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Just Cause in Montana: Did the Big Sky Fall?

Barry D. Roseman*

I. INTRODUCTION

For more than 130 years, the default rule in employment in the United States has been the rule of employment at will. Persons who are employed at will can be fired for a good reason, a bad reason or no reason at all—even a totally arbitrary or irrational reason—as long as that decision is not unlawful as a result of a specific law, such as the National Labor Relations Act or federal, state or local antidiscrimination statutes and ordinances. In contrast, most unionized employees in the United States can be fired only if the employer has a good reason, or just cause, for that decision.

This issue brief summarizes the common-law doctrine of employment at will in the United States and its impact, including the unfair results it has produced for many employees. It then examines the experience of Montana, the only one of the 50 states that has adopted an alternative approach—one requiring that private-sector employers have just cause to dismiss employees even if they do not have contractual just-cause protections.

One of the arguments for employment at will is an economic one, that just cause for termination of employment leads to higher unemployment rates and lower job growth rates. As this paper shows, in Montana this is not true. Montana now has one of the lowest unemployment rates in the United States. Its economy over the last three decades has been driven by factors that have nothing to do with the fact that it has abolished employment at will.

An examination of this issue is especially timely right now, because a ballot measure that would amend the Colorado constitution to adopt the just cause standard is slated to appear on the ballot in that state this fall if its proponents collect enough valid signatures.¹ The Colorado measure would prohibit the discharge or suspension of an employee except for “just cause,” as that term is defined in that proposal, and would provide for resolution of disputes through hearings before private mediators. Those in Colorado and elsewhere interested in learning more about just cause employment thus would do well to consider the Montana experience.

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¹ The final text of the proposed initiative can be found on the Colorado State Board of Elections website, Proposed Initiative 2007–2008 #76: Final Text, http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Final%20Text/final_text_76.pdf (last visited Sept. 11, 2008). On August 4, 2008, the initiative’s proponents submitted petitions containing over 130,000 signatures, far more than the number required for certification under Colorado law. Andy Vuong, *Signatures Turned in for Labor Initiatives*, THE DENVER POST, Aug. 4, 2008, http://www.denverpost.com/business/ci_10097679 (last visited August 5, 2008). On August 21, 2008, the Colorado Secretary of State certified that the proponents of that initiative had submitted more than the number of petition signatures needed for it to be placed on the November 2008 ballot. Statement of Sufficiency, Aug. 21, 2008, http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Statement%20of%20Sufficiency/76_statement_of_sufficiency.pdf (last visited Sept. 2, 2008).

II. EMPLOYMENT AT WILL: THE DOCTRINE

A. THE ORIGINS OF THE RULE

In a treatise published in 1877, Horace G. Wood proclaimed an “inflexible” rule “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.”² This was a substantial departure from the common law, at least in England. Under the English common law, an indefinite hiring was presumed to create an employment relationship or contract for one year, which could not be terminated at will during that term.³ The Tennessee Supreme Court provided a succinct summary of Wood’s rule in an 1884 opinion: “All may dismiss their employment at-will, be they for many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.”⁴

The doctrine of employment at will soon became the default rule in the United States.⁵ It is the law in every state except Montana. It is common law in most states and codified in a few.⁶ The United States is, however, alone among industrialized countries in following the general rule of employment at will. Established industrial powers such as France, Germany, Japan and the United Kingdom, and new democracies such as the post-apartheid Republic of South Africa, require that employers have just cause to dismiss non-probationary employees.⁷

B. THE EVOLUTION OF THE DOCTRINE AND ITS CONTINUED IMPORTANCE

Employment at will no longer is an inflexible rule. Anti-discrimination statutes prohibit private employers from terminating a worker’s employment because of that person’s race, sex, national origin, religion, age or disability.⁸ In addition, in 1912, Congress enacted the Lloyd-LaFollette Act,⁹ generally prohibiting the federal government from discharging federal employees except for cause. Over time, the vast majority of public employees in the United States also were granted protection, through statutes and ordinances, against dismissal without cause.¹⁰

A variety of federal statutes prohibit employers from discharging employees because they have engaged in conduct protected by those statutes. The National Labor

² HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT CONCERNING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 272 (1877).

³ WILLIAM BLACKSTONE, 1 COMMENTARIES 425 (“If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year, upon a principle natural equity, that the servant shall serve the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.”).

⁴ *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by Hutton v. Walter*, 179 S.W. 134 (Tenn. 1915).

⁵ See, e.g., *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416, 417 (1895).

⁶ Cal. Labor Code § 2922; Ga. Code Ann. § 34-7-1; La. Civ. Code arts. 2024, 2747; N.D. Cent. Code § 34-03-01; S.D. Codified Laws Ann. § 60-4-4.

⁷ See generally WILLIAM L. KELLER AND TIMOTHY J. DARBY, INTERNATIONAL AND EMPLOYMENT LAWS (2d ed. 2004).

⁸ The major federal statutes barring employment discrimination are Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e-2(a); the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 623(a); the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, *et seq.*; and Title I of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12112. Every state and many local governments also have enacted antidiscrimination statutes and ordinances. See *infra* at note 15.

⁹ 37 Stat. 539, 555, § 6 (1912).

¹⁰ See generally Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1619-68 (1984).

Relations Act prohibits termination of employment for an employee's participation in protected concerted activity.¹¹ The principal federal anti-discrimination statutes prohibit employers from retaliating against employees for having participated in proceedings under those statutes or for having opposed what they believe in good faith to have been unlawful employment discrimination.¹² Other federal statutes also prohibit termination of employment for retaliatory reasons.¹³ For example, the Family and Medical Leave Act¹⁴ prohibits employers from interfering with rights protected by the FMLA through termination of employment for having used leave authorized by that statute.

Most states also have enacted statutes that prohibit employers from discharging or otherwise taking any adverse employment actions against employees because of race, sex, national origin, religion, age, disability, or other protected characteristics.¹⁵ Those and other states have enacted statutes that prohibit the discharge of employees who have engaged in statutorily protected conduct or for other reasons.¹⁶

In addition, the development of common-law claims in most of the states has contributed to what some have characterized as the erosion of the employment at will doctrine.¹⁷ The three principal categories of these common-law claims are: (1) claims for breach of contract based on the employer's representations in personnel policies, employee handbooks, other documents and oral statements;¹⁸ (2) claims sounding in tort for wrongful discharge in violation of public policy;¹⁹ and (3) breach of an implied covenant of good faith and fair dealing.²⁰ A 2001 survey found that 38 states had recognized the implied-contract exception to the doctrine of employment at will, 43 states had recognized the public-policy exception and 11 states had adopted the implied covenant of good faith and fair dealing in the context of employment.²¹

Some commentators have suggested that, in light of these developments, every decision to dismiss an employee should be based on a good, documented reason.²² But while it may be the perception of most employees that they can be dismissed only for

¹¹ 29 U.S.C. § 158(a)(1).

¹² 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA). The Supreme Court this last Term held that two statutes prohibited retaliation despite the fact that they were silent on that issue for some or all employees. *Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931 (May 27, 2008) (federal-sector provisions of ADEA); *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951 (May 27, 2008) (42 U.S.C. § 1981).

¹³ See, e.g., 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act of 1970); 30 U.S.C. § 820b(1) (Mine Safety and Health Act); 42 U.S.C. § 7622(a) (Clean Air Act); 33 U.S.C. § 1367 (Clean Water Act); 42 U.S.C. § 6971 (Resource Conservation and Recovery Act); 15 U.S.C. § 2622 (Toxic Substances Control Act); 49 U.S.C. § 2305 (Surface Transportation Assistance Act); 18 U.S.C. § 1514A(a) (Sarbanes Oxley Act of 2002); 31 U.S.C. § 3730(h) (False Claims Act).

¹⁴ 29 U.S.C. §§ 2601, *et seq.*

¹⁵ The EEOC lists dozens of state and local agencies that administer statutes and ordinances which prohibit employment discrimination. See 29 C.F.R. § 1601.74.

¹⁶ See generally LEX K. LARSON, *UNJUST DISMISSAL*, ch. 5 (1984 & 2007 Cum. Supp.).

¹⁷ See, e.g., Amy M. Carlson, *States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511 (2004).

¹⁸ See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

¹⁹ See, e.g., *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

²⁰ See, e.g., *Fortune v. National Cash Register, Co.*, 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977).

²¹ Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. R. 3, 4 (2001).

²² SEAN R. GALLAGHER & KATHY MILLER, *THE PRACTITIONER'S GUIDE TO COLORADO EMPLOYMENT LAW*, at 2-2 (2006 ed.).

just cause,²³ that is not the law. In reality, unless an employee has entered into or is the beneficiary of a contract of employment that requires just cause for termination by the employer,²⁴ the employment relationship is presumed to be at will. As a result, the statutory, contract and tort claims available to some employees are viewed as exceptions to the general rule,²⁵ and many judges treat these statutory and common-law claims as aberrational claims that should be interpreted narrowly.²⁶

III. THE IMPACT OF EMPLOYMENT AT WILL

The presumption of employment at will makes it more difficult for employees to prevail on claims that have been adopted legislatively and by the courts. Court frequently have stated that, in determining whether employers' proffered reasons for adverse employment actions are a pretext for employment discrimination or retaliation, they do not sit as "super-personnel departments, evaluating the correctness or wisdom of those employers' decisions."²⁷ Some courts have gone even further, concluding that it is not sufficient for a plaintiff to establish that a reason proffered by an employer is not accurate; rather, the plaintiff must establish that the employer lacked a good-faith belief in the accuracy of that reason.²⁸ Since it is generally difficult to rebut an employer's claim that it acted in good faith,²⁹ plaintiffs have a correspondingly more difficult task in convincing trial courts that there exists a genuine issue of material fact sufficient to defeat a motion for summary judgment.

These proof problems make it more difficult for employees to establish a discriminatory or retaliatory motive, either through direct evidence or by showing that the proffered reason was a pretext for an impermissible one. The predictable result is fewer verdicts for plaintiffs and fewer pro-plaintiff appellate decisions.

The doctrine of employment at will also creates grossly unfair results. Three cases illustrate this:

- Judge Andrew N. Frye, Jr., a circuit judge in West Virginia, dismissed Mary Lou Smith, a magistrate court clerk, because her son filed as a candidate against the incumbent circuit court clerk. The Fourth Circuit affirmed the

²³ Mark V. Roehling, *The "Good Cause Norm" in Employee Relations: Empirical Evidence and Policy Implications*, 14 EMP. RESP. & ARTS J. 91 (2002).

²⁴ Such contracts are not uncommon for highly compensated executives, athletes, coaches and persons who work in entertainment or in broadcast journalism. See David Yermack, *Golden Handshakes: Rewards for CEOs Who Leave*, at 2 (2005), <http://www.nber.org/~confer/2005/cgs05/yermack.pdf>, (last visited March 25, 2008) (84% of CEOs in sample who were dismissed received severance packages, with mean present value of \$7.11 million). In addition, most collective bargaining agreements require just cause for termination of employment. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 196 (9th Cir. 1990) (Reinhardt, J., concurring). However, only 7.9% percent of private-sector employees in the United States were represented by a labor union in 2003. Jelle Visser, *Union Membership Statistics in 24 Countries*, 129 MONTHLY LABOR REVIEW 38, 46 (Jan. 2006).

²⁵ See, e.g., *Benders v. Bellows & Bellows*, 515 F.3d 757, 766 (7th Cir. 2008); *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 111, 176 P.3d 91, 110 (2008).

²⁶ See, e.g., *Kassem v. Washington Hosp. Ctr.*, 513 F.3d 251, 254 (D.C. Cir. 2008); *Addis v. Exelon Generation Co., L.L.C.*, 880 N.E.2d 685, 693 (Ill. App. 2007); *Miracle v. Bell County Emergency Med. Servs.*, 237 S.W.3d 555, 558 (Ky. App. 2007).

²⁷ See, e.g., *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983).

²⁸ See, e.g., *Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 811 (8th Cir. 2005); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995).

²⁹ Cf. *Pena v. State*, 166 S.W.3d 274, 279 (Tex. App. 2005); *Prod. and Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992).

dismissal of Ms. Smith's complaint.³⁰ Judge Motz, in a concurring opinion, noted that this "may be an unfair reason for firing Ms. Smith but, because she was an at-will employee, Judge Frye could fire her for no reason or any reason at all—except an unlawful reason."³¹

- Karen King, a ten-year Marriott International employee who worked in the company's employee benefits department, was discharged on the ground that she didn't get along with other employees after she had complained about the company's proposed transfer of funds from an employee medical plan to a general corporate account. The Maryland Court of Special Appeals affirmed the dismissal of her complaint, holding that the public policy exception in Maryland to the doctrine of at-will employment did not support a claim based on those facts.³²
- Don's Super Valu, Inc. in Menomonie, Wisconsin, terminated the employment of Karen Bammert because her husband, a Menomonie police officer, had arrested the store owner's wife for drunk driving. The Wisconsin Supreme Court affirmed the dismissal of Ms. Bammert's complaint on the ground that the public policy exception in that state did not extend to retaliation for the conduct of an employee's spouse.³³

The at-will framework that produced these results is not only a problem for employees. Employers, their attorneys and counsel for employees must become familiar with a patchwork quilt of employment statutes, ordinances and common-law principles for any given jurisdiction. That increases the complexity of the legal environment in which employers in that jurisdiction must operate. In addition, since many of the claims and defenses are relatively new and are evolving, this legal regime is less predictable and less easy to manage than one in which the basic principles are clear and well established. The fact that these rules differ from state to state only adds to that complexity.³⁴ This can lead to difficult choice of law questions in cases involving multiple jurisdictions.³⁵

In addition, the doctrine of employment at will can exacerbate racial, gender and other tensions in the workplace. That is because workers who do not fall into a category protected by an anti-discrimination statute may feel less protected by the law than co-workers who are covered by those laws, and more vulnerable to an unfair termination.

IV. THE ALTERNATIVE—"JUST CAUSE"

The alternative to employment at will is a simple one, a requirement that an employer have just cause to discharge a nonprobationary employee. That is the law in

³⁰ *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007).

³¹ *Id.* at 277 (Motz, J., concurring).

³² *King v. Marriott Inter. Inc.*, 160 Md. App. 689, 866 A.2d 895 (2005).

³³ *Bammert v. Don's Super Valu, Inc.*, 254 Wis.2d 347, 646 N.W.2d 365 (2002).

³⁴ *Compare, e.g., Preston v. Claridge Hotel & Casino*, 231 N.J. Super 81, 555 A.2d 12 (1989) (recognizing claim for breach of implied in fact contract based on employee handbook) *with* *Murphy v. American Home Prods. Corp.*, 58 N.Y. 2d 293, 305, 448 N.E.2d 86, 91 (1983) ("absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employee at will remains unimpaired").

³⁵ *See, e.g., Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054 (Utah 2002) (applying Utah choice of law rules in determining that Idaho law established that plaintiff's claim sounded in tort and therefore was preempted by Labor Management Relations Act).

other advanced industrialized countries.³⁶ Highly compensated corporate executives, athletes, persons who work in broadcast journalism and others with highly specialized skills often enjoy the protection of just-cause protections in their individual employment contracts.³⁷ So do the majority of unionized employees, in their collective bargaining agreements.³⁸ A number of academic commentators have proposed that the federal government or state governments adopt just-cause statutes.³⁹

Of course, arguments have been offered in favor of the doctrine of employment at will. Professor Richard A. Epstein, for example, has argued that employment at will benefits both employers and employees.⁴⁰ The ability of both employers and employees to terminate their relationship at will, he contends, enables each side to monitor the other's behavior and to terminate that relationship whenever the net value of the contract turns negative.⁴¹ Employer abuses are minimized because of the reputation costs of unfair dismissals.⁴² Both employers and employees can diversify their risks and correct mistakes resulting from erroneous information at the initiation of the contract by terminating their relationships and seeking alternative opportunities.⁴³ In addition, according to Professor Epstein, employment at will is much cheaper to administer than a just-cause dismissal scheme.⁴⁴

This analysis is fundamentally flawed, most significantly because it does not take into account inequality in the bargaining relationship between employers and employees. Most employees simply lack the bargaining power to reject at-will status if the employer insists on it.⁴⁵ This is especially true in an economy in which employees have few alternative places to turn, since there are relatively few jobs available that provide just-cause protection.⁴⁶ Moreover, most employees erroneously believe that they can be discharged only for just cause.⁴⁷

The more frequent objection to just-cause statutes, however, is that at-will employment relationships are more economically efficient and therefore increase societal wealth and employees' earnings.⁴⁸ In a 1990 paper, Professor Edward P. Lazear, now the Chairman of the White House's Council of Economic Advisors, concluded that job security protections increase the unemployment rate.⁴⁹ That argument can be

³⁶ See INTERNATIONAL AND EMPLOYMENT LAWS, *supra* note 7.

³⁷ See *supra* note 24.

³⁸ *Id.*

³⁹ See, e.g., Steiber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REFORM 389 (1983).

⁴⁰ Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 946, 956-57 (1984).

⁴¹ *Id.* at 963-67.

⁴² *Id.* at 967-68.

⁴³ *Id.* at 968-69.

⁴⁴ *Id.* at 970-72.

⁴⁵ The fact that just-cause protections are much more prevalent for employees with significant bargaining power strongly suggests that employees who currently lack such power would obtain these protections if they could.

⁴⁶ Unionized private-and public-sector jobs in the United States declined from 23.5% to 12.4% between 1970 and 2003. Visser, *supra* note 24, at 45.

⁴⁷ See James Robert Ward, III, *The Endowment Effect and the Empirical Case for Changing the Default Employment Contract from Termination "At-Will" to "For-Cause" Discharge*, 28 LAW & PSYCHOL. REV. 205, 207 (2004).

⁴⁸ See Epstein, *supra* note 40, at 951, 977-78.

⁴⁹ Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q.J. ECON. 699 (1990). Other economists disagree with that conclusion. See, e.g., Katherine G. Abraham and Susan N. Houseman, Does

highly persuasive to legislators. Fortunately, it is possible to determine whether there is any empirical basis for the claim that just-cause arrangements result in reduced job growth and higher unemployment rates, to the detriment of both employers and employees. That answer can be found in Montana.

V. THE STORY FROM MONTANA—THE BIG SKY DID NOT FALL

A. WHAT HAPPENED IN MONTANA

In 1987, the Montana legislature enacted the first and, to date, the only state statute in the United States requiring that private-sector employers have just cause to discharge their employees.⁵⁰ The history of that statute, however, had its origins in more than five years of judicial decisions before the law's enactment.

On January 4, 1982, the Montana Supreme Court recognized, for the first time, an implied covenant of good faith and fair dealing for an employment contract that was terminable at will.⁵¹ The scope of that initial decision, known as "*Gates I*," was relatively limited, since the court held that the covenant was implied in the employment contract resulting from representations in an employee handbook stating that a written warning would be given to an employee prior to dismissal for unsatisfactory performance.⁵²

In later decisions, the Montana Supreme Court substantially expanded employers' liability and employees' possible damages for breach of that implied covenant. In an appeal after remand of *Gates I*, the court held, in a 4-3 decision, that breach of the covenant of good faith and fair dealing was a tort for which a plaintiff could recover not only economic damages, but also compensatory and punitive damages.⁵³

That court then recognized a claim for breach of the covenant where an employer had not adopted an employment handbook.⁵⁴ It held that whether a covenant of good faith and fair dealing would be implied "depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."⁵⁵ The court held that there were genuine issues of material fact precluding summary judgment on that claim, which included the plaintiff's allegation that she was given a pay raise after three months and promised another pay raise in an additional three months; that her supervisor told her he wanted her to learn to do his company's bookkeeping; that she was told she was doing a good job; and that her employer had a written policy that employees who demonstrated independence and initiative were most likely to become station managers.⁵⁶

Employment Protection Inhibit Labor Market Flexibility? Lessons from Germany, France and Belgium, in *SOCIAL PROTECTION VS. ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF?* (1994)

⁵⁰ In addition, both Puerto Rico and the U.S. Virgin Islands have enacted legislation requiring just cause for termination of employment. The Puerto Rican statute requires compensation for any employee, working without a contract for a definite term, who is discharged without good cause. 29 P.R. Laws Ann. §§ 185a-m. The Virgin Islands Wrongful Discharge Act sets forth the permissible grounds for termination of employment and provides the remedies of reinstatement and back pay for termination of employment in violation of that statute. 24 V.I. Code Ann. §§ 76, *et seq.*

⁵¹ *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 184-85, 638 P.2d 1063, 1066-67 (1982) ("*Gates I*").

⁵² 196 Mont. at 184, 638 P. 2d at 1067.

⁵³ *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 307, 668 P.2d 213, 215 (1983) ("*Gates II*").

⁵⁴ *Dare v. Montana Petroleum Mktg. Co.*, 212 Mont. 274, 282, 687 P.2d 1015, 1020 (1984).

⁵⁵ *Id.*

⁵⁶ *Id.* at 283, 687 P.2d at 1020.

In a third decision, the Montana Supreme Court held that probationary employees were owed a duty of good faith and fair dealing.⁵⁷ The court found that there was evidence of objective manifestations by the employer supporting the employee's belief that she had job security, based in part on her earlier employment by an independent contractor that was acquired by the defendant; the defendant's failure to hold an evaluation meeting at the end of her 500-hour probationary period, as required by its personnel policy; and the defendant's failure to refer to her probationary status in the discharge memorandum or in an internal decisions sustaining the discharge.⁵⁸

Not all judicial decisions in the five years following *Gates I* resulted in an expansion of employees' rights and remedies. A federal district court granted summary judgment in favor of an employer on an implied-covenant claim because the plaintiff had not shown that the employer had breached his employment contract.⁵⁹ The Montana Supreme Court created exceptions to the implied covenant of good faith and fair dealing based on judicial immunity, First Amendment protections for the free exercise of religion, and preemption by the grievance procedures in a collective bargaining agreement.⁶⁰ Other decisions used a more deferential approach than the Montana Supreme Court had applied earlier to employers' performance standards and to employers' justifications for discharge decisions.⁶¹

This movement toward a more restrictive interpretation of the implied covenant of good faith and fair dealing in the employment context may have been the result of the accession of more conservative judges to the Montana Supreme Court.⁶² Whatever the cause of that trend, it was settled by 1987 that the implied covenant would provide meaningful relief for at least some Montana employees.

Gates I and its progeny nevertheless caused many employers and insurance carriers to look to the state legislature for relief from the tort damages available under the implied covenant. Pro-business legislators, working with lobbyists from the Montana Association of Defense Counsel, drafted a bill that eventually was enacted as the Montana Wrongful Discharge Act of 1987 ("MWDA").⁶³

The MWDA, which went into effect on July 1, 1987,⁶⁴ provides that an employer's decision to discharge an employee, or the constructive discharge of an employee,⁶⁵ is unlawful where (a) "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy"; (b) "the discharge was not for

⁵⁷ *Crenshaw v. Bozeman Deaconess Hosp.*, 213 Mont. 488, 498, 687 P.2d 487, 492 (1984).

⁵⁸ *Id.* at 497, 693 P.2d at 491-92.

⁵⁹ *Maxwell v. Sisters of Charity of Providence of Montana*, 645 F.Supp. 937, 939 (D. Mont. 1986).

⁶⁰ *Mead v. McKittrick*, 223 Mont. 428, 431, 727 P.2d 517, 519 (implied covenant claim by court secretary against district court judge); *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 116-17, 728 P.2d 794, 796 (1986) (claim by parochial school teacher); *Brinkman v. State*, 224 Mont. 238, 250, 729 P.2d 1301, 1309 (1986) (claim by State employee who was covered by a collective bargaining agreement).

⁶¹ *Belcher v. Dept. of State Lands*, 228 Mont. 352, 358-59, 742 P.2d 475, 479 (1987) ("This Court will not interfere with the Department of State Lands' right to manage its affairs and hire employees who will perform their jobs as long as there is a standard and the Department has abided by it"); *Coombs v. Gamer Shoe Co.*, 239 Mont. 20, 24, 778 P.2d 885, 887 (1989) ("[A]bsent any evidence of dishonesty or pretext [the employer's] actions would be appropriate given an employer's discretion to make personnel decisions it feels are in its best interests").

⁶² An empirical study of that trend appears in Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 107-08 n. 79 (1990).

⁶³ See *id.*, 108-110, for a brief synopsis of the legislative history of that statute.

⁶⁴ See Schramm, *supra* note 62, at 113.

⁶⁵ MONT. CODE ANN. § 39-2-903(2).

good cause and the employee had completed the employer's probationary period of employment"; or (c) "the employer violated the express provisions of its own written personnel policy."⁶⁶ The statute defines the term "public policy" to mean "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."⁶⁷ It defines "good cause," the basis for the second ground for a wrongful discharge claim, as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."⁶⁸

Although the substantive protections provided by the MWDA are far more extensive than those under any other state's statutes, the limitations period and the remedies are limited. A claim under the Montana statute must be filed within one year of the date of discharge, and an employer can require an employee to exhaust its written internal procedures for a period of no more than 120 days.⁶⁹ The statute preempts common-law claims "for discharge" arising "from tort or express or implied contract."⁷⁰ A plaintiff who establishes a wrongful discharge can be awarded damages for lost wages and fringe benefits for a period of four years from the date of discharge, less the amount of the plaintiff's interim earnings (less job-search expenses) or the amount the plaintiff could have earned with reasonable diligence, plus interest.⁷¹

A plaintiff can recover punitive damages only by establishing by clear and convincing evidence that the employer engaged in actual fraud or actual malice in a wrongful discharge.⁷² A plaintiff cannot recover damages for pain and suffering, emotional distress, compensatory damages, punitive damages (with the exception outlined above) or any other form of damages.⁷³

Either party to a dispute under the MWDA can make an offer to arbitrate that dispute within 60 days after service of the complaint, and the offer must be accepted, if at all, within 30 days after it is made.⁷⁴ If the discharged employee makes an offer to arbitrate that his or her ex-employer accepts and if that employee prevails in arbitration, that plaintiff will recover the arbitrator's fee and all costs of arbitration.⁷⁵ But if either party rejects a valid offer to arbitrate and loses, the prevailing party is entitled to recover attorney fees incurred after the date of the offer.⁷⁶

⁶⁶ MONT. CODE ANN. § 39-2-904.

⁶⁷ MONT. CODE ANN. § 39-2-903(7).

⁶⁸ MONT. CODE ANN. § 39-2-903(5). In an apparent concession to the tobacco lobby, the statute expressly provides that the "legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason," *id.*, unless the employer acts within the provisions of a separate statute that allows employers to restrict their employees' use of food, beverages or tobacco under certain circumstances. MONT. CODE ANN. §§ 39-3-313(3) and (4). Those circumstances include an employee's use of a lawful product that affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees or that conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment.

⁶⁹ MONT. CODE ANN. §§ 39-2-911(1) and (2).

⁷⁰ MONT. CODE ANN. § 39-2-913. However, the MWDA does not apply to the discharge of an employee who is covered by a written collective bargaining agreement or a written contract of employment for a specific term. MONT. CODE ANN. § 39-2-912(2).

⁷¹ MONT. CODE ANN. § 39-2-905(1).

⁷² MONT. CODE ANN. § 39-2-905(2).

⁷³ MONT. CODE ANN. § 39-2-905(3).

⁷⁴ MONT. CODE ANN. § 39-2-914(3).

⁷⁵ MONT. CODE ANN. § 39-2-914(4).

⁷⁶ MONT. CODE ANN. § 39-2-915.

In 1989, the Montana Supreme Court, in a 4-3 decision, held that the MWDA did not violate the legal redress provision in the Montana Constitution,⁷⁷ overruling earlier decisions of that court⁷⁸ that had held that the Montana Constitution provides substantive protections against legislation that abolished common-law rights and remedies. The majority opinion also rejected the argument that the MWDA was unconstitutional because it failed to provide an adequate substitute for the common-law claims it abrogated, concluding that that statute was “an adequate substitute” for those common-law claims and remedies.⁷⁹

The MDWA, with all its limitations, still provides far greater rights than Montana employees had before the Montana Supreme Court, in *Gates I*, first recognized implied covenant of good faith and fair dealing claims in the employment context. Employment at will in Montana has not been the law in that state for the last 26 years, the last 21 of which was the result of a state statute with no parallel in any other state.

B. THE ECONOMIC IMPACT OF THE MONTANA WRONGFUL DISCHARGE ACT

As noted earlier, some have argued that greater worker protections lead to higher unemployment and reduced job growth.⁸⁰ The logic of that position is that if it is more difficult and expensive for employers to fire employees, they will be more reluctant to hire them. For example, the conservative columnist Thomas Sowell, writing in March 2006, claimed that French students, protesting a proposed law that would have made it easier to fire younger employees, ignored “elementary economics that adding to the costs, including risks, of hiring workers tends to reduce the number of workers hired.”⁸¹ Of course, a simple comparison of French and American employment laws and unemployment rates would ignore the potential impact of other factors, such as the very different unemployment and welfare benefits in the two countries, comparative wage rates, international competition, international trade policy and the outsourcing of jobs to firms based in other countries. The profound differences between the French and American legal systems also would make it difficult to determine what economic consequences, if any, those two countries’ laws on employees’ rights have on unemployment rates and employment growth in those countries.

The Montana Wrongful Discharge Act, however, does provide an opportunity to analyze the economic impact of a just-cause employment regime. Montana employers are subject to the same federal laws as employers in other states. Its legal system is the same, and its unemployment and welfare benefits are very similar to those of other states, including the states that border it. The same market forces that affect hiring decisions of employers in Montana also affect the hiring decisions of employers in the same or similar industries in other states, including neighboring states. And economic reports by the Bureau of Labor Statistics (“BLS”) of the U.S. Department of Labor use the same assumptions and methodology on a national basis.

⁷⁷ *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989). The Montana Constitution provides that the courts of that state “shall be open to every person, and speedy remedy afforded for every injury of person, property or character,” and that “[n]o person shall be deprived of this full legal redress.” Mont. Const., Art. II, Sec. 16.

⁷⁸ *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983); *Pfost v. State*, 219 Mont. 206, 218-22, 713 P.2d 495, 502-05 (1985).

⁷⁹ *Meech*, 238 Mont. at 43, 776 P.2d at 501.

⁸⁰ See *supra* note 49 and accompanying text.

⁸¹ Thomas Sowell, *French Student Riots*, THE POST CHRONICLE, March 18, 2006, http://www.postchronicle.com/commentary/article_21210928.shtml (last visited June 16, 2007).

I have compared the seasonally adjusted unemployment rates in Montana with those in neighboring states—Idaho, North Dakota, South Dakota and Wyoming—during three periods of time. If the legal developments in Montana had affected unemployment rates, one would expect to see differences between those rates in Montana and those in surrounding states. The first period, from January 1976 through December 1981, preceded *Gates I*. During the second period, from January 1982 through June 1987, Montana employees could bring claims under *Gates I* and its progeny for breach of the implied covenant of good faith and fair dealing. The third period, from July 1987 through December 2007, is the one in which Montana employers have been required to comply with the Montana Wrongful Discharge Act.

Between January 1976 and December 1981, Montana employment rates followed the same general trends as those in neighboring states and in the United States, generally, although the Montana unemployment rate in December 1981 was higher than that in any of the states that border it other than Idaho (see Figure 1).⁸²

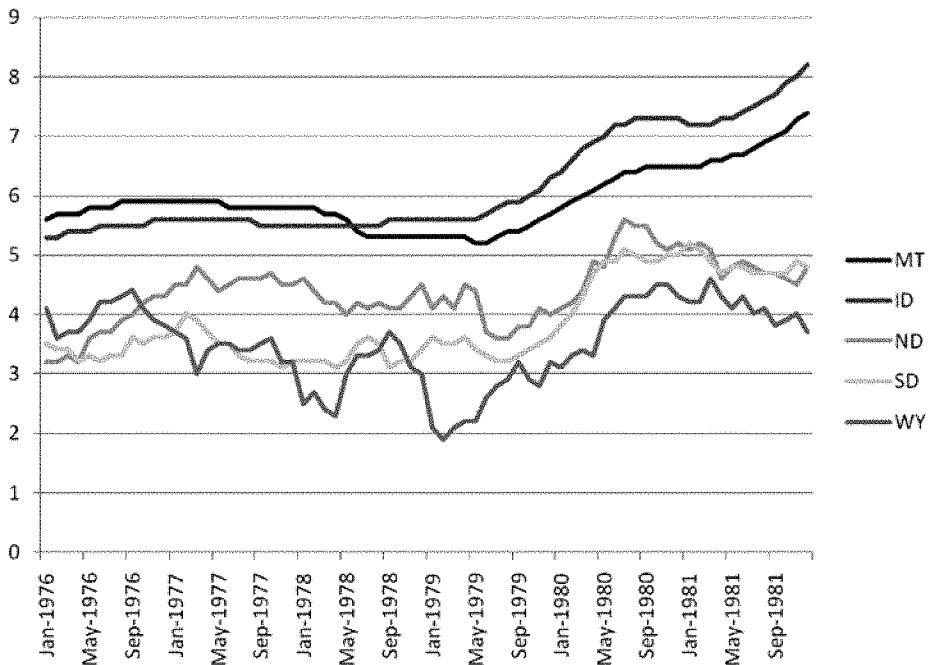


FIGURE 1:
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JAN. 1976-DEC. 1981

What happened after the Montana Supreme Court handed down its decision in *Gates I*? In two words, not much (see Figure 2).

⁸² The information in the following graphs all is derived from data on the Bureau of Labor Statistics' Web site, <http://www.bls.gov/>.

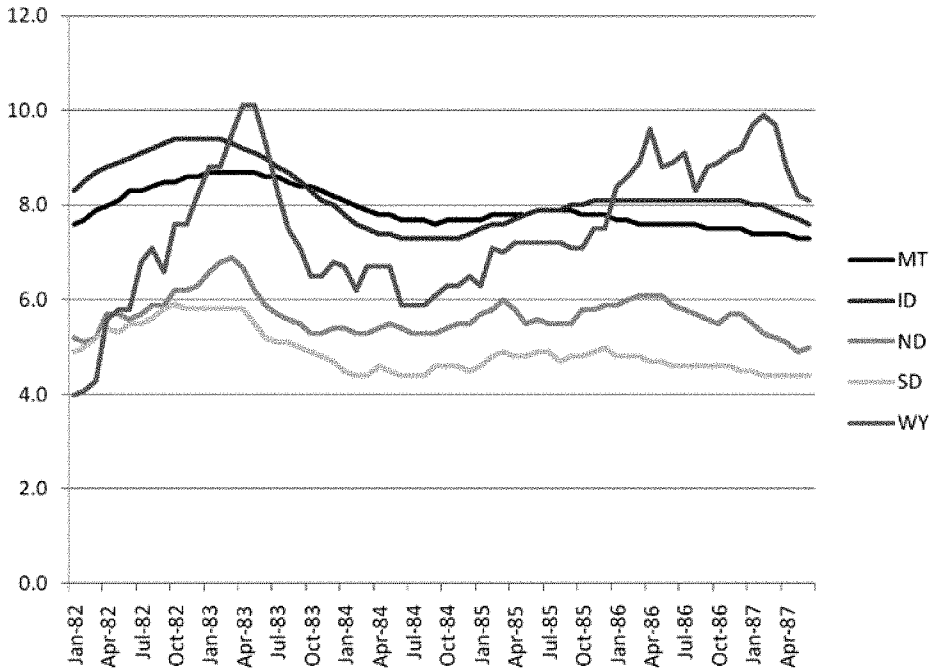


FIGURE 2
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JAN. 1982-JUNE 1987

The unemployment rates in both Montana and Idaho, after remaining in the 5-6% range during the latter 1970s, began increasing in July 1979 and reached 7.4% and 8.2%, respectively, by December 1982. The unemployment rates for North Dakota, South Dakota and Wyoming were more volatile and generally were lower than the unemployment rates in Montana and Idaho during that same period of time.

The unemployment rates for Montana and Idaho continued to move in tandem with each other after *Gates I* and before enactment of the MWDA. The unemployment rates in North Dakota and South Dakota also continued to move in tandem with each other and were significantly lower than the unemployment rates in Montana and Idaho during that same time period. Wyoming's unemployment rate became much more volatile. It jumped from 3.7%, the lowest rate among these five states in December 1981, to 8.1%, the highest rate among the five, in June 1987.

What happened after the MWDA was enacted? The Montana unemployment moved in the opposite direction from what Professor Lazear and others predict based on their view of elementary economics (see Figure 3):

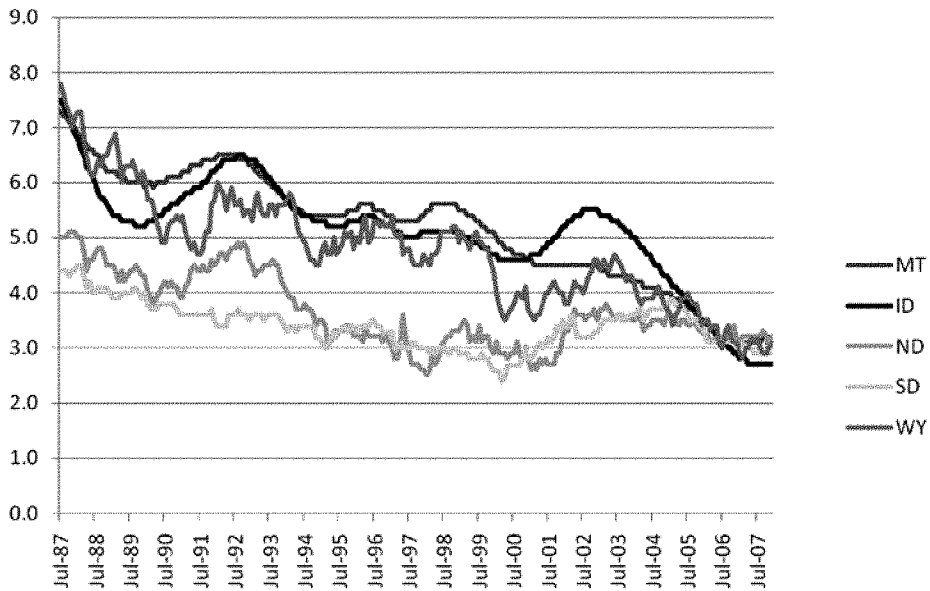


FIGURE 3
SEASONALLY ADJUSTED UNEMPLOYMENT RATES, JULY 1987-DEC. 2007

During this third period of time, the unemployment rates in three states—Montana, Idaho and Wyoming—moved in tandem with each other. The unemployment rates in North Dakota and South Dakota also moved in tandem with each other, but by 2004-06, were no longer consistently lower than the rates in the other three states. By December 2007, the unemployment rate in Montana was only 3.2%, no higher than the unemployment rates in any of the four states that border it.

The unemployment rate does not directly measure job growth or job losses at any given moment or over time. The BLS also provides information about the number of nonfarm jobs nationally, in each state and in local labor markets. What I have done is to measure the annual changes in nonfarm employment for each of these five states and for the United States from January 1970 through December 2007. In other words, I calculated the change in the number of jobs in Montana between January 1970 and January 1971, February 1970 and February 1972, and so on. The use of nonfarm employment figures tends to reduce the impact of drought, which varies geographically and from year to year and which, of course, has nothing to do with the Montana Wrongful Discharge Act.⁸³

⁸³ This measure does not totally eliminate the impact of weather and climactic conditions on these states' economies, since economic distress in agriculture typically causes job losses in businesses that supply farmers and in small towns in general.

The first comparison is job growth or losses in Montana and in the United States as a whole during these 36 years (*see* Figure 4):

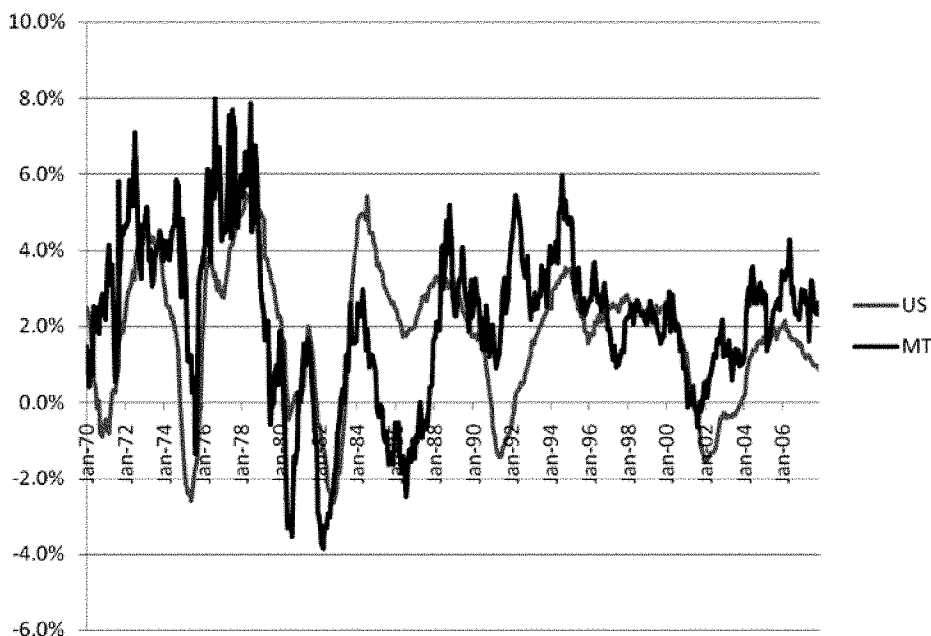


FIGURE 4
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND U.S., 1970-2007

The national and Montana job-growth figures closely matched each other with a number of notable exceptions. Between August 1978 and September 1988, the national economy consistently outpaced Montana in terms of job growth. Montana experienced net job losses, as measured on a year-to-year basis, repeatedly between July 1979 and October 1987. The national economy dipped into negative job-growth territory during that time only between July 1982 and February 1983. However, between January 1991 and December 1996 and again between December 2001 and December 2007, the Montana economy consistently outpaced the national economy in terms of nonfarm job growth.

The job-growth comparisons between Montana and each of its neighbors also are illuminating (*see* Figures 5-8):

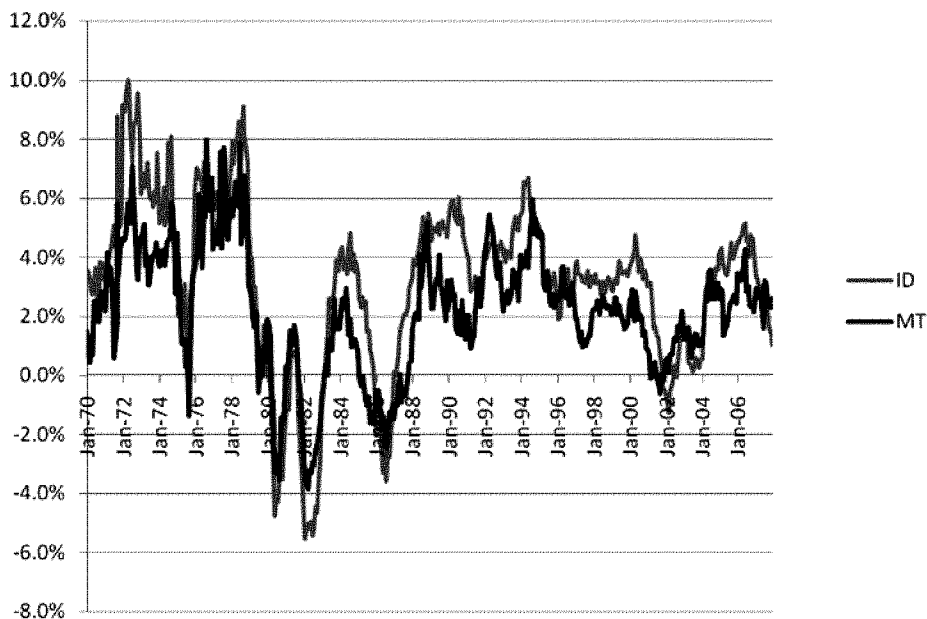


FIGURE 5
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND IDAHO, 1970-2007

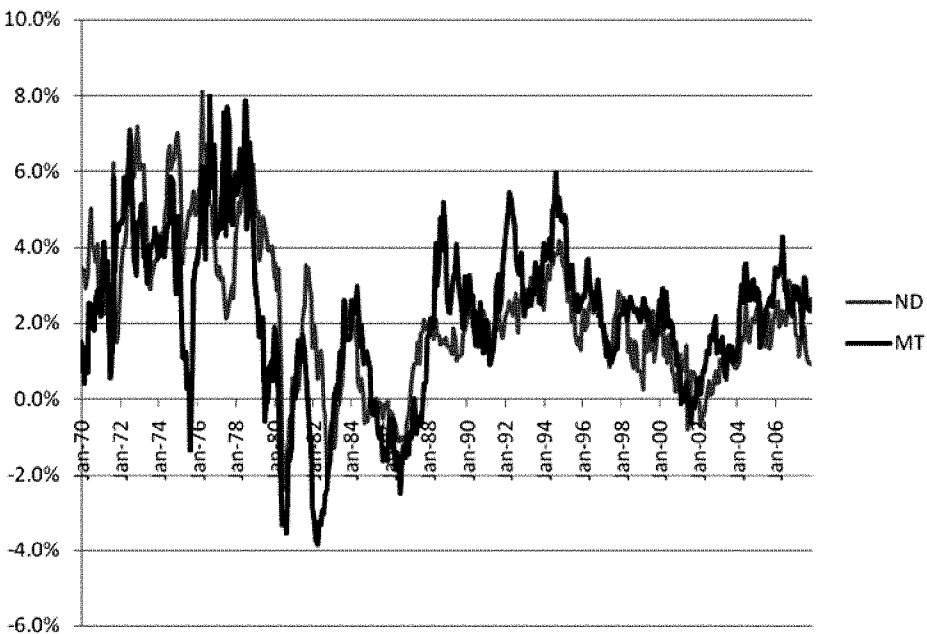


FIGURE 6
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND NORTH DAKOTA, 1970-2007

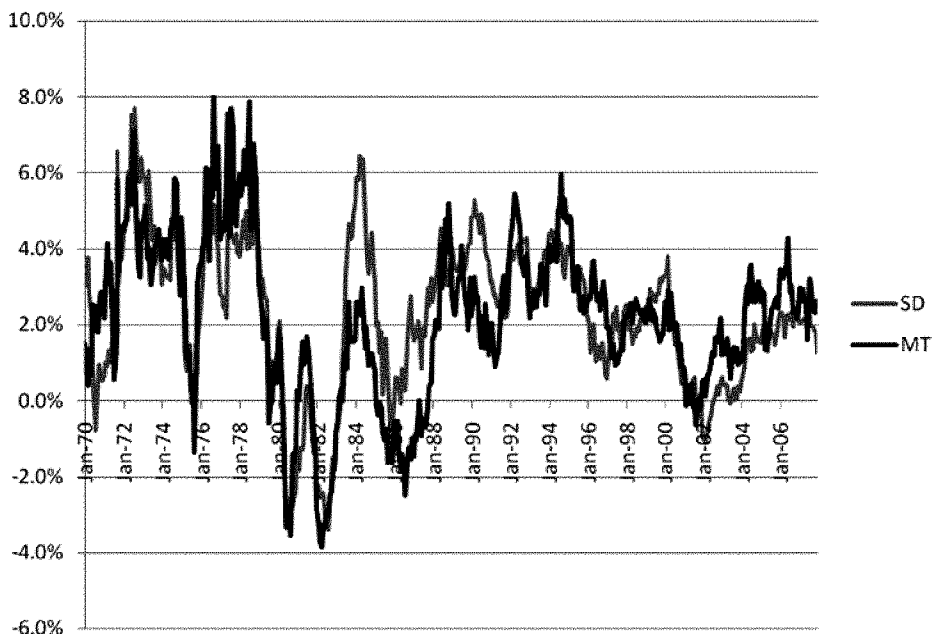


FIGURE 7
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND SOUTH DAKOTA, 1970-2007

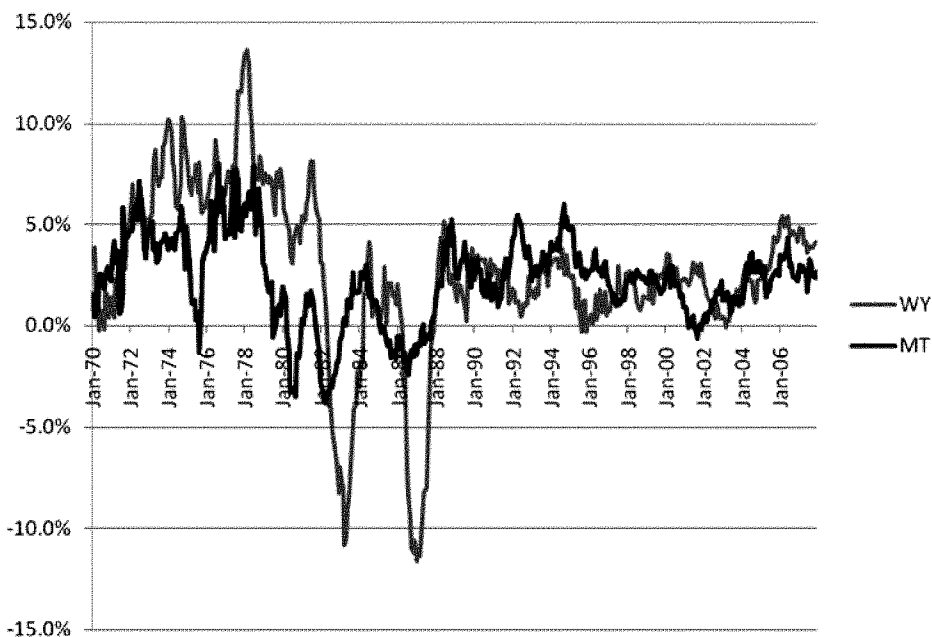


FIGURE 8
ANNUAL PERCENTAGE CHANGES IN NONFARM EMPLOYMENT
MONTANA AND WYOMING, 1970-2007

Montana's and Idaho's job-growth figures closely parallel each other, although Idaho generally has done better than Montana in this area since June 1983. The same general trend also applies to Montana and North Dakota, with Montana having better job-growth percentages since April 1988. Montana and South Dakota's numbers similarly have moved in tandem with each, with each state periodically outperforming the other. The greatest variance is between Montana and Wyoming; the latter state had significantly better employment increases between January 1977 and December 1981, dropped precipitously in this area in 1982, generally had much worse job-growth figures (including periods in which annual losses exceeded 10%) through the end of 1987, and since then has closely matched Montana's performance in employment growth.

In very broad terms, the Montana economy was anemic in the 1980s and has done very well since then. What accounts for those trends? Paul E. Polson, Director of the Bureau of Business and Economic Research and professor at the School of Business Administration of the University of Montana, attributes Montana's economic problems in the 1980s to specific economic hits it took during that decade.⁸⁴ First, there was a bust in oil exploration in Montana and Wyoming in the early 1980s and a bust in natural gas exploration in the last part of the 1980s.⁸⁵ Second, high interest rates between 1980 and 1982 caused a sharp decrease in construction activity and job losses in the wood products industry, which in turn increased mechanization, causing further job losses.⁸⁶

Third, the Anaconda Company closed its copper mine in Butte and closed its refineries in Anaconda and Great Falls in the 1980s.⁸⁷ Fourth, Montana had four or five very bad farm years in the 1980s as a result of drought and generally very poor agricultural conditions.⁸⁸

The turnaround in the Montana economy since then has been the result of several factors. During the 1990s, 96% of the state's economic and income growth centered in and around seven regional centers, and much if not most of that growth occurred in health care; business, engineering, and management services; finance, insurance, and real estate; and construction.⁸⁹ More recently, the prolonged major boom in the economies of China, India and other Asian countries has increased demand for oil, natural gas, copper, lead and zinc, increasing employment in Montana in those industries; and those and other industries have undergone the structural changes that contributed to mass layoffs in the 1980s.⁹⁰ The result has been economic exuberance in Montana, which does not appear to be irrational.⁹¹

⁸⁴ Telephone Interview with Paul E. Polson, March 15, 2007.

⁸⁵ See also William W. Ballard, *Montana's oil and gas industry*, MONT. BUS. Q., Spring 1991.

⁸⁶ See also Charles E. Keegan, III, *Montana's forest products industry*, MONT. BUS. Q., Spring 1991.

⁸⁷ See also George Everett, *A Peek at Butte's Economy*, <http://www.butteamerica.com/peek.htm> (last visited June 17, 2007).

⁸⁸ See also <http://www.montana.edu/msuhistory/1980.html> (last visited June 17, 2007).

⁸⁹ MONTANA'S AGENDA: ISSUES SHAPING OUR STATE, 4-5 (Winter 2005), www.umt.edu/urelations/Agenda/Winter2004-05.pdf, (last visited June 17, 2007).

⁹⁰ See *supra* note 88.

⁹¹ See Paul E. Polzin, *U.S. Economy Slows Slightly: Will Montanans Even Notice?*, 2007 ECONOMIC OUTLOOK SEMINAR, p. 5.

VI. THE BIG SKY DID NOT FALL

It is difficult to find economic data showing that the Montana Supreme Court's decision to apply the implied covenant of good faith and fair dealing to employment relations, and that state's adoption of the Montana Wrongful Discharge Act, affected hiring decisions in that state. The market forces that led to major layoffs in the extractive industries began before 1982. The unemployment rate in Montana declined in the five and one-years after *Gates I* and continued to decline after enactment of the MWDA. Unemployment and job growth increased and decreased as the result of the national and global business cycles, boom-and-bust cycles in petroleum and natural gas exploration, weather and climactic conditions, mechanization, changes in the import and export markets, the development of high-tech jobs, and other developments. Those economic trends affected Montana and the states that surround it.

Those neighboring states are affected by the same market forces and by the same corporate job-growth or job-reduction decisions, often in the same industries, as Montana. None of those states has abrogated the doctrine of employment at will.⁹² Yet, as a general rule, those states' economies have had unemployment rates and changes in nonfarm economic growth that are remarkably similar to those in Montana. The differences between those states' economic figures and those in Montana are most likely the result of the greater concentration of oil and gas exploration in Wyoming,⁹³ or the greater role played by agriculture in North Dakota and South Dakota, in comparison to more economically diverse Montana.

VII. CONCLUSION

It is time—many believe, long past time—for the federal government and the states to enact laws to require just cause for termination of employment. The economy of the United States, the global economy and the state of labor relations are vastly different than they were in the first year of the administration of Rutherford B. Hayes, the year in Horace Wood first announced the doctrine of employment at will. The mere fact that this has become the default rule for the common law of employment does not mean that it is based on sound policy, if that ever was the case.

The burden should be placed on the opponents of just-cause legislation to present empirical data demonstrating that there is a positive correlation between the adoption of just-cause legislation and unemployment rates or that there is a negative correlation between the enactment of such legislation and job growth. The data outlined in this issue brief do not show that. What they show is an absence of a correlation between these legal and economic trends.

Employees do not risk losing their jobs as a result of gaining greater job protections. Employers do not put themselves at a competitive disadvantage by legislation that protects their employees from arbitrary and unfair discharge decisions. The twin bogeymen of higher unemployment and lower job-growth rates should not shape the public policy debate on the abolition of the doctrine of employment at will.

⁹² North Dakota and South Dakota have enacted statutes that provide, in virtually identical language, that an "employment having no specified term may be terminated at the will of either party on notice to the other," unless otherwise provided by statute. N.D. Cent. Code § 34-03-01; S.D. Codified Laws Ann. § 60-4-4. Judicial decisions in Idaho and Wyoming continue to recognize employment at will as the default rule. *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 333, 563 P.2d 54, 57 (1977); *Davis v. Wyoming Medical Ctr., Inc.*, 934 P.2d 1246, 1249 (Wyo. 1997).

⁹³ See Sherry Wen, *Oil and Gas Production and the Relationship Between Prices and Employment in Wyoming*, 42 WYO. LABOR FORCE TRENDS 5 (2005).