁷ *Id.* at 359.

¹⁰⁸ *Thompson*, 685 P.2d at 1086. The court stated:

While an employer may agree to restrict or limit his right to discharge an employee, to imply such a restriction on that right from the existence of a contractual right, which, by its terms has no restrictions, is internally inconsistent. Such an intrusion into the employment relationship is merely a judicial substitute for collective bargaining which is more appropriately left to the legislative process.

Id. at 1086-87.