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PENETRATING DOCTRINAL CAMOUFLAGE:
UNDERSTANDING THE DEVELOPMENT OF
THE LAW OF WRONGFUL DISCHARGE

Cornelius J. Peck*

Abstract: American courts developed the employment-at-will doctrine during the post-
Civil War period of industrial and commercial expansion. Under that doctrine, either an
employer or an employee could terminate an employment contract for any reason, good or
bad. In the early 1980s, state supreme courts increasingly recognized exceptions to the
employment-at-will doctrine to provide greater job protection for employees. In creating
those exceptions, state courts have manipulated and stretched traditional legal doctrine to
camouflage their reformist program. But that camouflage which facilitated changes in the
law now often obscures the original reason for departing from the employment-at-will
d Doctrine. Some state courts, including the Supreme Court of Washington, have lost sight
of the original objective of providing adequate job protection and base their decisions on
doctrinal technicalities. The Author suggests that courts should abandon the camouflage
of traditional legal doctrine and give explicit recognition to a rule requiring just cause for
termination of employment.

A commonplace comment about Americans is that they describe
themselves in terms of the jobs they hold. The identification of personality with employment elevates employment to a very high ranking
among the non-economic interests valued by Americans. Employment is also of great importance to most people because, given current
means of production, it is necessary for their survival and determines the level of comfort and enjoyment at which they and their families
will live. Most Americans believe that government provides protection against the destruction of important economic and non-economic
interests, and it is a great surprise to many to learn that, at least until recently, employees have had no general protection from unjust or
arbitrary terminations of their employment.1

* Professor of Law, University of Washington. This Article elaborates on an earlier article Professor Peck wrote in 1979, predicting that by the end of this century American courts would no longer recognize the employment-at-will doctrine, Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 (1979). More recently, Professor Peck published a review of two major treatises on employee dismissal law, Peck, Book Review, 8 INDUS. REL. L.J. 263 (1986), updating his earlier comments.


1. A telephone survey conducted in Omaha, Nebraska, of 250 households (132 agreed to participate in the survey) produced results showing that most persons did not know an employer
From the latter part of the nineteenth century until quite recently, the employment contracts of most employees in the United States were terminable at the will of the employer. This general principle was known as the employment-at-will doctrine. It is (or was) an American creation. The doctrine provides that, absent some consideration other than the services to be performed, a contract of employment for an indefinite term is a contract terminable at the will of either party. An agreement that the employee will be compensated a designated amount on an annual, monthly, weekly, or daily basis is considered to fix only the rate of pay and not the duration of the employment. Pursuant to the doctrine, an employer can discharge an employee for any cause, no cause, or bad cause without liability. Likewise, employees can leave their employment at will and without notice or liability. Historically, however, the primary beneficiaries of the doctrine have been employers. Within the last decade, state supreme courts have made revisions and modifications of the employment-at-will doctrine. The thesis of this Article is that those courts did so because other developments in law gave new emphasis to the importance of Americans' interest in employment and demonstrated that the doctrine was an anachronism, unsuited to contemporary conditions.

As is a familiar phenomenon of common law development, many of the changes to the doctrine were accomplished by a camouflaged twisting and misuse of doctrinal principles. Unfortunately, as case law developed and precedents accumulated, many courts forgot why the revision of the law was undertaken, and became immersed in doctrinal arguments. As a consequence, they lost sight of their original objective to provide adequate protection for employees from unjust or arbitrary terminations of employment. The Supreme Court of Washington originally approached the task with some timidity, and the court in its recent decisions appears to have abandoned the goal of providing real job protection for employees.


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I. A BRIEF HISTORY OF THE EMPLOYMENT-AT-WILL DOCTRINE

English common law was not the source of the employment-at-will doctrine. To the contrary, by the time of Blackstone the English common law had evolved a rule that if the hiring of a servant was general it would be construed as a hiring for one year.3 No master could "put away his servant" during the one year term of employment "unless upon reasonable cause to be allowed by a justice of the peace."4 Nor could the master terminate the relationship at the end of the term "without a quarter's warning."5 Apprentices could be discharged "on reasonable cause" upon the request of the master at the quarter session courts.6 Laborers hired by the day or week who did not live in the master's house apparently did not enjoy this job security. But during the nineteenth century the English common law evolved the rule that, unless otherwise specifically agreed upon, employment was terminable only after notice fixed by the custom of the trade, or after a reasonable time if there was no custom, unless there was cause for summary dismissal.7

A. Development of the Employment-At-Will Doctrine in the United States

During the early colonial period, American law applicable to employment contracts generally followed English common law. An important difference was that, unlike English courts, American courts did not apply criminal law to employee breaches of contract. Instead, employer refusals to give an "honorable discharge" prior to one year of service, wage withholdings, and a functioning system of blacklisting enforced the contract for employers, and rendered the annual contract of employment of little value to employees. After 1850, employers in the New England textile industry asserted their power to dismiss at a moment's notice, while still requiring employees to give notice before they quit.8 American law was in a confused and uncertain state and seldom used.

3. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (21st ed. 1847).
4. Id.
5. Id.
6. Id. at 426.

Development of the employment-at-will doctrine in America is frequently attributed to the publication in 1877 of H. Wood's treatise on the law of master and servant. In that treatise, Wood said:

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

Recently, critics have pointed out that the cases Wood cited did not support the proposition he stated, but it is wrong to attribute development of the doctrine entirely to his erroneous statement. David Dudley Field and Alexander Bradford set out a similar rule for their proposed New York Civil Code, which later was adopted as the California Civil Code in 1872. Section 1999 of the California Code stated: "An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title." As with Wood's treatise, none of the cases cited supported the codified proposition.

Despite their errors, both statements established a rule well suited to employer needs in America's developing industrial and commercial society. The courts readily adopted the rule, preferring it over a rule presuming an annual hiring or a rule presuming employment for the period stated for the rate of pay. In the United States the "collar line" did not have the significance it had in England, and employment-at-will deprived office clerical employees of job protection which their counterparts in England still enjoyed.

With the passage of time, the employment-at-will doctrine achieved more than acceptance. The United States Supreme Court gave it constitutional protection in decisions invalidating federal and state stat-

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10. Id. at 272.
15. Id. at 28–31.
16. Id. at 34–35.
utes enacted to protect membership in labor unions. The doctrine never found a place in the *Restatement of Contracts*, and Corbin insisted that the question of the duration of a contract of employment was "one of factual interpretation, and very frequently . . . a jury question." Williston, however, accepted the concept that a contract not for a fixed term was terminable at will, and the *Restatement of Agency* explained that a contract of employment for a salary proportion to units of time does not indicate that the contract is to continue for the stated period of time. The pervasiveness of the doctrine is demonstrated in an *American Law Reports* note of 1975, which summarized numerous American employment cases and concluded that: "few legal principles would seem to be better settled than the broad generality that an employment for an indefinite term is regarded as an employment-at-will which may be terminated at any time by either party for any reason or for no reason at all."

**B. Beginnings of the Rejection of the Doctrine**

As has happened in other contexts, decisional sports established a basis for revision of the employment-at-will doctrine. The first, but then unrecognized, break in the employment-at-will doctrine was made in 1959 by the Court of Appeals of California in *Petermann v. International Brotherhood of Teamsters Local 396*. In *Petermann*, the plaintiff alleged that he was discharged from his employment as a union business representative because he disregarded orders to commit perjury at a state legislative committee hearing. The court recognized that the employment-at-will doctrine prevailed in California, but concluded that a discharge for refusing to commit perjury conflicted with public policy of such importance that the plaintiff was entitled to a judicial remedy. So firmly established was the employment-at-will

22. For example, it is possible that the doctrine of res ipsa loquitur would not have developed if it were not for the fact that Baron Pollock's knowledge of Latin led him to use the phrase during the course of an argument about the sufficiency of a circumstantial evidence case. W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 243-44 (5th ed. 1984).
doctrine that Petermann was viewed as a sport rather than as general modification of employment law.\textsuperscript{24}

Five years later, Professor Blumrosen of Rutgers University Law School demonstrated that Wood's statement of the employment-at-will doctrine was not supported by the cases he cited.\textsuperscript{25} In the same article, Professor Blumrosen also pointed out that the United States' legal system had developed a broad array of statutory and other restraints on employer power to discharge employees.\textsuperscript{26} In 1967, Professor Larry Blades wrote what has become a leading and frequently cited article calling for the development of a tort remedy to protect employees from abusive exercise of power by employers.\textsuperscript{27}

In 1973, the Supreme Court of Indiana concluded that the discharge of an employee for filing a worker's compensation claim was actionable, treating the discharge as a statutorily prohibited device for defeating claims.\textsuperscript{28} With such a specific statutory base the decision did not have the appearance of a broad attack on the employment-at-will doctrine.

\textbf{C. Early Public Policy and Tort Law Limitations}

It was not until 1974 that the Petermann decision was judicially extended to a general limitation on employer power to discharge. In \textit{Monge v. Beebe Rubber Co.},\textsuperscript{29} the plaintiff, a married woman, alleged and presented evidence to show that she was discharged because she refused to go out with her foreman after completing work on the night shift. The New Hampshire Supreme Court, citing Petermann as well as Professors Blades and Blumrosen, concluded that it could not ignore "the new climate prevailing generally in the relationship of employer and employee."\textsuperscript{30} It held that "a termination by the employer of a contract of employment-at-will which is motivated by

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\textsuperscript{24} Petermann was noted by only two law reviews during the year following the case's publication. Comment, \textit{Contracts—Termination of Employment at Will—Public Policy May Modify Employer's Right to Discharge: Petermann v. International Brotherhood of Teamsters Local 396, 344 P.2d 25 (Cal. 1959), 14 Rutgers L. Rev. 624 (1960); Note, \textit{Contracts—Termination—Employment for Indefinite Duration Not Terminable for Refusal of Employee to Commit Perjury, 14 Vand. L. Rev. 397 (1960). The author of the Vanderbilt Law Review Note doubted that the decision would be extended to other employment problems and questioned whether it would even be followed in other similar cases. Id. at 401.}

\textsuperscript{25} Blumrosen, \textit{ supra} note 11.

\textsuperscript{26} Id.


\textsuperscript{29} 114 N.H. 130, 316 A.2d 549 (1974).

\textsuperscript{30} \textit{Id.} at 551.
bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract.\textsuperscript{31} Similarly, in 1975, the Supreme Court of Oregon held that a discharge from employment-at-will for serving on jury duty was a prima facie tort for which damages should be awarded because of the community interest in encouraging jury service.\textsuperscript{32}

In 1978, the Supreme Court of West Virginia recognized a tort basis for recovery by an at-will employee in Harless v. First National Bank.\textsuperscript{33} The court held that an at-will employee could recover damages, including damages for emotional distress, for a discharge for reporting intentional violations of consumer protection laws.\textsuperscript{34} In 1979, the Supreme Court of Illinois held actionable on a tort basis a discharge for filing a worker’s compensation claim, rejecting the employer’s argument that such a recovery could be had only if the worker’s compensation act made provision for such a suit.\textsuperscript{35}

In 1980, the California Supreme Court ratified the Petermann holding in Tameny v. Atlantic Richfield Co.\textsuperscript{36} The plaintiff in Tameny alleged that he had been discharged for refusing to participate in an illegal scheme to fix retail gasoline prices.\textsuperscript{37} The court rejected the employer’s argument that an action for wrongful discharge sounds only in contract, in which case the “common law” terminable at-will rule codified in section 2922 of the California Labor Code would have controlled.\textsuperscript{38} The court based plaintiff’s right to recover on tort law, accepting the proposition that an employer’s power to terminate employment may be limited by express statutory objectives or firmly established principles of public policy.\textsuperscript{39}

\section*{D. Early Contractual Limitations}

Contractual limitations of an employer’s power to discharge at will developed in two ways. One was recognition that an implied covenant of good faith in employment contracts imposed such a limitation. The other was relaxation of the evidence required to establish that an enforceable promise had been made and accepted.

\begin{itemize}
\item \textbf{31.} Id.
\item \textbf{33.} 162 W. Va. 116, 246 S.E.2d 270 (1978).
\item \textbf{34.} 246 S.E.2d at 276.
\item \textbf{35.} Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 358 (1978).
\item \textbf{36.} 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
\item \textbf{37.} 610 P.2d at 1330–31.
\item \textbf{38.} Id. at 1334.
\item \textbf{39.} Id. at 1336.
\end{itemize}
In 1977, in *Fortune v. National Cash Register Co.*, the Supreme Judicial Court of Massachusetts held that an employer was liable under an implied covenant of good faith and fair dealing of an employment contract when it discharged the plaintiff salesman in order to avoid payment of a commission on a sale he had made. The employer's bad faith attempt to deprive the employee of an earned commission had the appearance of fraud. Indeed, the implied covenant resembles tort law in that its obligations are derived not from the negotiations and agreement reached by the parties, but are imposed by general law on those in contractual relationships, much as tort law imposes other obligations on the parties to various relationships.

In 1980, the Supreme Court of Michigan's decision in *Toussaint v. Blue Cross & Blue Shield* dramatically developed contract law applicable to negotiated agreements. In that case, the Michigan Court held that an employee's expectations grounded on statements in an employer's manual of personnel policies were contractually enforceable even though no pre-employment negotiations took place and there was no meeting of the parties' minds on the subject. The court reasoned it was enough that the employer chose to create an environment in which employees believed that the employer's policies and practices were fair and applied consistently and uniformly. The court also held that employer statements that an employee would be with the company "as long as I did my job" or that he would not be discharged if he was "doing the job" could be found by a jury to have created an agreement for a contract of employment for an indefinite term, but terminable only for cause. The Michigan court's discussion of cases in which contracts for "permanent employment" were held to be terminable at will indicates that in earlier years the statements in *Toussaint* would have been denied contractual significance for being too vague and indefinite. A fair appraisal of the decision leads to the conclusion that the court stretched both the principle of estoppel and the rules of evidence to provide job protection for the employees.

42. 408 Mich. 579, 292 N.W.2d 880 (1980).
43. 292 N.W.2d at 892.
44. Id.
45. Id. at 890.
46. Id. at 888–90; see also Stieber & Baines, *The Michigan Experience With Employment-At-Will*, 67 Neb. L. Rev. 140, 144–46 (1988); Annotation, supra note 21.
E. Reasons for Judicially Imposed Limits on Employer Power

As this survey of developments demonstrates, by the beginning of the 1980s, a number of state supreme courts had undertaken a revision of the employment-at-will doctrine. By undertaking such a revision, these courts manifested a willingness to curtail the power the doctrine previously gave to employers. What caused this undertaking? Surely the answer is not that long established legal doctrines suddenly developed a previously undetected potency and malleability. The doctrines were revised to achieve a balance in the relationship between employers and employees better suited to the conditions of contemporary society.

The primary cause of this judicial activism was an understanding derived by judges from their experience in construing and enforcing a host of statutes prohibiting discharges from employment for a variety of reasons. Those statutes evidenced a legislative judgment that employee interests in employment deserved protection from the unhindered power of employers to discharge, and that the interests of society would be better served by limiting that power even though it encumbered the freedom of employers to direct and manage businesses. Writings of academics questioning and attacking the employment-at-will doctrine played a supportive role.47 Some of those writings persuasively demonstrated that law in the United States had failed to develop job protection for employees to the level enjoyed by employees in every other developed country and in many underdeveloped or third world countries.48 And developments of constitutional law that had produced job protections for government employees made it difficult as a practical matter to justify the arbitrary and capri-

47. In addition to the articles cited supra notes 11 and 26, see Summers, Individual Protection Against Unjust Dismissal: Time For A Statute, 62 VA. L. Rev. 481 (1976).

48. See Weyand, Present Status of Individual Employee Rights, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 171, 209 (T. Christensen ed. 1970). Weyand summarized a report of the International Labor Organization based on a study conducted in 1962. Statutory regulation of termination of employment existed in 76 countries, including Belgium, Bolivia, Brazil, France, Germany, Japan, Spain, Switzerland, Turkey, the USSR, the United Arab Republic, and Yugoslavia.


See also Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310 (1985); Summers, supra note 47, at 508–19 (describes the protections provided by the laws of France, Germany, Great Britain, and Sweden).
cious action of private employers tolerated by the employment-at-will doctrine.49

Title VII of the Civil Rights Act of 196450 made it unlawful to discharge any individual because of that individual's race, color, religion, sex, or national origin. The Federal Age Discrimination in Employment Act51 also gave protection to persons between the ages of forty and seventy from discharge because of their age and unproven performance deficiencies assumed to accompany age. States and some municipalities adopted even more comprehensive laws prohibiting discrimination in employment on the basis of still other attributes, such as handicap or marital status.52

Since 1935, the National Labor Relations Act (NLRA) has prohibited discrimination against employees to encourage or discourage membership in labor unions.53 Earlier, the Railway Labor Act (RLA) prohibited such discrimination against employees covered by that Act.54 In addition, many other statutes conferred job protection on special groups of employees or from specialized types of employer actions.55

Judicial and administrative developments under the NLRA and the RLA extended the protection of organized employees considerably beyond the prohibition against discharge or discipline because of union activities. The Supreme Court found in those statutes a duty of fair representation that runs from a union to all employees in a repre-

49. For example, in Toussaint the Michigan Supreme Court referred to and relied on the United States Supreme Court's decision in Perry v. Sindermann, 408 U.S. 593 (1972) (lack of a contractual or tenure right to re-employment did not defeat state college professor's claim that non-renewal of his contract violated his free speech rights under the first and fourteenth amendments).


55. For example, the Selective Service Act of 1940 required reinstatement of veterans to their former positions of employment after discharge from military service, specifically providing that a person so reinstated "shall not be discharged from such position without cause within one year after such restoration." Selective Training and Service Act of 1940, ch. 720, § 8(c), 54 Stat. 885, 890 (codified at 50 U.S.C. app. §§ 301–318 (1988)). The Consumer Credit Protection Act, Pub. L. No. 90-321, § 304(a), 82 Stat. 146, 163 (1968) (codified as amended at 15 U.S.C. § 1674(a)), provides protection against discharge because of a wage garnishment "for any one indebtedness."
sented bargaining unit. Breach of the duty of fair representation constitutes an unfair labor practice under the NLRA, with the consequence that an aggrieved employee is able to obtain the investigatory and legal services of the NLRB. This is of immediate significance when the claimed breach of the duty of fair representation is a failure to process a grievance concerning discharge or discipline. Both the judicial remedy of a law suit against the employer and the union, and the administrative remedy of a NLRB proceeding are available if there has been a breach of the duty of fair representation.

In the 1970s, somewhat less than twenty-eight percent of the non-agricultural work force was employed pursuant to the terms of a collective bargaining agreement, and approximately ninety-five percent of those agreements contained grievance and arbitration provisions. Employers had the burden of proving just cause for discharge or discipline in cases that reached the arbitration level. Judges who enforced awards against employers for alleged improper discharge or decided cases against unions for breach of the duty of fair representation must have been impressed that the power of government was used to ensure that employees receive from unions the full protection provided by a collective bargaining agreement. For organized employees, the law ensured that discharges be only for just cause, but unorganized employees were subject to employer power that could be exercised in an arbitrary or unfair manner.

United States employees and most state government employees also enjoy substantial protections against unjust discharge from employment. In 1976, the 2,879,000 civilian employees of the federal government constituted about three percent of all persons employed in the United States. Over ninety percent of these federal employees are tenured and enjoy the procedural safeguards that Congress and the then Civil Service Commission provided against "adverse action" taken by supervisors. In 1976, there were 12,170,000 state and local employees.

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58. Id.
government employees, of whom 3,340,000 were state employees.\textsuperscript{64} Reliable information is not available on how many of these have civil service type job protection, but a conservative estimate would be that more than half are so protected.

It thus appears that at the end of the 1970s, between thirty-five and forty percent of the non-agricultural work force had substantial specific protection against discharge without cause. In addition, while Title VII and other statutes prohibiting discrimination on the basis of race, sex, national origin, or religion apply directly only to discharges made on the forbidden basis, the effect of the statutes is to confer a much more comprehensive protection. Employers have recognized that a discharge of a member of a protected class made without just cause is very susceptible to characterization as a discharge for the prohibited reason.\textsuperscript{65} They therefore have become much more careful to ensure that a discharge of a member of a protected class is a discharge for just cause. First line supervisors are unlikely to have the power to discharge; their recommendations for discharge will be reviewed to ensure that incidents of unsatisfactory behavior are properly documented, followed by warnings, and that a valid substantive reason for termination of employment exists. The care exercised by employers must have been obvious to judges considering employer defenses to charges by employees of prohibited discrimination.

As indicated above, the law governing termination of employment offers employees in the United States far less protection than the law of other developed countries.\textsuperscript{66} Furthermore, unjust discharge is a major phenomenon of employment in the United States. Professor Clyde Summers of the University of Pennsylvania Law School estimates that American employers unfairly terminate approximately 200,000 employees every year; and Professor Jack Steiber of Michigan State School of Labor and Industrial Relations "conservatively" estimates that each year 50,000 employees would be able to get their jobs.

\textsuperscript{64} \textit{Statistical Abstract}, \textit{supra} note 62, at 306, table 489.

\textsuperscript{65} An applicant for employment establishes a prima facie case of discrimination under Title VII by showing that: (i) he belongs to a racial minority; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications he was rejected; and (iv) after his rejection the position remained open and the employer continued to seek applicants from persons of his qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If a prima facie case is established, the burden then shifts to the defendant to articulate some legitimate non-discriminatory reason for the rejection. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–55 (1981). Lower courts have developed analogous models for other types of employment discrimination, such as discharge or failure to promote. \textit{See, e.g.,} Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981).

\textsuperscript{66} \textit{See supra} note 48.
back if an appropriate remedy existed to appeal a discharge. My own estimate, derived from Federal Mediation and Conciliation Service and the American Arbitration Association statistics, is that there would be as many as 300,000 claims of unjust discharge made every year if the standards applicable to discharge cases in the unionized sector of United States employment were applicable to the non-union sector. After settlement negotiations, 12,000 to 15,000 of those claims would proceed to trial or arbitration.

Accepting my calculations for the purposes of argument, Professors Freed and Polsby estimate that the probability of an employee who is not protected by some form of just cause regime being unfairly disciplined or discharged during a year is .5769%. From this, Freed and Polsby concluded that the cost of providing job protection is too great. That probability, however, turns into more than a five percent...
chance over a period of ten years. Surely, if one identified a product that caused cancer in five percent of employees within a ten-year period, that product would be banned from industrial use.

Judges hearing cases of alleged discrimination in violation of statutes must have become impressed with the frequency with which employers discharge employees for reasons unrelated to the sound operation of their business. They must also have noticed the frequent legislative judgments that the interests of employees in continued employment outweigh the interests of employers in unfettered power to terminate employment. And they must have wondered why only special groups or classes of employees deserved protection against arbitrary, capricious, or simply unjustified decisions by supervisors to discharge an employee. Indeed, it began to appear that only white males under the age of forty lacked some kind of job protection; and the question must have arisen of why it was just to protect employees from decisions based on arbitrary factors of race, sex, national origin, or religion, without providing protection against decisions that were equally arbitrary because they were not based on relevant factors of job performance and work needs.

Thoughts such as those outlined above gave rise to what is sometimes called the erosion of the employment-at-will doctrine, and at other times referred to as the provision of job protection. As suggested above, doctrinal principles were not suddenly infused with new strength from some judicial reservoir. Rather, judges modified those doctrinal principles and put them to use by conferring new and greater protection on the employment interest. The process began because judges became convinced that the employment-at-will doctrine as previously applied no longer was suitable to the conditions of contemporary society.

Thus, in the leading decision of Monge v. Beebe Rubber Co., the New Hampshire Court said:

The employer has long ruled the workplace with an iron hand by reason of the prevailing common-law rule that such a hiring is presumed to be at will and terminable at any time by either party. The law governing the relations between employer and employee has evolved over the years to reflect changing legal, social and economic conditions.

empirical data establishes, the setting of minimal terms of employment contracts, such as a requirement of just cause for discharge, could receive very powerful support from economic analysis. Id.

In all employment contracts, whether at will or for a definite term, the 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 the public's interest in maintaining a proper balance between the two.\(^{71}\)

In the earlier California case of *Petermann v. International Brotherhood of Teamsters Local 396*\(^ {72}\) the court supplemented its public policy rationale for invalidating the discharge with the observation:

When one, who has been employed for such time as his services are satisfactory, is discharged it is "well settled that the employer must act in good faith; and, where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury."\(^ {73}\)

In 1980, the Supreme Court of New Jersey said:

In the last century, the common law developed in a laissez-faire climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an employee at will . . . . The twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.\(^ {74}\)

The Illinois Supreme Court said in reviewing the history of the employment-at-will doctrine that: "[i]t 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 earn-

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71. 316 A.2d at 551 (emphasis added).
73. 344 P.2d at 28 (citations omitted).
74. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505, 509 (1980). More recently, the New Jersey Supreme Court said:

No longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee. Instead, as Justice Pollock so effectively demonstrated [in *Pierce*], this Court was no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest and the extent to which our deference to one or the other served or diserved the needs of society as presently understood.

ing a livelihood, and society's interest in seeing its public policies carried out.\footnote{Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876, 878 (1981) (emphasis added).}

More recently, the Court of Appeals of North Carolina said in its review of the erosion of employment-at-will: "[c]ourts have begun to respond to a perceived need to protect non-contract employees from abusive practices by the employer."\footnote{Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818, 824, cert. denied, 314 N.C. 331, 333 S.E.2d 490 (1985).}

Such an undertaking by the judiciary is in accord with the finest common law traditions. Revision or overturning of judicially made rules is not an usurpation of legislative powers. The judiciary has made comparable changes in tort law in the areas of products liability, responsibilities of the medical profession, the effect of contributory negligence in tort actions, land occupiers' liability, sovereign immunity, charitable immunity, interspousal and parental immunity, liability for causing emotional distress, and liability for purely economic losses.\footnote{Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1, 13-24 (1983).} The judiciary engrafted the duty of fair representation of unions onto the RLA and the NLRA, and the judiciary also established arbitration as a king pin of our national policy governing the relationship between employers and unions.\footnote{Id. at 31-37.}

Courts have also played a creative role in the development of family law, as, for example, in the recognition of "palimony" in response to changed life styles.\footnote{Id. at 40-42.} These types of activity pose no threat to representational democracy so long as the courts respect a legislative response when the judicial activity serves as a catalyst for legislative consideration of problems previously overlooked by legislatures.

II. CURRENT THEORIES OF RECOVERY FOR WRONGFUL DISCHARGE

Although courts have been willing to undertake the task of revising employment law to provide job protection for employees, they have been unwilling to do it by establishing a new and comprehensive rule that an employer must have just cause for terminating employment. Instead, courts prefer to use the camouflage of the terminology of familiar doctrines or principles of law, stretching and misshaping...
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those doctrines or principles. If the terminology is familiar, the substantive change receives less attention. The courts have used the doctrines and principles found in both contract and tort law to revise employment law.

A. Recent Developments in Contract Law

Recent changes in employment contract law fall into two categories: (1) relaxation of the evidentiary requirements for establishing that the employment contract precluded discharges other than for cause, and (2) application of an implied covenant of good faith and fair dealing to employment contracts. The changes have provided protection for employees in the cases in which they were developed, but that protection is limited if courts permit employers to insert disclaimers of contractual obligation. In particular, allowing employers to insert disclaimers conflicts with the recognition of an implied covenant of good faith and fair dealing. Indeed, if the covenant is considered to require employer justification for discharge on the basis of business or operational needs, its recognition could produce a requirement of just cause for termination of employment. Recognition of disclaimers ignores the reasons for the changes made in contract law.

1. Loosening the Evidentiary Requirements

The changed evidentiary requirements for establishing that an employment contract precludes discharges other than for cause are exemplified in the decision of the Supreme Court of Michigan in Toussaint v. Blue Cross & Blue Shield. When he inquired about job security in a pre-employment interview, Toussaint was told that he would

80. Compare the development of strict liability for defective products. For years the courts circumvented the common law requirement of privity of contract with fictions of warranties that ran with the product, agencies to make purchases for family and members of the household, and "inherently dangerous" products until Cardozo produced his famous opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Food and drink and products for intimate bodily contact were distinguished as products for which it would not be necessary to establish negligence to recover for a defect. Res ipsa loquitur was stretched to establish negligence of manufacturers despite subsequent handling by others prior to delivery to the injured consumer. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 438–39 (1944). Ultimately, it took the courage and leadership of the late Chief Justice Traynor of California to state frankly in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), that there was a new strict tort liability for defective products. See Peck, supra note 77, at 14.

81. The author proposes job protection against discharges allegedly for causes other than economic considerations. It would not, therefore, provide protection against layoffs or termination of employment because of recessions or declines in the employer's business.

82. 408 Mich. 579, 292 N.W.2d 880 (1980).
be with the company "as long as I did my job." The other plaintiff, who had concerns about a potential conflict with his immediate supervisor, was told that if he was "doing the job" he would not be discharged. In addition, when Toussaint inquired about job security on the day of his hire, he was handed a "Supervisory Manual" in a three ring, looseleaf binder consisting of 250 pages covering eleven categories of employment policies, one of which related to terminations. The manual made no reference to Toussaint, his job description, or his compensation, and was not signed by him or a management representative. It thus lacked the detail one would expect in an individual contract of employment. Nevertheless, four of the seven justices of the court held that the oral assurances and receipt of the manual were sufficient evidence to support the juries' conclusions that there were oral or unwritten contracts that the plaintiffs would be discharged from employment only for cause.

In *Pugh v. See's Candies, Inc.*, the California Court of Appeals concluded that there could be an implied-in-fact promise for some form of continued employment on the basis of the personnel policies or practices of an employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee was engaged. No specific promise, written or oral, that discharge would only be for cause was required to provide job protection. Recognition that this evidence could establish the existence of an actual agreement between the parties requiring good cause for termination of plaintiff's employment obviously was less novel than recognition of a new rule requiring just cause for termination of employment. But, by making the question a factual issue for the jury to decide, the court made it more difficult for anyone to accuse it of judicial activism.

Earlier, in *Cleary v. American Airlines*, a different district of the California Court of Appeals had held that a contractual protection against discharge without cause could be derived from the employee's long service and the expressed policy of the employer. No express agreement, oral or written, to that effect was required. The length of

83. 292 N.W.2d at 890.
84. *Id.* at 904-06 (Ryan, J., dissenting).
85. *Id.* at 885.
87. 171 Cal. Rptr. at 927.
89. 168 Cal. Rptr. at 729.
service and the employer's expressed policy created a form of estoppel against discharging an employee without just cause.90

In 1983, the Supreme Court of Minnesota was equally relaxed in its requirements of the evidence necessary to present a jury question of whether an oral contract of employment for an indefinite term could be modified by the employer's subsequent issuance of an employee handbook which discussed, among numerous other things, job security and discipline.91 The court affirmed a jury verdict in favor of an employee who had been discharged without observance of the procedures set out in the handbook.92

In 1985, the Supreme Court of New Jersey decided Woolley v. Hoff- man-La Roche, Inc.93 After noting that the principles of contract law applicable to long-term employment contracts had no relevancy in a case involving a policy manual,94 the court concluded that the job security provisions in a manual constituted an unilateral offer which an employee accepted by continuing to work.95 Employee reliance upon those provisions is to be presumed, with the consequence of employer responsibility, even though there is no proof that the employee read the manual or relied upon it in continuing his or her work.96

The significant change in standards for determining whether a contract of employment is terminable without cause is made apparent by comparing successive annotations in American Law Reports. A previously quoted 1975 annotation states:

Despite its sometimes harsh operation and the obvious opportunities for abuse it affords an unscrupulous employer, few legal principles would seem to be better settled than the broad generality that an employment contract for an indefinite term is regarded as an employment at will which may be terminated at any time by either party for any reason or for no reason at all.97

A 1982 annotation states:

As to the employment contract, some courts have been willing to recognize an obligation on the part of an employer not to terminate an

90. Id.
92. Id. at 631.
94. 491 A.2d at 1263.
95. Id. at 1267.
96. Id. at 1268 n.10. The lack of detail concerning other terms of employment—its duration, wages, precise service to be rendered, hours of work—were held not to prevent enforcement of the job security provision. Id. at 1269.
97. Annotation, supra note 21.
employee for an indefinite term arbitrarily where a policy or program on the part of the employer is claimed to have restricted the employer's traditional right of termination at will.\textsuperscript{98}

2. Disclaimers as a Limitation on Contract Theory

A contract theory for job protection has limitations because employers may specifically provide in application forms or other employment documents that employment is at will or that policy statements in a personnel manual have no contractual significance and are not \textit{guarantees} of treatment pursuant to those general policies stated. Courts have been willing to give effect to such employer disclaimers. In \textit{Reid v. Sears, Roebuck & Co.},\textsuperscript{99} the employee had signed an application for employment which provided:

\begin{quote}
In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.\textsuperscript{100}
\end{quote}

The Sixth Circuit held that because the clause governed termination of employment there could not be an implied contractual provision covering the same subject.\textsuperscript{101}

More importantly, the Supreme Court of Michigan later held that an employer that had not expressly reserved the right to discharge at will might unilaterally change its policy to one of termination-at-will, provided it gave the affected employees reasonable notice of the policy change.\textsuperscript{102} The court explained that, under \textit{Toussaint}, written personnel policies are not enforceable because they have been offered and accepted as unilateral contracts but because of the benefit the employer derives from such a policy. If the employer changes its policy to at-will employment, it loses the benefit of work environment of assured employees. The court concluded that once the employer loses


\textsuperscript{99} 790 F.2d 453 (6th Cir. 1986).

\textsuperscript{100} \textit{Id}. at 456.

\textsuperscript{101} \textit{Id}. at 462.

\textsuperscript{102} \textit{In re} Certified Question, 432 Mich. 438, 443 N.W.2d 112 (1989).
that benefit, there is no longer a reason to enforce a discharge-for-cause policy.103

Other courts have enforced disclaimer provisions in employment manuals.104 This approach is sound if a court considers the problem before it to be simply a matter of what law should be applied to a contract made by parties who enjoy equal bargaining power. If, however, the recent revisions of the employment-at-will doctrine were prompted by recognition that employees do not enjoy equal bargaining power with employers and a conviction that they deserve legal protection from arbitrary and unjust loss of employment, giving effect to disclaimers is inconsistent with the undertaking. Whether an employee who received oral assurances of job security gave consideration in addition to performance of services, or whether the manual should be viewed as an offer of a unilateral contract, are purely academic. They are so far from the forces behind revisions of employment law that they should be ignored in making that revision.105

The view that enforcing disclaimers in employment contracts is bad policy has gained acceptance by the National Conference of Commissioners on Uniform State Laws. Section 4(b) of the current draft of the Uniform Employment Termination Act permits an agreement to terminate the employment of an employee without good cause only if that agreement provides for severance payments for periods fixed by the employee's length of service.106

3. An Implied Covenant of Good Faith and Fair Dealing

According to one tabulation, courts in eighteen states indicate that they will not recognize the covenant of good faith and fair dealing in employment contracts, whereas only twelve states indicate that they will recognize the covenant.107 Those courts recognizing the applicability of the covenant to employment contracts find support in the

103. 443 N.W.2d at 119.
107. State Rulings Chart, 9A Lab. Rel. Rep. (BNA) 505:51–52 (Aug. 1989). Professor St. Antoine, a highly respected authority on the subject of unjust discharge, suggests that the traditional contract doctrine of good faith and fair dealing has not been utilized as a catch-all protection against arbitrary conduct on the part of a contracting person. Therefore, the doctrine
Restatement of Contracts. Section 205 of the Restatement of Contracts (Second) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." The applicability of the section to at-will employment contracts is supported by the Reporter's Notes to section 205, in which the first case cited is *Fortune v. National Cash Register Co.* As the notes of the restatement Reporter indicate, in that case the Supreme Court of Massachusetts applied an implied covenant of good faith to an employment contract terminable at will.

Recognizing the implied covenant could provide very comprehensive and effective job protection if the covenant were held to require the employer to have "good cause" or "just cause" for termination of employment. In that case, the implied covenant could establish for all employees a standard of protection equal to that enjoyed by persons employed under the terms of collective bargaining agreements. Such a holding would also permit an employer to obtain services of the quality and type that were justifiably expected at the establishment of the employment relationship. If, however, the covenant requires only that the employer have a subjective good faith belief that the appropriate discipline for a supposed infraction was termination of employment, errors of supervision are tolerated despite the harm imposed on the employee, and the protection provided for employees is much reduced.

Most courts recognizing an implied covenant of good faith and fair dealing do not hold employers to the requirement of establishing good cause for terminating employment. The early decisions in *Petermann v. International Brotherhood of Teamsters Local 396* and *Monge v. Beebe Rubber Co.* were cases in which the trier of fact could find that the terminations were based on improper reasons that constituted bad faith. The jury found that the attempted deprivation of commissions on sales in *Fortune* was in bad faith. Two of the early wrongful discharge cases decided by California Courts of Appeals did not

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108. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); see also U.C.C. § 1-203, 1 U.L.A. 109 (1989) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

109. 373 Mass. 96, 364 N.E.2d 1251 (1977); see supra text accompanying notes 40-41 (discussing *Fortune*).

110. 364 N.E.2d at 1255-56.

111. 174 Cal. App. 2d 184, 344 P.2d 25 (1959); see supra text accompanying notes 23-24 (discussing *Petermann*).

112. 316 A.2d 549 (1974); see supra text accompanying notes 29-31 (discussing *Monge*).

113. 364 N.E.2d at 1255.
require the employers to establish just cause for the terminations, but instead placed the burden of proving unjust termination on the employee, recognizing as a defense the employer's proof of good faith and fair dealing. 114 Other courts, giving employees even less protection, have held that the covenant does not protect employees from "no cause" terminations and gives protection only against discharges that violate public policy. 115 Decisions limiting the application of the covenant do not expand the protection enjoyed by employees.

Fortunately, some courts have taken a less limited view of the covenant. For example, the Supreme Court of Montana held in 1982 that proof that the employee was discharged without warning and an opportunity for hearing created an issue for the jury as to whether the employer breached the covenant. 116 Two years later, the same court held that widely divergent versions of an employee's work performance and the reasons for her termination presented issues of fact concerning whether she was fired for cause. 117 The Supreme Court of Idaho recently stated that placing an employee on part-time status because she used accumulated sick leave violated an implied covenant of good faith and fair dealing. 118 And, while the Supreme Court of Massachusetts was unwilling to hold that a discharge of an at-will employee without cause violated the covenant, the court did hold that with respect to future compensation for past service, the employee need not prove an absence of good faith. 119

In a recent decision, Foley v. Interactive Data Corp., 120 the Supreme Court of California gave recognition to the covenant as a protection against wrongful discharge, but drastically limited the damages which may be recovered for its breach. Prior decisions by the California Court of Appeals had permitted the recovery of tort damages for

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114. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). In Pugh, the court expressly stated that "good cause" in the context of a covenant of good faith and fair dealing was quite different from the standard in determining the propriety of an employee's termination under a contract for a specified term. 171 Cal. Rptr. at 928.


120. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).
breach of the covenant. Commentators on the law of California also considered a tort cause of action for bad faith discharge to be the law of California. The majority in Foley reviewed cases involving a breach of the covenant of good faith and fair dealing in the insurance context, an area in which the court had approved the award of tort damages. The majority believed that the inequality of bargaining power between a claimant and an insurer was greater than the inequality of bargaining power between parties to employment contracts and that opportunity to profit by breach was greater for insurers than it is for employers.

The majority in Foley concluded that awarding tort damages for breach of the implied covenant was inappropriate for employment cases because, among other reasons, it involved a standardless inquiry into whether improper motivation and bad faith produced employer decisions to terminate. The court therefore limited the remedies for breach of the covenant to contract damages, explaining that the diversity of possible solutions to problems it had examined revealed "the confusion that occurs when we look outside the realm of contract law in attempting to fashion remedies for a breach of a contract provision." Moreover, the court specifically stated that breach of the implied covenant cannot be based on a claim that a discharge was made without good cause, because to do so would eviscerate the employment-at-will provision found in the California Labor Code. It did, however, remand the case for determination of whether the termination of employment violated an implied-in-fact contract not to discharge except for good cause even though the plaintiff had been employed for only six years and nine months.

Of course, a covenant of good faith and fair dealing should permit termination of employment for any reason consistent with furthering the employer's business needs. Those needs and operational requirements could constitute the standards for determining whether a breach had occurred. Moreover, as pointed out by Justice Kaufman in dissent, the duty to deal fairly and in good faith with the other party to a contract is a duty imposed by law, not one arising from the terms of the contract; it is a duty which is nonconsensual in origin and there-

121. See 765 P.2d at 403-06 (Broussard, J., concurring in part).
122. Id. at 405-06 (Broussard, J., concurring in part).
123. Id. at 394-96.
124. Id. at 400-01.
125. Id. at 401.
126. Id. at 400 n.39.
127. Id. at 375, 401.
fore much like duties imposed by tort law.\textsuperscript{128} Granting tort damages for its breach would not defeat the reasonable expectations of an employer in entering into the employment relationship unless power to terminate without cause or justification is assumed to be a norm recognized by both parties. Comment a to section 205 of the \textit{Restatement (Second) of Contracts} states: "Good 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 decency, fairness or reasonableness."\textsuperscript{129}

If the remedies available for wrongful discharge are to be determined by principles of contract law, a breach of the covenant should be found in discharges violating community standards of decency, fairness, or reasonableness.\textsuperscript{130} Tort damages are more compatible with and suitable for remedying such a breach than the commercial expectations of the parties upon making the contract. One cannot avoid the suspicion that the California court's determination that tort damages cannot be recovered for breach of the covenant sprang more from a concern for the large recoveries obtained by plaintiffs, including awards of punitive damages, than from concern for consistency with the doctrinal principles of commercial contract law.\textsuperscript{131}

\begin{footnotes}
\footnotetext[128]{Id. at 413 (Kaufman, J., dissenting in part).}
\footnotetext[129]{\textit{Restatement (Second) of Contracts} § 205 comment a (1981).}
\footnotetext[130]{Cf. id. § 205 comment d, illustration 6 ("A contracts to perform services for B for such compensation 'as you, in your sole judgment, may decide is reasonable.' After A has performed the services, B refuses to make any determination of the value of the services. A is entitled to their value as determined by a court.").}
\footnotetext[131]{In California, between 1982 and 1986, employees won more than 70\% of the cases tried before juries; the average total award was $652,100. A survey conducted by a San Francisco law firm indicated that punitive damage awards in California averaged $494,000. Gould, \textit{Stemming the Wrongful Discharge Tide: A Case for Arbitration}, 13 EMPLOYEE REL. L.J. 404, 405–06 (1987).

A RAND Corporation study of 120 California wrongful termination cases indicated that in spite of large awards in some cases and a high success rate, the typical plaintiff receives damages equivalent to a half year's severance pay. The average net payment (minus fees) to successful plaintiffs was $188,520 and the median payment was $74,500. Defense legal fees and expenses averaged $83,862 per case, and combined legal fees of both sides averaged $164,484. J. DERTOUZOS, E. HOLLAND & P. EBENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 19, 39, 40 table 16 (1988).}
\end{footnotes}

A few courts have held that an employer may be liable for negligent performance of contract duties, such as a contractual duty to warn an employee of potential dismissal for unsatisfactory performance, or negligent failure to investigate the facts concerning a discharge for insubordination, disruptive conduct, and poor performance.

C. The Public Policy Exception

Courts have used tort theories to provide job protection from unjust terminations of employment which involve possible violations of or conflicts with public policies. Cases with violations or conflicts involve (1) discharges for refusing to violate criminal or civil laws, (2) discharges for having performed civic duties or statutory obligations, (3) discharges for asserting statutory or constitutional rights or privileges, (4) discharges for socially desirable performances not required by law, and (5) discharges for what are recognized as socially reprehensible reasons. The degree of conflict with public policy in these categories is apparent. The exception thus affords courts broad discretion in deciding the extent to which they will exercise control over employer decisions to terminate employment. The exception also provides courts with protection against charges that judges have set themselves up as qualified to review and reverse decisions made by business managers.

1. Discharges for Refusing to Violate Criminal or Civil Laws

Cases in which a remedy is provided for discharges for refusing to violate criminal or civil laws are exemplified by early cases involving discharges of employees: for refusing to commit perjury; for refusing to engage in price fixing; and for bringing repeated violations of state food, drug, and cosmetic act to the attention of the employer.

As expected, a substantial number of subsequent cases set aside terminations of employment for refusing to violate laws.\footnote{See, e.g., Woodson v. AMF Leisureland Centers, Inc., 842 F.2d 699 (3d Cir. 1988); Lorenz v. Martin Marietta Corp., 802 P.2d 1146 (Colo. Ct. App. 1990); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989); Shaw v. Russell Trucking Co., 542 F. Supp. 776 (W.D. Pa. 1982).} There are, however, decisions denying relief to those terminated for refusing to violate laws. For example, in one case a court denied relief to a supervisor of nurses discharged for transferring practical nurses from a hospital emergency room as required by state law.\footnote{Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617 (1986). The court held that whether the transfer was required by state law was a matter for interpretation rather than a clear violation. 338 S.E.2d at 619.} In another case, the court denied relief to a long distance truck driver discharged for refusing to violate federal regulations by driving an excess number of hours or by falsifying his reports.\footnote{Coman v. Thomas Mfg. Co., 91 N.C. App. 327, 371 S.E.2d 731 (1988), rev'd, 325 N.C. 172, 381 S.E.2d 445 (1989).} In a related manner, some courts have concluded that the impropriety to which the employee objected did not sufficiently involve a public interest to render termination of employment improper. Thus a professional employee’s objection to performing research that she believed would require breach of professional ethics did not sufficiently implicate the public interest.\footnote{Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).} Similarly, the public interest was not involved in a discharge of a chemist for informing his employer that it was violating, on a large-scale basis, its legal and societal obligations.\footnote{Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).}

2. **Discharges for Performing Civic Duties**

At an early date, the Supreme Court of Oregon gave protection to an employee discharged because she had performed the civic duty of serving on a jury.\footnote{Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).} Of course, it seems unlikely that this was because of a recently discovered problem of obtaining jurors. The Oregon courts had functioned in a satisfactory way for many years before. In essence, the court rejected the employer’s business judgment that a loyal employee should have asked to be excused from jury duty. It obscured that fact by characterizing the employee’s termination as thwarting the will of the community.\footnote{536 P.2d at 516.} The Supreme Court of South Carolina held that the discharge of an employee because she honored a subpoena to appear at an employment security commission hearing violated the public policy of that state and created an exception to the
The decision seems more responsive to problems of unjustified discharges from employment than to problems of obtaining compliance with subpoenas. The Supreme Court of New Hampshire permitted recovery for wrongful discharge in part on the basis that a store manager had acted in accordance with the Occupational Safety and Health Act (OSHA) when he did not require employees to travel at night, unprotected, to the bank with substantial sums of money. This stretch of OSHA’s protections seems more related to providing job security than providing physically safe employment conditions.

3. Discharges for Socially Desirable Performances

More problematic is the decision of the Supreme Court of Illinois, which concluded that a managerial employee stated a cause of action for wrongful discharge because he supplied information to local law enforcement officers indicating that another employee might be violating a state criminal law and agreed to assist in the investigation and trial if requested. The employee’s conduct was socially desirable even though it could result in personnel problems and friction in the employer’s operations. As the dissenting justices pointed out, it was doubtful whether the public policy was served because no statute existed requiring the plaintiff to supply such information, nor did plaintiff allege that a crime had in fact been committed. The interest in job security, however, was well served.

Other courts have not been as willing to use a public policy disguise to provide job protection. The United States Court of Appeals for the Fourth Circuit held that discharging an employee because he was going to report to higher corporate authorities that business was acquired through kickbacks did not constitute a violation of Maryland public policy or an abusive discharge. Much earlier, a divided Supreme Court of Pennsylvania denied relief to a salesman of a steel company who alleged that he was fired because he had reported to a corporate officer, who was also a personal friend, that the company was marketing steel tubing for a purpose for which the tubing had not been adequately tested.
4. Discharges for Asserting Statutory or Constitutional Rights

Among the earliest cases establishing exceptions to the employment-at-will doctrine are cases in which an employee was discharged for exercising a statutory right to apply for workers' compensation. These cases involve an intolerable interference with the employee's rights against the offending employer. Not all courts, however, have recognized such a claim absent a provision in the applicable workers' compensation act explicitly providing for such a suit. The Third Circuit held that the discharge of an employee for refusal to take a polygraph test would be a discharge in violation of public policy because of a Pennsylvania law making it a misdemeanor to require an employee to take such a test. As with the workers' compensation claim cases, the discharge intolerably interferes with the employee's statutory protection. The Third Circuit also forged ahead in establishing job protection based on constitutional rights in Novosel v. Nationwide Insurance Co., holding that discharging an employee who had refused to participate in lobbying efforts sponsored by the employer violated the employee's first amendment rights and therefore was contrary to the public policy of Pennsylvania. Satisfaction of the usual requirement of state action for assertion of constitutional rights was waived for the purpose of providing job protection in what the court referred to as the considerable ferment surrounding the employment-at-will doctrine.


153. Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979); see also Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (contrary to public policy of West Virginia to require employee to submit to a polygraph test as a condition of employment).

Washington has a similar statute making it a misdemeanor to require an employee to take a polygraph test. The statute provides for recovery of a civil penalty of $500 by any employee or applicant required to take such a test, but makes no provision for suit for damages for wrongful discharge. WASH. REV. CODE ANN. §§ 49.44.130–135 (West 1990).

In most cases reliance on state laws will no longer be necessary given the enactment of the federal Employee Polygraph Protection Act, 29 U.S.C. §§ 2001–2009 (1988), which specifically provides that an employer who violates the statute may be liable for legal and equitable relief, including employment, reinstatement, promotion, and payment of lost wages and benefits. Id. § 2005(c).

154. 721 F.2d 894 (3d Cir. 1983).

155. Id. at 896, 900.
5. **Discharges for Socially Reprehensible Reasons**

Cases involving actionable discharges from employment on the grounds of social reprehensibility rest on a less secure basis than those cases conflicting with legally supported principles. Even though most people would condemn an employer's action, such condemnation does not provide an effective camouflage for providing job protection because the court must join in the condemnation. Nevertheless, some courts have provided that protection. The early decision of the Supreme Court of New Hampshire in *Monge v. Beebe Rubber Co.*,\(^{156}\) in which a married woman was discharged because she would not date her foreman after working on the night shift, involves such a condemnation of supervisory use of power. The same court held actionable the discharge of an employee because a company official desired "revenge" against him, in part because of his refusal to lie to the company's president on the official's behalf.\(^{157}\) The Supreme Court of Oregon held that an employer could be liable for discharging an employee who refused to sign a false and potentially defamatory letter about a former co-employee because it conflicted with the societal obligation not to defame others.\(^{158}\) The Court of Appeals for the Eighth Circuit concluded that the Supreme Court of Arkansas would find the discharge of a woman contrary to public policy because she would not "sleep with" her foreman, even though such conduct may not technically violate the law against prostitution.\(^{159}\) Similarly, the Arizona Supreme Court concluded that discharging a nurse who would not "moon" (expose her buttocks) on a camping and rafting trip was against public policy even though under the circumstances such exposure would not necessarily violate a law against indecent exposure.\(^{160}\)

On the other hand, an Indiana Court of Appeals refused to find wrongful the discharge of a public works inspector fired because, during the course of his duties, he became aware of a possibly meretricious relationship between the board's president and the executive secretary.\(^{161}\) The Oregon Supreme Court rejected the wrongful discharge claim of an employee who alleged that his employment was

\(^{156}\) 114 N.H. 130, 316 A.2d 549 (1974); see *supra* text accompanying notes 29–31 (discussing *Monge*).


\(^{159}\) Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984).


terminated because he would not give up an after-work relationship with a female employee. The Seventh Circuit concluded that a discharge for consulting an attorney after receiving a letter of reprimand did not constitute an actionable violation of the public policy of Wisconsin. The Seventh Circuit also decided that Wisconsin's public policies were not violated by the discharge of the president of a subsidiary corporation so that his superior in the holding corporation could acquire what was formerly the president’s income. The court explained that greed is at the foundation of much economic activity and that it is not the sort of prohibited motive in the management of a business that will support a tort action.

The wavering line in cases involving violations of or conflicts with public policy are best understood as reflecting the differences in the courts’ desire to provide the job protection they believe employees and society deserve. The cases reflect variations in the courts’ willingness to move in the direction of job protection and different evaluations of whether the camouflage provides sufficient protection against charges that judges have legislated a principle requiring just cause for termination of employment. Courts feel the greatest safety when the employee is discharged for refusing to violate laws; courts feel most exposed when the employee is discharged for merely socially reprehensible reasons.

D. Legislation

Legislation would provide more certain and effective protection against unjust discharge than slow development of job protection in judicial decisions. Statutory law is not limited or confined by development within a particular factual context. A well drafted statute offers more immediate, comprehensive, and definitive protection. Statutes are more easily understood by employees than the law extracted from judicial opinions.

Statutes may contain exceptions and limitations which cannot be developed or justified on the basis of general propositions underlying judicial decisions. Thus, they may exclude employers with a small number of employees from their coverage, avoiding undesirable intrusions on personal relationships between an individual employer and his or her employees. Statutes may fix probationary periods during

163. Beam v. IPCO Corp., 838 F.2d 242, 247 (7th Cir. 1988).
165. Id. at 1326.
which cause for discharge is not required. High-level managerial employees may be excluded from its coverage. Statutes may define what constitutes cause for discharge. They may also define what lesser forms of discipline must be based on just cause. New forums and new procedures for more expeditious resolution of disputes may be established. Enforcement responsibilities may be assigned to an administrative agency, avoiding an increased burden on the courts. Alternatively, statutes may provide for arbitration, by either state-employed arbitrators or private arbitrators selected by the parties. If private arbitration is used, provision may be made for payment by the state of arbitration fees and expenses. Statutes may establish state-provided mediation services prior to hearing of a dispute concerning whether a discharge was for just cause. Statutes may also establish appropriate and permissible remedies for unjust discharges. Finally, any other questions which may arise in providing protection from unjust discharge can receive dispositive resolution in a statute.\textsuperscript{166}

Recognizing the importance of providing job protection and the need for a statute governing unjust discharges, the Commissioners on Uniform State Laws have drafted a Uniform Employment Termination Act. The Commission has not yet approved the Act. A drafting committee, for which Professor St. Antoine is Reporter, has produced seven drafts, the last of which was produced after a meeting in November 1990.\textsuperscript{167} In the most recent draft, section 2(a) of the Act provides that an employer may not terminate the employment of an employee without good cause.\textsuperscript{168} The draft offers three options for enforcement: arbitration, administrative proceedings, and judicial proceedings.\textsuperscript{169} The current draft provides that if the employee alleges that a termination was without good cause, the employer must pro-

\begin{footnotesize}
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\item 166. For excellent discussions of proposals for wrongful termination of employment statutes, see Grodin, \textit{Toward a Wrongful Termination Statute for California}, 42 HASTINGS L.J. 135 (1990); St. Antoine, \textit{supra} note 107, at 70–81.
\item 168. \textit{Id.} § 2(a), at 540:25. Section 1(4) defines good cause:

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

\textit{Id.}
\item 169. \textit{Id.}
\end{itemize}
\end{footnotesize}
ceed first to present its case. The employee, however, has the ultimate burden of proving that the termination was prohibited. A written agreement signed by an employer and employee may authorize the employer to discharge the employee without good cause if severance payments are provided at specified rates of monthly pay for various years of service. The record of adoptions of other Model and Uniform acts suggests that when completed, adoption of the Model Employment Termination Act will depend upon whether there are lobbies or pressure groups to shepherd it through the legislative process.

One might think that a proposal providing employees with job security would have great political appeal, assuring the adoption of the Uniform Employment Termination Act by numerous states. At the present time, however, only Montana has enacted a general law providing protection against wrongful discharges from employment. Proposals for similar legislation have been made in other states, but they have not been successful. The reasons for the absence of legislative action are found in the nature of the legislative process.

Generally speaking, statutes are not enacted because they provide good and desirable improvements in existing law. A statute is enacted because groups with sufficient political power have decided that they desire the enactment of that statute. The supporters must have political power sufficient to overcome the opposition to its enactment. The employees who would benefit most from enactment of a statute providing protection against unjust discharge are persons in private employment who are not represented by a union. These unorganized employees are exactly that—unorganized. They do not constitute an effective lobbying group, and they have no organization to act for them in achieving enactment of such a law.

One might think that labor unions would seek enactment of statutory protections against unjust discharge. In fact, since 1987 the Exec-

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170. *Id.* § 6(e).
171. *Id.* § 4(b).
174. *See* Grodin, *supra* note 166, at 141–42 and n.44.
175. For a more elaborate discussion of this view and succeeding comments on the legislative process, see Peck, *supra* note 77, at 6–9.
utive Council of the AFL-CIO has lobbied in favor of expanding exceptions to the termination-at-will doctrine.\textsuperscript{176} But one of the most persuasive organizing arguments unions have is that they will bring due process and protection against arbitrary action to the work place.\textsuperscript{177} Predictably, many union leaders would believe that enactment of such a law would undermine the very reasons for having labor unions.\textsuperscript{178} Employers have experienced lobbyist representatives at all state legislatures, and their initial reaction is to oppose attempts to revise the employment-at-will doctrine. Plaintiffs' attorneys are also likely to resist enactment of a statute if it establishes procedures which would threaten a practice based on contingent fees. Given organized opposition, the attempts by individual legislators to support enactment of such a law will almost certainly be defeated.

Valuable as the judicially developed protections against unjust termination of employment have been and will be, their greatest service may be that of bringing about enactment of statutes providing that protection. As the discussion of the \textit{Foley} decision\textsuperscript{179} reveals, employers have been subjected to substantial judgments of punitive damages and damages for emotional distress. The uncertainties of judicially developed law and the exposure to large damage awards and legal expenses may induce employers, which do have effective lobbying organizations, to seek the adoption of a statute governing unjust discharges. This appears to be what happened in Montana. The Montana Supreme Court recognized early and comprehensively the implied covenant of good faith and fair dealing, leading employers to seek both relief and certainty through the enactment of the first state statute governing wrongful termination of employment.\textsuperscript{180}

Judicial activism may stimulate legislative consideration of problems otherwise overlooked because of what Guido Calabresi has

\textsuperscript{176} Hauserman & Maranto, \textit{The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions To The Termination-At-Will Doctrine Hurt Unions?}, 72 MARQ. L. REV. 317 (1989).


\textsuperscript{178} Experience in Great Britain suggests that union leaders err in making that assessment. \textit{Protecting Unorganized Employees Against Unjust Discharge} 46, 48–49 (J. Stieber & J. Blackburn eds. 1983) (comments of B.A. Hepple, Chairman of Industrial Tribunals, England). Hepple's suggestion is that unorganized employees are likely to approach a union to obtain assistance in asserting rights upon a law which they know exists but with which they are unfamiliar.

\textsuperscript{179} See \textit{supra} notes 120–27 and accompanying text.

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identified as legislative inertia.\textsuperscript{181} Recognizing that judicial decisions may perform a catalytic function does not mean that the law produced should be outrageous or unacceptable. Nevertheless, it would be appropriate for courts to consider Calabresi's suggestion that, as a protection against bad results, a court should put the burden of overcoming the effects of its decision on those with ready access to legislative reconsideration.\textsuperscript{182}

Courts should also recognize that when legislative attention is directed toward new solutions for problems, legislators will review and defer to judicially developed solutions. After all, legislators recognize the inevitable fact that the laws they enact must be interpreted and applied by the judiciary and that the judiciary has greater insights into problems which may arise in enforcement of statutes. Nor need courts fear that if they produce an extremely good change in the law that there will be no legislative reaction. Certainly, a major change in the employment-at-will doctrine will pressure politically adept employers, leading them to seek reconsideration in the legislative process. Judicial changes in the law of products liability have already prompted such a reaction by manufacturers.\textsuperscript{183}

III. DEVELOPMENTS IN WASHINGTON

The Washington Supreme Court accepted Wood's employment-at-will doctrine without question.\textsuperscript{184} The Washington court's departure from the employment-at-will doctrine has followed the development of the law in other states, but with timidity. At the present time, any enthusiasm the Washington Court had for developing a new law providing job protection for employees has waned. As a result, Washington employees enjoy less protection against unjust discharge than employees in more progressive jurisdictions.

The Washington court's reluctance to dismantle the employment-at-will doctrine is at odds with the position of leadership it assumed and still occupies in other areas of judicial modernization of common law rules. The court was, for example, a leader in providing protec-

\textsuperscript{181} G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 120-45 (1982). Calabresi's comments were directed to replacement of obsolescent statutes, but obviously they are applicable to revising obsolete common law rules.

\textsuperscript{182} Id. at 125.


tion to consumers from defective products.\textsuperscript{185} The court did not hesitate when its cost/benefit analysis led it to require the use of a test procedure not established by the standards of specialists in ophthalmology.\textsuperscript{186} Nor would the court permit the medical profession to determine whether the risk of a procedure should be disclosed to a patient.\textsuperscript{187} Employees need protection as much as consumers and patients. This is particularly true today when the proportion of the work force protected by collective bargaining agreements has been dramatically reduced and still is shrinking.\textsuperscript{188} But as will be seen, the court has failed to provide protection comparable to that which it has given to patients and consumers.

\textbf{A. An Early Unrecognized Exception}

In 1965, the Supreme Court of Washington made an exception to the employment-at-will doctrine in \textit{Krystad v. Lau}.\textsuperscript{189} In that case, the court held that employees discharged because of their union membership were entitled to damages for lost wages, an order reinstating them to their former positions, and an injunction against any further interference with their union activities. The court concluded that the employment-at-will doctrine did not govern the case because the policy statement of Washington's little Norris-LaGuardia Act\textsuperscript{190}—an act to prohibit the issuance of injunctions in labor disputes—provided that employees should be free from employer interference with their efforts without privity of contract for defective food and drink. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). Its decision in Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), was a precursor of the strict liability to consumers recognized in \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965). That section was accepted by the court at an early date in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969). And the court has recently shown great reluctance to accept a legislative attempt to cut back on the protection it has built for consumers. Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974 (1989).

The court's decision in Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984), went beyond the usual leader, California, in providing a market share remedy for women who had been injured because their mothers had taken DES to prevent miscarriages. \textit{Cf.} Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

\textsuperscript{185} The Washington court was one of the first to impose a strict liability to consumers without privity of contract for defective food and drink. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). Its decision in Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), was a precursor of the strict liability to consumers recognized in \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965). That section was accepted by the court at an early date in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969). And the court has recently shown great reluctance to accept a legislative attempt to cut back on the protection it has built for consumers. Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974 (1989).

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\textsuperscript{188} The U.S. Bureau of Labor Statistics estimated that during 1989 the proportion of United States workers belonging to labor unions shrunk to 16.4% and that only 18.6% of U.S. workers were represented by unions. \textit{Union Membership Down To 16.4 Percent in 1989}, 133 Lab. Rel. Rep. (BNA) 209–10 (Feb. 19, 1990).

\textsuperscript{189} 65 Wash. 2d 827, 400 P.2d 72 (1965).

\textsuperscript{190} \textit{WASH. REV. CODE ANN.} § 49.32.030 (West 1990).
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to organize unions and bargain collectively. The decision was considered a specialized development of state labor law.\(^{191}\) Like the decision of the California Court of Appeals in *Petermann v. Teamsters Local 396*,\(^ {192}\) it was not viewed as establishing general protection against discharges violating public policy, nor was it considered a general repudiation of the employment-at-will doctrine.

B. The First Direct Challenges

The first Washington Supreme Court case involving a direct challenge to the employment-at-will doctrine was *Roberts v. Atlantic Richfield Co.*\(^ {193}\) In that 1977 case, the employee's principal argument was that his discharge violated the Washington law prohibiting age discrimination in employment. The employee also argued that he had an implied agreement that his employment was not terminable at will because he had given consideration in addition to performance of services. Finally, the employee argued that the court should either abolish the employment-at-will doctrine or make a new exception to it. In support of his third contention, the employee directed the court's attention to public policy exceptions recognized in other states. The employee also pointed to the New Hampshire court's decision in *Monge v. Beebe Rubber Co.*\(^ {194}\) invalidating a discharge motivated by bad faith or malice. The court rejected all the employee's arguments and affirmed the trial court's dismissal of the case. The court said that on the record it could not reach the question of whether it should abandon the terminable at-will doctrine or follow the *Monge* court. The court also said, "[w]hile the future of this doctrine is a compelling issue, it is one that must be left for another day and different facts."\(^ {195}\)

The court did not reconsider the issue until 1984, when it decided *Thompson v. St. Regis Paper Co.*\(^ {196}\) Once again, the court rejected the employee's arguments that he had an implied agreement that he would be discharged only for cause because of the employer's policy state-

\(^{191}\) See Peck, *Judicial Creativity And State Labor Law*, 40 WASH. L. REV. 743 (1965). In *Krystad*, the court presented a short history of labor law from the time of the 1349 English Statute of Labourers, 23 Edw. 3 (1349), through recent developments in this nation and in the state, leading to a conclusion that the little Norris-LaGuardia Act had been enacted to serve a purpose beyond that of legitimizing labor unions. That purpose was, the court said, to confer rights on employees for the violation of which actions could be brought. 65 Wash. 2d at 846, 400 P.2d at 83.

\(^{192}\) 174 Cal. App. 2d 184, 344 P.2d 25 (1959); see supra notes 23–24 (discussing *Petermann*).


\(^{194}\) 114 N.H. 130, 316 A.2d 549 (1974); see supra notes 29–31 (discussing *Monge*).

\(^{195}\) *Roberts*, 88 Wash. 2d at 898, 568 P.2d at 770.

ments or because he had given consideration in addition to the contemplated service. It then turned to developments concerning employment at will in other states. Although the Washington court had previously held that there is an implied covenant of good faith and fair dealing in all contracts,\(^{197}\) it refused to recognize the presence of such an obligation in a contract of employment, saying:

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. We believe that "to imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith." Moreover, 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.\(^{198}\)

The latter part of the court's statement misses the point emphasized by the dissenters in *Foley v. Interactive Data Corp.*\(^{199}\) The covenant is imposed by law, not implied from agreed-upon contract provisions. The covenant's function is to prevent a party from doing something not specifically prohibited or specifically authorized at the time the contract was made, thereby assuring both parties, not merely one of the parties, the full benefit of the contract. Insofar as the concept of good faith performance of the contract is concerned, the reasons parties enter into employment contracts are either self-evident or easily ascertainable. The court's timidity about judging what is bad faith with respect to contracts of employment, which involve everyday problems of human relationships, leaves one amazed at its willingness

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\(^{197}\) Lonsdale v. Chesterfield, 99 Wash. 2d 353, 357, 662 P.2d 385, 387 (1983) (involving the obligation of the purchaser of a developer's interest to install a water system on platted lots); Miller v. Olthello Packers, Inc., 67 Wash. 2d 842, 844, 410 P.2d 33, 34 (1966) (involving planting, growing, harvesting, and processing lima beans). Indeed, the court has repeated the statement since its refusal to recognize the covenant in employment contracts. Metropolitan Park Dist. v. Griffith, 106 Wash. 2d 425, 437, 723 P.2d 1093, 1100 (1986) (involving the refusal of a city to allow the operator of an exclusive restaurant and food concession in a public park to obtain a liquor license).

\(^{198}\) 102 Wash. 2d at 227-28, 685 P.2d at 1086 (citations omitted). The court's reference to the employer as a single male individual is anomalous considering the corporate size of the St. Regis Paper Company. Thinking of the employer as an individual who has provided the occasion and means for employment does weight the argument in favor of the employer running his business as he sees fit.

\(^{199}\) 47 Cal. 3d 654, 765 P.2d 373, 408, 413, 254 Cal. Rptr. 211 (1988).
to impose that covenant on specialized contractual relationships with which the court has had much less experience.\textsuperscript{200}

The court in \textit{Thompson} held that an employer could contractually obligate itself by adopting policies in an employment manual if the requirements of contract formation, offer, acceptance, and consideration, are part of the initial employment contract or a modification of that contract.\textsuperscript{201} In addition, the court held that an employer's distribution of an employment manual can lead to obligations governing the employment relationship. It does so if the employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced by such promises to remain on the job and not seek employment elsewhere.\textsuperscript{202} The court reasoned that the employer creates the atmosphere for its own benefit, and, having created employee expectations, the employer has an obligation of treatment in accord with the written promises.\textsuperscript{203}

The court made it clear, however, that employers might avoid such obligations by conspicuous statements that nothing in a manual is intended to be part of the employment relationship or anything more than general statements of company policy.\textsuperscript{204} In addition, it said the employer may specifically reserve a right to modify policies or write them in a manner that preserves employer discretion.\textsuperscript{205} The court thus reassured employers by giving them advice as to how they could avoid the obligations just recognized by the court.

In \textit{Thompson}, the court joined the growing majority of jurisdictions that recognize a cause of action in tort for wrongful discharge if that discharge contravenes a clear mandate of public policy. The court cautioned, however, that courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.\textsuperscript{206} The court said this properly balanced the interests of the employer and employee, giving protection against friv-
olous law suits and permitting employers to make personnel decisions without fear of incurring civil liability. If the employee proves that the discharge may have been motivated by considerations violating a clear mandate of public policy, the burden then falls on the employer to prove that the dismissal was for reasons other than those alleged by the employee.

The court offered no basis for its conclusion that employee claims of unjust discharge that did not involve violations of public policy are frivolous. An employer clearly has no protectable interest in conduct that violates public policy, but employees certainly have an interest in job security that goes beyond protection from that kind of conduct. Whether a challenged personnel decision is one that an employer should be free to make without fear of civil liability should be the question and not the answer to whether an exception to the employment-at-will doctrine should be recognized.

Thus, Thompson offered the possibility of providing protection against unjust discharge under both contractual and tort principles. But the court’s concern for preserving an employer’s freedom to run a business was apparent from the outset. The opinion carried warnings that the Washington court did not believe it was necessary to make any substantial change in the power relationship between employers and their employees. Subsequent developments provide no basis for greater optimism that meaningful protection will be forthcoming.

C. Failures of Tort Theory

As previously noted, in Thompson, the court limited the public policy exception to the employment-at-will doctrine by emphasizing that a court should look to prior judicial decisions and legislation in determining what constitutes a violation of public policy. Because all prior judicial decisions recognized the employment-at-will doctrine and the unlimited power it gave employers, judicial decisions are not likely to be a significant source of protection for employees. The limitation does protect the court from charges of meddling with the power relationship of employers and employees. But that leaves only the legislature to limit employer power. Limiting wrongful discharge actions to those instances where an employer has violated legislative policies does little to prevent employers from using their “iron fist” by discharging employees for reasons unrelated to the efficiency or profitability of operations.

207. Id.
208. Id. at 232–33, 685 P.2d at 1089.
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In *Trumbauer v. Group Health Coop*,\(^{209}\) it was undisputed that the plaintiff had performed adequately as an accounting clerk and office assistant during his short probationary period.\(^{210}\) The plaintiff was discharged because of the discovery that he had had a brief sexual relationship with his supervisor several years prior to beginning his employment. The supervisor hired the plaintiff, but the sexual relationship did not exist during the plaintiff's employment. The employer had a nepotism rule prohibiting one family member from supervising another, but the rule had not yet been applied to persons in other relationships. The United States District Court rejected the employee's claim of unjust discharge. The court found no statute or judicial decision prohibiting discrimination based on a social relationship and concluded that the relationship did not enjoy constitutional protection.\(^ {211}\)

Recently, in *Dicomes v. State*,\(^ {212}\) the Washington Supreme Court enlarged the public policy basis for wrongful discharge suits to include discharges violating the Washington Whistle Blower statute.\(^ {213}\) That enlargement produced no real benefit for the plaintiff employee. The Washington statute recognizes the importance of protecting government employees who are discharged for reporting improper governmental action. The court said that in determining whether a discharge contravenes the public policy of protecting employees it will consider "whether the employer's conduct constitute[s] either a violation of the letter or [the] policy of the law, so long as the employee sought to further the public good, and not merely private or proprietary interests."\(^ {214}\) In *Dicomes*, the employee claimed that she was discharged from her position as executive secretary to the Washington Medical Disciplinary Board and Board of Medical Examiners because she released information indicating that the director of the Department of Licensing had not included funds from the medical disciplinary account in its budget surplus. State law provided that funds deposited in the account should be used to administer and implement the law.\(^ {215}\) The court found no violation of state law in the director's decision not to include the medical disciplinary account surplus funds in his budget proposal. The court concluded that the plaintiff, whose conduct might

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\(^{210}\) Id. at 546.
\(^{211}\) Id. at 549.
\(^{212}\) 113 Wash. 2d 612, 782 P.2d 1002 (1989).
\(^{213}\) WASH. REV. CODE ANN. §§ 42.40.010–.900 (West 1990). The statute is limited in its application to government employees reporting "improper governmental actions."
\(^{214}\) Dicomes, 113 Wash. 2d at 620, 782 P.2d at 1008.
have been praiseworthy from a subjective standpoint, and from which the public might have derived some remote benefit, had not established a contravention of a clear mandate of public policy. The court held that the employee therefore failed to state a claim under the public policy exception to the employment-at-will doctrine. 216

By a law enacted in 1983, the Legislature had effectively doubled the amount collected from physicians for medical discipline. 217 The statute 218 provides that all assessments, fines, and other funds collected be deposited in the medical disciplinary account and used to implement the law. There is no express requirement that all the funds in the account be appropriated to medical disciplinary actions; the legislature retains the power to make such appropriations. But it seems unlikely that the Washington Medical Disciplinary Board, the Board of Medical Examiners, or the Legislature can make intelligent decisions about the amount that should be appropriated to support disciplinary actions in a biennium unless they know how much money is available for that purpose. Ignorance concerning what can be done to protect the public through medical disciplinary proceedings obviously endangers the public; creation of that ignorance should be considered contrary to a clear mandate of public policy. The court said, however, that it did not accept the plaintiff’s claim that the failure to budget surplus funds substantially and specifically endangered the public health or safety. 219 Instead, the court found the plaintiff’s discharge justifiable because of her lack of loyalty to her superior who made a political decision to withhold important information from authorized decision-makers. 220 The Dicomes decision is consistent with the court’s statement in Thompson that courts should proceed cautiously in determining what constitutes public policy for the purposes of wrongful discharge law. That caution or timidity, however, guarantees that employees will receive little protection from consideration of the policy of a law.

Recognition of tort principles as a limitation on employer power to terminate employment raises the question of how much of tort damage law is applicable to tortious terminations of employment. Fairly soon after its decision in Thompson, the court raised hopes for generous damage awards. In Cagle v. Burns & Roe, 221 the court held that in a

216. 113 Wash. 2d at 623–24, 782 P.2d at 1009–10.
217. Id. at 621, 782 P.2d at 1008.
219. Dicomes, 113 Wash. 2d at 623, 782 P.2d at 1009.
220. Id.
221. 106 Wash. 2d 911, 726 P.2d 434 (1986).
suit for a termination of employment violating public policy, damages for emotional distress are recoverable. The court reasoned that tortious discharge is an intentional tort, and that it had permitted such damages in actions that did not vindicate dignity or personality interests. The court further held that in order to recover damages for emotional distress resulting from a wrongful discharge, the employee need not prove either that the employer intended to cause the distress or that the distress was reasonably foreseeable. This analysis of prior decisions led to a conclusion supporting the claims of employees, but the court apparently failed to recognize that a discharge from employment is almost always an affront to personal dignity and results in substantial emotional distress.

D. The Implied Covenant of Good Faith and Fair Dealing

As previously noted, the implied covenant of good faith and fair dealing is closely related to tort principles of responsibility and liability. The covenant is a general principle of law applicable to parties in a contractual relationship. The covenant is not based upon the negotiations that resulted in the contractual relationship. The covenant offers possibilities for even greater protection against unjust discharge than tort theories limited to public policy violations. Early rejection of the covenant in Thompson was emphatic, but reconsideration is always possible. Unfortunately, the first case raising this issue after Thompson was so weak on its facts that it was probably the worst case in which reconsideration could have been sought.

That case was Willis v. Champlain Cable Corp. The parties to a formal written contract designating one of them a sales representative made specific provisions for termination of the agreement and for computation of commissions due following a termination. The court rejected the plaintiff’s attempt to use the covenant to claim commissions on sales made as much as a year and one-half after the relationship was terminated. The court concluded that both the employer and employee had complied with the express terms of the contract, and that they were determinative of the employee’s rights.

There would have been a better opportunity for development of the law, perhaps first giving recognition to the implied covenant in one of its less encompassing versions, if the attempt had not been made in

\[222. \text{Id. at 916, 726 P.2d at 436.}\]
\[223. \text{Id. at 919-20, 726 P.2d at 438.}\]
\[224. 109 Wash. 2d 747, 748 P.2d 621 (1988).\]
\[225. \text{Id. at 759, 748 P.2d at 628.}\]
Unfortunately, the decision stands as a reinforcement of the court's refusal to consider the covenant applicable to employment contracts.

E. Developments of Contract Theory

Except for rejection of the implied covenant, Thompson offered the possibility for developing contract theories protecting against unjust discharge on two bases developed in other states: (1) express contracts derived from provisions found in employment manuals and (2) estoppel of employers who had created for their benefit an atmosphere of fair treatment and job security. Decisions issued immediately after Thompson suggested that this protection would be substantial. More recent decisions have undermined that expectation.

The first decision after Thompson of an unjust discharge claim based on contract, Brady v. Daily World,226 suggested a liberal standard for what constituted sufficient evidence for a jury question on whether a contract required good cause for termination of employment. After serving as a pressman for thirty-two years, the plaintiff was discharged for being intoxicated or under the influence of alcohol while on the job. A personnel handbook contained a section entitled “Dismissal For Cause.” Among the grounds listed as sufficient for dismissal was “Intoxication or drug abuse.” The section also stated that “Any decision which requires such action [termination of employment] is made only after careful consideration of all known facts.” On the employer's motion for summary judgment the court considered the evidence and inferences in plaintiff’s favor. It concluded that whether any of the employer policies amounted to promises of specific treatment in specific situations and whether plaintiff justifiably relied upon such promises presented questions of fact that remained to be proven.227 Likewise, whether “being under the influence” was the equivalent of “intoxication” was considered a question of fact that remained to be proven.228 Moreover, plaintiff testified that he had been told he was doing a good job and would be employed as long as he was doing a good job.229 The court concluded that plaintiff had,

227. Id. at 775, 718 P.2d at 788.
228. Id. at 776, 718 P.2d at 788. Other issues of fact were raised by plaintiff's denial of consumption of more than two beers with dinner on the date of his discharge, and the fact that he was permitted to work his entire shift prior to discharge. In addition, his performance evaluation for the period immediately before that discharge did not refer to a drinking problem. Id.
229. Id.
therefore, raised genuine issues of fact, making summary judgment inappropriate.

Obviously, a statement that any decision requiring termination of employment will be made only after careful consideration of all the facts is neither an express promise that discharges will only be for just cause nor an express promise of specific treatment in specific situations. Remanding the case for trial gives an employee the opportunity to prove what meaning the words of the manual had acquired in the employer’s workplace. This approach affords employees the level of job security that they have been led to believe they have by their employers’ practices.

Two subsequent decisions of the Washington Court of Appeals displayed a similar liberality in determining whether there were jury issues on contractual claims of unjust discharge.\textsuperscript{230} But the recent decision of the supreme court in \textit{Stewart v. Chevron Chemical Co.},\textsuperscript{231} turns those issues into questions of law and takes them from the jury. In \textit{Stewart}, the court reversed a judgment on a jury verdict for an employee whose employment was terminated in a staff reduction after twenty-nine years of service. The jury had based its verdict on the employee’s claim that the termination of his employment violated his employment contract because the employer failed to comply with a provision of its policy manual. That manual contained a section stating: “In determining the sequence of layoffs due to lack of work, consideration should be given to performance, experience and length of service.”\textsuperscript{232}

Adopting the principle that the interpretation of a writing is a question of law, the court determined that the word “should” in the policy manual was merely advisory. Likewise, the section required only that the named factors be “considered” and therefore did not constitute a promise. Moreover, the employee did not specifically testify that he had relied on the layoff provision of the manual, and therefore the court concluded he failed to establish that he had justifiably relied on the provision. The fact that he had testified that he had consulted the manual on several occasions to see what his rights were and the fact that fifteen or sixteen years earlier he had turned down a job offer in


\textsuperscript{232} \textit{Id.} at 611, 762 P.2d at 1144.
reliance on the security he believed the manual provided were not sufficient to establish justifiable reliance as a matter of law.233

Holding that determination of the meaning of the words in the manual is a question of law for determination by the court is inconsistent with the Thompson ruling that an employer who creates an atmosphere of job security creates an expectation, and thus an obligation, of treatment in accord with those written promises.234 The effect the words of the manual had at the work place should determine what such provisions mean, not what a judge in chambers thinks they should mean. Similarly, whether employees had come to believe that policies stated in a manual are applied consistently and uniformly to each employee presents a question of what effect the manual had in the work place. If the manual created employee expectations of fair treatment and job security, the employer created a situation "instinct with obligation."235

The court’s decision in St. Yves v. Mid State Bank236 similarly limited the jury’s role in resolving factual questions concerning an employment contract. In St. Yves, the president of a bank had a formal written employment contract. One clause of the contract provided that his employment was to be for a two-year period, automatically renewed for successive one-year terms unless either party advised the other with sixty days written notice that the employment would not be renewed. Another clause stated that the president’s right to compensation “will cease upon termination of his employment for any reason, and the term hereof shall . . . end.” The contract further provided that the president’s “termination by bank at any time, during any term of employment, with or without cause or notice, shall not constitute a breach of this agreement by bank.”237

The trial court dismissed the wrongful discharge claim, but the court of appeals reversed on the ground that there was a question of fact for jury determination of whether a personnel manual created an independent basis for a wrongful discharge claim, even assuming that the formal employment contract was unambiguous.238 Noting that both Thompson and Brady were cases in which there were no written

233. Id. at 614, 762 P.2d at 1145–46.
237. St. Yves, 111 Wash. 2d at 375, 757 P.2d at 1385.
238. Id. at 378, 757 P.2d at 1386.
employment contracts, the supreme court reversed the court of appeals and held that the right to rely on promises in personnel policy manuals did not override the application of the parol evidence rule for express contracts. The court concluded that the clause relating to termination of employment was a limitation of the clause establishing the term of employment; therefore, the contract was unambiguous and governed the case.

In dissent, Justice Dore persuasively argued that the contract of employment was ambiguous and that the manual provisions were needed to resolve that ambiguity. But even if the formal employment contract was unambiguous, that fact should not have precluded the parties from entering into a new or modified contract. The employer adopted the manual in the year in which the plaintiff was hired. Under the Thompson rationale, if the employer had created an atmosphere of job security and fair treatment, the employer's promises that create such an atmosphere become enforceable. Whether that atmosphere had been created is not controlled by the parol evidence rule. It should have been a factual question for jury resolution. As matters now stand, however, it appears that a clear statement in a contract of employment that it is terminable with or without cause or notice enables an employer subsequently to create an atmosphere of job security and enjoy all the benefits thereof without responsibility to live up to what employees have justifiably come to expect.

A recent decision of the Washington Court of Appeals gives a continuing and enduring effect to a statement on an application form that employment might be terminated at any time by either party long after the date of the application. The employee sought to rely upon pro-

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239. Id. at 379, 757 P.2d at 1387.
240. Id. at 378, 757 P.2d at 1386-87.
241. Id. at 380-85, 757 P.2d at 1388-90 (Dore, J., dissenting).
242. The Washington Supreme Court has since overruled cases, including St. Yves, in which it had held that an ambiguity in the meaning of contract language must exist before evidence of the circumstances surrounding the making of the contract and subsequent conduct of the parties is admissible for interpretation of the contract. Berg v. Hudesman, 115 Wash. 2d 657, 666, 669, 801 P.2d 222, 228, 230 (1990). Whether this development in general contract law will produce a different result in an employment case like St. Yves is problematical. In St. Yves, the court emphasized that, while employment manuals had been given effect in Thompson and Brady, those were cases in which there were no written employment contracts. 111 Wash. 2d at 379, 757 P.2d at 1387. It also spoke of the pre-emptive effect of specific contractual terms. Id. And it did not accept the conclusion of the court of appeals that a right to continued employment might be found in a personnel manual. Id. at 378-79, 757 P.2d at 1386. Thus it is possible that a manual will be given weight only for interpreting what the parties meant at the time an employment contract was made, but not for the purpose of establishing new contractual rights.
visions of a personnel manual issued some ten years after she had signed an application form with such a statement. The court held that the at-will provision prevailed, noting that the policies of the manual might have been made part of the contract of employment if the parties had complied with the requirements of offer, acceptance, and consideration.\textsuperscript{244} It is deliriously fanciful to imagine an employee of a large department store proposing a renegotiation of her contract of employment to incorporate the manual provisions, but realistic to believe that its provisions gave her a sense of job security. If this decision is followed, employers have a formula to avoid all of the contract protection the court appeared to give employees in its \textit{Thompson} decision.

\textbf{F. The Meaning of a Just Cause Provision in an Employment Contract}

If an employee manages to avoid all of the barriers set up by the Washington Supreme Court by establishing that his or her contract of employment requires just cause or good cause for termination of that employment, there remains the question of the meaning of those terms. The supreme court recently supplied an answer in \textit{Baldwin v. Sisters of Providence}.\textsuperscript{245} In \textit{Baldwin}, the parties agreed that the provision in an employee manual that the employer could discharge an employee for “just cause” was contractually binding. They disagreed, however, about what that standard meant and who had the burden of proof with respect to whether a discharge had occurred in accordance with that standard. The trial court placed the burden of proof on the defendant employer to prove that the plaintiff was dismissed for just cause and defined just cause as meaning “that under the facts and circumstances existing at the time the decision is made, an employer had a good, substantial and legitimate business reason for terminating the employment of a particular employee.”\textsuperscript{246}

The supreme court first decided that it was error to instruct the jury that the employer had the burden of proof that plaintiff was dismissed for just cause.\textsuperscript{247} The court reasoned that the burden of proof of an employer in a contractually based wrongful discharge case should not be greater than the employer’s burden in statutory employment discrimination cases.\textsuperscript{248} The court said that, as with discrimination cases,

\textsuperscript{244} Grimes, 53 Wash. App. at 557, 768 P.2d at 529–30.
\textsuperscript{245} 112 Wash. 2d 127, 769 P.2d 298 (1989).
\textsuperscript{246} Id. at 136, 769 P.2d at 303.
\textsuperscript{247} Id. at 133–36, 769 P.2d at 301–02.
\textsuperscript{248} Id. at 135, 769 P.2d at 302.
the burden on the employer in an unjust discharge case will arise only after the plaintiff has established a prima facie case, and then it consists only of articulating reasons sufficient to meet the prima facie case. The burden of persuasion remains on the employee to show that the articulated reasons for discharge are mere pretext.  

The court also concluded that the trial court had erred in its instruction concerning what constitutes just cause. It concluded that an employer's agreement to discharge only for just cause does not constitute an agreement that the employer has surrendered the power to determine whether facts constituting cause for termination exist. While it said employers should not be allowed to make arbitrary determinations of just cause, it concluded that a sufficient protection against such actions would be provided by a good faith standard limited by an objective reasonable belief standard. The court held that "'just cause' is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for 'just cause' is one . . . based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true" and (3) which is not for any arbitrary, capricious, or illegal reason.  

The court expressed its concern that any more stringent standard might induce employers to remove "just cause" provisions from their personnel manuals. It likewise rejected the argument that use of a good faith test was inconsistent with its refusal in Thompson to recognize an implied covenant of good faith in employment contracts. In Thompson, that recognition was denied because to grant it would require judicial incursions into the amorphous concept of bad faith. The explanation offered was that the test was of good faith and used to determine whether a term "placed into a contract by the employer" was breached. To bolster the determination that courts should not review employer termination decisions beyond a good faith test, the

249. Id. at 136, 769 P.2d at 303; see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).
251. Id. at 139, 769 P.2d at 304.
252. Id. at 139, 769 P.2d at 304. The Supreme Court of New Jersey took a drastically different view of the possibility that employers might be reluctant to prepare and distribute company policy manuals. It did not believe that the constructive aspects of such manuals would be diminished, stating that it would be unfair to allow an employer to distribute a policy manual that made the workforce believe that certain promises had been made and then allow the employer to renege on those promises. What it sought was basic honesty on the part of the employer. Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, 1271 (1985).
court relied on an opinion of the Supreme Court of Oregon. View-
ing an employee handbook as a unilateral statement of the employer, the Oregon court found no reason to believe the employer had intended to surrender its power to determine whether facts constitut-
ing cause for discharge exist.

The Washington court's explanation of why the plaintiff must bear the burden of proof in a case alleging wrongful discharge is unsatis-
factory. In a disparate treatment case under Title VII or state law, the plaintiff contends that the cause of the discharge was a factor, such as race or sex. Such a discharge is prohibited by the applicable statute. The plaintiff makes an affirmative allegation and normally the burden of proof is placed on a party asserting the affirmative. In a wrongful discharge case it is the employer that alleges the affirmative—that there was cause for discharge. To place the burden of proof on the employee requires the employee to undertake what is frequently impossible, that is to prove a negative. Another factor governing the allocation of the burden of proof is access to information. The employer is the party who took the action and ought to be in the position to establish why it took that action. Moreover, employers generally maintain elaborate personnel records; employees do not. For these reasons the consistent practice of arbitrators who make determinations of just cause under collective bargaining agreements is to place the burden of proof on employers.

The court's definition of what constitutes just cause is almost unintelligible. Causes are not "fair" or "honest." People may be hon-
est or fair, but that honesty and fairness is in their reasoning or thought processes and actions. A cause may be adequate or sufficient to justify actions based on its existence. In the employment relation-

253. Baldwin, 112 Wash. 2d at 137–38, 769 P.2d at 303–04 (citing Simpson v. Western Graphics Corp., 293 Or. 96, 643 P.2d 1276 (1982)).
254. Simpson, 293 Or. at 100–01, 643 P.2d at 1279.
257. For example, how can an employee demonstrate that tardiness or absence from work did not interfere with operations, that he never reported for work under the influence of alcohol or a controlled substance, that he never fell asleep while at work, that he was not the one who damaged a piece of equipment, or that his spoilage rate did not exceed that of other employees?
258. F. ELKOURI & E. ELKOURI, supra note 61, at 661.

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ship, that adequacy or sufficiency should turn on whether or not recognition of the cause as adequate furthers the legitimate interests of the business enterprise without unduly harming the interests of the parties to that relationship. It should be adequate and sufficient to justify the injuries done to an employee who is discharged if it is to be just. Justice is not subjective.

It seems impossible that a trier of fact can determine that a discharge is "based on facts . . . supported by substantial evidence" without reviewing both the evidence supporting and the evidence against an employer’s decision. And it seems impossible to determine whether evidence is substantial without considering the relevance of those facts to those legitimate interests of the business enterprise. Whether an employer could reasonably believe facts to be true would necessarily involve consideration of how thoroughly the employer investigated a case, and this calls for review by a trier of fact. And it seems an unacceptable distortion of language to say that a cause is “just” simply because it can be said that it was not arbitrary, capricious, or illegal to recognize it as the basis for action. If that is what employers want to offer as assurances to their employees, their manuals should state only that employees will not be discharged for arbitrary, capricious, or illegal reasons.

The court’s position in Baldwin that the words an employer placed in a manual should not be construed as a surrender of employer power is also in conflict with a well-established rule for interpreting contract language. Ordinarily, the preferred meaning is that which operates against the party who supplied the words or from whom the writing came. The rule is particularly suitable when consideration is given to the fact that employer representatives generally have much better training, more experience, and greater ability than employees in preparing written documents.

More importantly, in Baldwin the parties agreed that they had a contract that required just cause for termination of employment. It was not a unilateral statement by the employer. Moreover, even if it had originally been a unilateral statement, the court’s decision in Thompson made the relevant question one of whether it had induced


reliance. If it had, pursuant to Thompson it should have been treated as an obligation enforceable as a promise.\footnote{261}

Nor does it appear what value manual provisions requiring just cause for discharge will have as contractual protections if they establish such limited restraints on employer power. Indeed, the court's test of just cause makes it possible for employers to create an atmosphere of job security and fair treatment without actually providing either.

The court's lack of confidence in the judiciary's ability to determine what constitutes just cause is unfounded: labor arbitrators have made such determinations on the merits for many years, and their decisions are reported in numerous volumes burdening library shelves.\footnote{262} The Ninth Circuit recently decided that under Alaska law a good faith belief that cause existed does not constitute just cause for discharge—the employer must prove that the employee engaged in the forbidden conduct.\footnote{263} In so holding, the court noted that in Toussaint v. Blue

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\begin{itemize}
\item \footnotemark[262] There are now 93 bound volumes of Labor Arbitration Reports published by Bureau of National Affairs. Commerce Clearing House has published approximately the same number of Labor Arbitration Reports. Prentice Hall and other reporting services likewise report labor arbitration decisions. Close to one half of the decisions reported are concerned with what constitutes just cause for discharge or other discipline.
\item In addition, there are numerous treatises which deal with what constitutes just cause for discharge or other discipline. See, e.g., F. Elkouri & E. Elkouri, supra note 61, at 650-707; M. Hill, Jr. & A. Sinicrope, Management Rights 94-113, 193-217 (1986).
\item One of the best and most frequently quoted statements of the criteria used by arbitrators in determining whether there was just cause for discharge is in the form of seven questions posed by arbitrator Carroll Daugherty:
\begin{enumerate}
\item Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct.
\item Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
\item Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
\item Was the company's investigation conducted fairly and objectively?
\item At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
\item Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
\item Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?
\end{enumerate}
\item Arbitrator Daugherty stated that a "no" answer to one or more of the questions normally indicates that just cause for discipline did not exist. Enterprise Wire Co., 46 Lab. Arb. (BNA) 359, 363-64 (1966) (Daugherty, Arb.).
\item Sanders v. Parker Drilling Co., 911 F.2d 191, 194-95 (9th Cir. 1990).
\end{itemize}
Cross & Blue Shield,264 the case that provided much of the basis for the Washington decision in Thompson, the Michigan court said that a promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge.265 The Michigan court also said that where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable.266 Hopefully, the Washington court will abandon its deficient definition of just cause and incorporate a standard more in accord with that set out in the case that provided the foundation for its Thompson decision. Alternatively, if the definition of just cause given in Baldwin proves to be difficult and brings about reconsideration of the matter, the court should consider the definition developed by the drafting committee for the Commissioners on Uniform State Laws.267 The Commissioners have not yet approved the definition, but it was developed with the advice of lawyers from the American Bar Association Section on Labor and Employment Law and the Section on Tort and Insurance Practice. Also included as advisors were representatives of the AFL-CIO, the American Trial Lawyers Association, the National Association of Manufacturers, the Plaintiff Employment Lawyers Association, the United States Chamber of Commerce, and other interested groups.268 The product, distilled from the advice of diverse groups familiar with problems of employment law, has much greater appeal than the confusing definition provided in Baldwin. It is a definition that will achieve the goal set forth in Thompson of balancing the interests of employers in running their businesses with the interests of employees in obtaining real and meaningful protection against unjust discharge.

IV. CONCLUSION

The law governing wrongful discharge is still developing in state supreme courts throughout the United States. Washington state is behind other states in developing that law and providing protection for employees. It is even further behind the law of other developed nations of the world.269

265. 292 N.W.2d at 895.
266. Id. at 896.
267. See supra note 161.
269. See supra note 47.
Unfortunately, both in Washington and elsewhere, courts frequently forget the reasons for developing exceptions to the employment-at-will doctrine. Instead, courts direct their attention to applying traditional concepts of contract or tort law to cases. As indicated at the beginning of this Article, I believe courts undertook a course of revising and rejecting the employment-at-will doctrine because they sensed that it was no longer acceptable in contemporary society.\textsuperscript{270} Courts should remain committed to that undertaking.

Most certainly the public policy exception did not develop because it was discovered that various public policies needed additional enforcement. Most of those policies had existed and were implemented for many years without the support of wrongful discharge cases. The public policy exception received recognition because it permitted courts to provide job protection without criticism that the judiciary had assumed a role of supervising employer decisions, or passing on what constitutes just cause for discharge. The disguise was in that way useful, but it should not divert the courts from the initial undertaking of providing needed job protection for employees who have none. Upon occasion it is obvious that protection should be provided even though the disguise is not available.

The standards of what would establish that an enforceable promise of job security had been made were relaxed, not because errors of contract doctrine had been discovered, but for the purpose of providing job security. That purpose is not served when courts give effect to adhesion contract waivers of job security in employment applications or apply the parol evidence rule to bar consideration of the realities of the workplace.

One of the realities of the workplace is that there is a substantial number of employees who every year suffer from abuse of power by employers.\textsuperscript{271} Society has an interest in ensuring that all employees are protected from abuse of employer power, and that protection not be limited to those who experienced a particular type of abuse through discrimination. Those employees who have received particularized statutory protection from abuse of employer power were able to obtain that protection because they were members of groups with organizations that could effectively bring political pressure on Congress and state legislatures to enact the statutes. Unprotected employees, who have representation by neither labor unions nor by other organizations, have no effective spokespersons or advocates to advance their

\textsuperscript{270} See supra text accompanying notes 46–69.

\textsuperscript{271} See supra text accompanying notes 66–67.
cause in legislative halls. Decisions of courts exposing the abuses of employer power and the harm imposed on employees, certifying by their judgments the need for job protection, can thus do more than provide justice for individual cases. Indeed, those decisions may induce employers, who among those concerned with the problem, probably have the only effective legislative representation to achieve the task, to obtain enactment of statutes providing job security with forums and procedures superior to those provided in courtroom litigation. Until that is accomplished, however, courts should continue to press on in developing job protection because the problems are great and the need is real.

At times it may be prudent to provide that protection using the camouflage of existing tort and contract doctrines. The most useful is the implied covenant of good faith and fair dealing, which can be adapted to ensure on a case by case basis that there was just cause for termination of employment. It is to be hoped, however, that some court will exhibit the courage of Justice Traynor and the California Supreme Court when they abandoned doctrinal fictions and openly stated a new rule of strict liability for defective products.272 That courageous court should announce a general rule of employment law requiring just cause for termination of employment.

272. Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). It is noteworthy that several years after the Greenman decision Justice Traynor acknowledged that there was no single definition of "defect" that proved adequate to define the scope of a manufacturer's strict liability. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 373 (1965).