SHELTER FROM THE STORM: THE NEED FOR WRONGFUL DISCHARGE LEGISLATION IN ALASKA

I. INTRODUCTION

The 1970s and 1980s have been marked by change and uncertainty concerning employment terminations. The common law principle governing the employment relationship for the past century, the employment-at-will doctrine,[1] has slowly been eroding. An increased willingness by state courts to create exceptions to the at-will doctrine has helped to produce a significant increase in the number of nonunion employees challenging their discharge. Thus, the wrongful discharge doctrine[2] has emerged.

Alaska is one of thirty-nine jurisdictions that recognize some modification to the traditional rule.[3] Lacking legislative guidance, the Alaska Supreme Court has been struggling piecemeal toward a new conceptualization of legal rules to protect the expectations in the modern employment relationship. However, in *ARCO Alaska, Inc. v. Akers,*[4] the Alaska Supreme Court sent a message that it could no longer shoulder the burden of reforming the law of the workplace alone.[5] As a result, the time has arrived for the Alaska Legislature to contemplate a comprehensive law protecting employees against unjust dismissal.

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1. The American at-will rule was articulated by Horace G. Wood in 1877. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). The most cited judicial articulation of the rule reads as follows: "All may dismiss their employees at will, be it many or few, for good cause, for no cause, or even for cause morally wrong without being thereby guilty of legal wrong." Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-520 (1884).

2. Gullett & Greenwade, *Employment at Will: The No Fault Alternative,* 39 LABOR L.J. 372, 373 (1988).

3. 9A Lab. Rel. Rep. (BNA) 505: 51-2 (Jan. 1989).

4. 753 P.2d 1150 (Alaska 1988).

5. The court held that "[p]unitive damages are not recoverable for breach of the implied covenant of good faith and fair dealing." *Id.* at 1154. The limiting of wrongful discharge damages to lost wages will reduce the number of lawyers willing to take unjust dismissal cases on contingency. The decision means only highly paid executives will have ready access to counsel and the average nonunion workers who also need legal representation will be shut out. If the majority of nonunion employees are to be fully and equally protected against unjust dismissal, legislative assistance will be necessary.

This note focuses on developing a statutory mechanism to achieve a middle ground in the adjudication of nonunion employee dismissals by providing Alaska's nonunion workers with basic protection against arbitrary dismissal, while simultaneously limiting the awards obtained from suing their former employers.[6] First, the note will trace the historical justification for the employment-at-will doctrine. Second, the note will briefly review the nature and limitations of the three theories most commonly identified by courts as exceptions to the at-will rule. Third, the line of wrongful discharge cases in Alaska will be discussed, concentrating on the two most recent Alaska Supreme Court decisions and their treatment of the "public policy" theory. Finally, legislation forbidding wrongful discharge that has been introduced or enacted in various other states will be assessed in order to suggest a framework for the Alaska Legislature to use in devising a statutory solution to the Alaska at-will dilemma.

II. THE COMMON LAW PRESUMPTION

While many reasons have been advanced to explain why the at-will doctrine became the American rule, the most frequent explanation is that the rule expresses the freedom of contract ideology prevalent during the nineteenth century, when the at-will doctrine gained acceptance. According to this explanation, freedom to make contracts includes freedom to terminate them unless the parties are expressly bound for a specified duration.[7]

A second reason advanced for the at-will presumption is that the courts in the nineteenth century were adopting a rule that reflected the then popular laissez faire economic philosophy, thereby emphasizing the ability of the employer to run its business free from government interference. Economic efficiency required that the employer have the absolute right to remove undesirable employees or those who hindered the employer's ability to produce a fair profit.[8] In that age, immigration had reduced or reversed the American labor shortage, industrialization was developing at a brisk pace and workers frequently changed

6. While the Alaska Supreme Court has eliminated punitive damages in this area, a limitation on, rather than elimination of, punitive damages would be more equitable to the parties to an employment dispute. *See supra* note 5.

7. Some latter-day commentators have rejected this explanation by observing that the law of contracts that emerged in the late nineteenth century would have supported a rule whereby courts would create a durational feature based on the intentions of the contracting parties, contrary to the adoption of an at-will presumption. *See* Feinman, *The Development of the Employment at Will Rule,* 20 AM. J. LEGAL HIST. 118, 129-130 (1976).

8. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976).

jobs on their own initiative.[9] Therefore, a presumption according freedom to both employers and employees to terminate their relationship translated public policy into the realm of the workplace.

Lastly, proponents of the "critical legal studies"[10] approach argue that adoption of the at-will rule was a promotion of industrial capitalism by the courts.[11] According to this explanation, at-will termination protects the capitalist's investment by strengthening the employer's control over the workplace. The employer had the power to terminate at will; therefore, employees interested in keeping their jobs were motivated to maintain a high level of productivity. Moreover, the rule allowed employers the freedom to upgrade their staffing or lay off workers in relation to changes in their production needs.

Although the at-will rule achieved universal adoption and even constitutional status,[12] legislators eventually discovered that the at-will rule inadequately protected the interests of employees in many instances.[13] To balance the bargaining power in the employment relationship, legislators have created exceptions to freedom of contract along two general lines. First, the establishment of collective bargaining has been legislatively encouraged; and, second, certain minimum substantive terms and the prohibition of certain conduct has been statutorily established.[14] This note addresses the dismissal of employees who fall outside either area of the above-mentioned legislative protections.

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9. *See* Leonard, *A New Common Law of Employment Termination,* 66 N.C.L. REV. 632, 641 (1988).

10. The movement known as Critical Legal Studies is founded on a "central descriptive message — that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power." Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987); *see also* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 52-56 (1986).

11. Feinman, *supra* note 7, at 131-35.

12. *E.g.,* Adair v. United States, 208 U.S. 161 (1908).

13. Beginning with the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932), federal labor legislation attempted either to protect human rights or to introduce the elements of collective action to counter the employer's economic power. The public policy provision of Norris-LaGuardia, 29 U.S.C § 102 (1932), by stating that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor," clearly articulates the premise that the unregulated market inadequately protects the rights of unrepresented workers. *See* Leonard, *supra* note 9, at 642.

14. Leonard, *supra* note 9, at 642-47. Professor Leonard provides a thorough discussion of legislative efforts in the areas of collective bargaining and the growth of special purpose legislation to provide limited protection against discriminatory disharges.

III. THEORIES OF WRONGFUL DISCHARGE

The reasons for the upswing in the number of wrongful discharge lawsuits filed and the growing judicial acceptance of exceptions to the at-will doctrine are complicated.[15] Whatever the reason, during the past two decades three main theories have been advanced to challenge employee dismissals and to minimize the inadequacy of the terminable-at-will rule:[16] breach of an implied contract; the tort of wrongful discharge based upon a violation of public policy; and breach of the covenant of good faith and fair dealing.

Although some courts have failed to recognize any exceptions or limitations to the employment-at-will doctrine, courts in twenty-nine states have used the implied contractual limitation on employee discharges, thirty-two states have adopted public policy exceptions and twelve states apply the covenant of good faith and fair dealing to the employment relationship.[17] A total of thirty-nine states now employ one or more of the three theories to modify the at-will doctrine.[18]

A. The Implied Contract Theory

In the 1980s, a number of state courts accepted new contractual modifications to employment at will. The cases that develop this theory impose a contractual obligation upon an employer based on statements of policy evoking a "just cause" standard found in personnel manuals or employee handbooks, or a contractual obligation arising from oral representations made to employees concerning procedural fairness. The reported cases reflecting this trend describe company policy statements and handbooks introduced into evidence containing procedures for addressing disciplinary problems. In addition, these handbooks embrace concepts familiar from the unionized sector, such

15. Among the explanations for the increased protection of the at-will worker are the increased public awareness of fairness in the workplace, the decline of labor unions, the displacement of mid-level managers as a result of corporate mergers, the use of labor legislation in the United States and the rise of reverse discrimination litigation. *See* Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration,* 13 EMPLOYEE REL. L.J. 404, 409-10 (1987); Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework,* 1986 B.Y.U. L. REV. 885, 895-99.

16. Absent an express commitment by the employer to the contrary, an employee could be terminated at will, unless a collective bargaining agreement or civil service regulation covered the employee in question. *See supra* note 1 and accompanying text.

17. 9A Lab. Rel. Rep. (BNA) 505: 51-52 (Jan. 1989).

18. *Id.* Of the remaining 11 states, 10 states—Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Mississippi, New York, Rhode Island, and Utah—either have qualified their recognition of an exception or have failed to give an exception or definitive state ruling on the possible exceptions to employment at will. Only one state, Delaware, clearly does not recognize any of the exceptions to employment at will.

as progressive discipline and appeals procedures for disciplinary decisions by line supervisors.[19] Although these policy statements may not always mention a just cause or similar standard for termination, they do suggest that employee discharge determinations will be made for reasons related to the employer's economic interests or on the basis of uncorrected inferior work performance.

The leader in this area of reform was the Supreme Court of Michigan,[20] which found a public policy concern, in addition to holding that express job security promises in a handbook were enforceable. The New York Court of Appeals rejected the public policy concept but accepted the personnel manual as a basis for contract,[21] an idea followed by the Supreme Court of New Jersey[22] and others.[23] However, many courts still apply the at-will presumption to allow a discharge in cases when such company policies exist but have not been followed. These decisions may take the form of finding, contrary to the affirmative statements in the employee handbook, that such representations fail to show that the employer intended to be legally bound by such statements[24] or that the statements were merely offered as a unilateral expression of good will, revocable at will and therefore insufficient to justify reliance by employees.[25]

The implied contract exception based upon a handbook is only available to employees in the fortunate situation of having an employer-issued policy statement. Moreover, even in the states that impose an implied contract exception to the at-will rule, an employer

19. An excellent example is provided by the company handbook provisions issued by Hoffman-LaRoche, Inc., during the 1960s and discussed in Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 310-313, 491 A.2d 1257, 1271-73, *modified,* 101 N.J. 10, 499 A.2d 515 (1985).

20. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

21. Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 453 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

22. Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985), *modified,* 101 N.J. 10, 499 A.2d 515 (1985) .

23. *See* Comment, *Limiting the Employment-At-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis,* 16 SETON HALL L. REV. 465 (1986); Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine,* 31 VILL. L. REV. 335 (1986); Note, *Employee Handbooks and Employment-At-Will Contracts,* 1985 DUKE L.J. 196.

24. Heideck v. Kent Gen. Hosp., 446 A.2d 1095 (Del. 1982); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980).

25. *See, e.g.,* Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1363 (D.S.C. 1985) (allowing unilateral change to manual by employer); Richardson v. Charles Cole Memorial Hosp., 320 Pa. Super. 106, 109, 466 A.2d 1084, 1085 (1983) (handbook unilaterally revised twice); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. Ct. App. 1982) (employer free to amend unilaterally or even totally withdraw its handbook).

with a careful lawyer should not have trouble avoiding liability on this basis. In response to the possible unilateral assumption of liability for wrongful terminations, employers have revoked and rewritten job applications and handbooks expressly to deny any intent to grant contractual rights to employees[26] or to indicate that any resulting employment will be only at will.[27]

Aside from the employer's ability to eliminate or restrict contractual rights, policy declarations are likely to be confined to the more enlightened businesses, and oral assurances are likely to be given only to middle management or higher employees. Thus, the average worker at the smaller plant or shop — the individual with the least bargaining power who needs the most protection — is often without contract rights.

B. The Public Policy Theory

The public policy theory is premised on the rationale that the traditional formation of the at-will rule would undermine legislative efforts to augment social welfare or would ratify behavior antagonistic to general societal values encompassed in the common law. The public policy theory does not displace the at-will presumption; rather, the theory merely provides a mechanism for identifying improper grounds for dismissal.

A variety of public policy theories have been recognized by state courts to prevent an employer from acting contrary to an important public policy.[28] Some courts have gone beyond the more standard public policy exceptions and have recognized a cause of action when an employer has sought to use its position for personal advantage. This line of decisions is frequently called "abusive" or "retaliatory"

26. *See, e.g.,* Bailey v. Perkins Restaurants, Inc., 398 N.W.2d 120, 122-23 (N.D. 1986) (disclaimer in handbook relieves employer of duty to abide by progressive discipline policy announced therein). *But cf.* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (unclear whether disciplinary policy in handbook had become part of employment contract); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981) (subsequent oral assurance not binding because of written disclaimer in handbook).

27. Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); French v. Dillard Dep't Stores, Inc., 285 Ark. 332, 686 S.W.2d 435 (1985). *But cf.* Tirano v. Sears, Roebuck & Co., 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984).

28. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge for refusal to join price-fixing conspiracy); Petermann v. Local 396, Int'l Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (Dist. Ct. App. 1959) (discharge for refusing to commit perjury); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (discharge for reporting an employer or coworker for illegal acts); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (right to file a workers' compensation claim); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharge for serving on jury).

discharge cases. The leading decision sustained a suit by a female employee who was terminated for her refusal to date her foreman.[29] However, other courts have refused to remedy similar retaliatory action or personal abuse related to employment discharges.[30] The practical significance of the public policy exceptions to the employment-at-will doctrine is that they are grounded on tort theory. For the employer, this means that punitive as well as compensatory damages are potentially available to the complaining employee. For the employee, the tort label could require that he show that his employer had an intention to inflict harm or at least show the negligent or reckless infliction of such harm.[31]

The major difficulty for courts in applying the public policy theory is the identification of the relevant public policy. Some academic commentators believe that all unjust terminations subvert the public's interest in industrial stability.[32] The trend among the courts, however, is to require that the public policy relied upon be "well accepted" and "clearly articulated,"[33] or that it be "evidenced by a constitutional or statutory provision."[34] For the workers subjected to arbitrary treatment or personally motivated action, this theory provides little relief. Moreover, some courts have declared the whole concept of public policy unsuited for judicial application in the employee dismissal context and believe the creation of "new torts" to be a matter best left to the legislature.[35] Consequently, except in the most egregious circumstances,[36] or when an employer acts with a clear intent to inflict emotional injury on the worker, the public policy exceptions provide no guaranteed haven for the wrongfully terminated employee.

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29. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). *But cf.* Howard v. Dorr Woolen Co., 120 N.H. 295, 296-97, 414 A.2d 1273, 1274 (1980).

30. *E.g.,* Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263 (1982); Fawcett v. G.C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

31. Leonard, *supra* note 9, at 662.

32. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931, 1948 (1983).

33. Clifford v. Cactus Drilling Corp., 419 Mich. 356, 367, 353 N.W.2d 469, 474 (1984) (Williams, C.J., dissenting). *See also* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985).

34. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983). *See also* Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981).

35. Murphy v. American Home Prod. Corp., 58 N.Y.2d 293, 302, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235-36 (1983) ("Both of these aspects of the issue, involving perception and declaration of public policy — are best and more appropriately explored and resolved by the legislative branch of our government."). *See also* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981).

36. *See* Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982) (employee dismissed without prior warning and forced to sign a letter of resignation

C. The Covenant of Good Faith and Fair Dealing Theory

The third judicial qualification of the employment-at-will doctrine is based on the covenant of good faith and fair dealing. Courts have required that employment relationships demonstrate the same standard of good faith and fair dealing implied in commercial relationships based on some type of agreement or understanding. The basic premise is that the employer is acting in bad faith, contrary to reasonable standards of fairness toward the employee, when it wrongfully discharges the employee. This theory can be predicated on both contract and tort principles and may, therefore, be the most expansive of the three theories. The good faith and fair dealing theory relies upon subjectivity, assessing employer motivation as an issue and penalizing those motivations that either a judge or jury consider improper.[37] As a result, the damages awarded under this theory vary widely between jurisdictions.

The covenant of good faith and fair dealing theory was first related to employment contracts by the Supreme Judicial Court of Massachusetts in *Fortune v. National Cash Register Co.*[38] *Fortune* and other decisions[39] treat breaches of the covenant as sounding in contract without even considering any tort implications. In contrast, other courts, particularly in California, have expanded the covenant of good faith and fair dealing beyond the limits of a strictly contractual relationship in the employment context. In *Cleary v. American Airlines,*[40] the California Court of Appeal suggested that the breach of the covenant may sound in tort as well, thereby opening the door for punitive damages in addition to compensatory damages. The suggestion that there may be a tortious breach of the covenant of good faith and fair dealing has been accepted by other courts.[41] However, the California Supreme Court's recent decision in *Foley v. Interactive Data Corp.*[42] curtailed the development of a tortious breach of the covenant of good faith. In *Foley,* a four to three court held that because "the employment relationship is fundamentally contractual . . ., contractual

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which subsequently barred her unemployment benefits claim; promise of favorable recommendation was also breached).

37. Leonard, *supra* note 9, at 655.

38. 373 Mass. 96, 364 N.E.2d 1251 (1977).

39. Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

40. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

41. Wallis v. Superior Court, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (Ct. App. 1984); Eller v. Houston's Restaurants, Inc., 117 L.R.R.M. (BNA) 2651, 2653-54 (D.D.C. 1984); Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015, 1020 (Mont. 1984); K-Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987).

42. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

remedies should remain the sole available relief for breaches of . . . good faith and fair dealing in the employment context."[43]

Several courts have rejected a broad application of the implied covenant of good faith. In *Murphy v. American Home Products Corp.,* the New York Court of Appeals held that any implied covenant would have to be "in aid and furtherance of other terms of the agreement of the parties."[44] The *Murphy* court further observed that the plaintiff's employment in this instance was at will, providing the employer freedom to terminate. The court concluded: "In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."[45] Judicial reluctance to engraft the covenant of good faith and fair dealing onto the employment relationship likely stems from the poor fit between employment agreements and commercial contract doctrine. It is difficult to borrow economic-based standards governing contracts between merchants and apply them to the more personalized employment relationship.[46] Therefore, the implied covenant of good faith theory appears unlikely to become "a universally accepted panacea for wrongfully discharged employees."[47]

The application of any one of these three theories, each derived from traditional legal doctrine, to the employment relationship is problematic. Employee termination disputes do not always mesh easily with the contract domain. Although the employment relationship is founded on an agreement, many of the relevant terms are not the product of conscious bargaining. The employment "contract" does not seem to fall within the exchange transaction model characteristic of commercial contract law.[48] Similarly, discharge disputes often fit into tort law only with difficulty. While a dismissal may be lacking in objective justification and appear to be unfair, absent substantiated tortious behavior, the employee's injury does not seem to be tort-like.

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43. *Id.* at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

44. 58 N.Y.2d 293, 304-05, 48 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983). *Accord* Walker v. Modern Realty, 675 F.2d 1002 (8th Cir. 1982); Gordon v. Matthew Bender & Co., 562 F. Supp. 1286 (N.D. Ill. 1983); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); Hinson v. Cameron, 742 P.2d 549 (Okla. 1987); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

45. *Murphy,* 58 N.Y.2d at 304-05, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

46. Leonard, *supra* note 9, at 656-57.

47. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower,* 67 NEB. L. REV. 56, 64-65 (1988).

48. Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine,* 36 SYRACUSE L. REV. 939, 959-60 (1985).

IV. JUDICIAL ACTION IN ALASKA

Although the employment-at-will doctrine is not codified in the Alaska statutes, the at-will rule is treated by the Alaska judiciary as having application to indefinite term contracts in Alaska.[49] Nevertheless, perhaps in response to the erosion of the employment-at-will doctrine by other state courts, during the past six years the Alaska Supreme Court has indicated a willingness to consider exceptions to the at-will rule.

In *Mitford v. de Lasala,*[50] the Alaska Supreme Court recognized the implied covenant of good faith and fair dealing in all at-will employment situations. The court in *Mitford* noted that it had previously implied the duty of good faith and fair dealing in the insurance context.[51] The *Mitford* court then explained the application of the theory to the employment situation by discussing the facts of two Massachusetts cases. Both of the cases, like *Mitford,* involved an allegation that a discharge decision was motivated by a desire to deprive the employee of his agreed share of company profits.[52] Finally, the court held that Mitford's employment contract contained an implied covenant of good faith.[53]

Seven days later in *Eales v. Tanana Valley Medical-Surgical,*[54] the Alaska Supreme Court recorded its acceptance of the implied contract theory. Although in *Eales* the contract in question was deemed to be one for a definite period, the court stated that the result would have been the same even if the contract were considered to be at will. The court in *Eales* stated that:

> Evidence was presented that it was represented to Eales that so long as he was properly performing his duties he would not be discharged. This representation may be found to be part of Eales' employment contract, even if the employment contract was for an indefinite period of time. If so, the Clinic would be precluded from discharging Eales except for good cause.[55]

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49. *See* Long v. Newby, 488 P.2d 719 (Alaska 1971).

50. 666 P.2d 1000 (Alaska 1983). For a more complete discussion of the case, see Crook, *Employment at Will: The "American Rule" and its Application in Alaska,* 2 ALASKA L. REV. 23, 35-36 (1985).

51. *Mitford,* 666 P.2d at 1006 (citing Guin v. Ha, 591 P.2d 1281 (Alaska 1979)).

52. *Id.* at 1006-07 (citing Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), and Maddaloni v. Western Massachusetts Bus Lines, 386 Mass. 877, 438 N.E.2d 351 (1982)).

53. *Id.* at 1007.

54. 663 P.2d 958 (Alaska 1983). For a more complete discussion of the case, see Crook, *supra* note 50, at 35-36.

55. *Eales,* 663 P.2d at 959.

Thus, in *Mitford,* the Alaska Supreme Court established that the covenant of good faith and fair dealing is implicit in all at-will employment contracts. In *Eales,* the court accepted the implied contract theory by ruling that certain employer representations can transform an employment contract otherwise terminable at will into one which can be terminated only for good cause.

The next wrongful discharge case before the Alaska Supreme Court, *State v. Haley,*[56] involved a state employee who alleged that she was terminated for exercising her first amendment rights. The court found the plaintiff was fired either because of her past statements or for her refusal to limit future speech. Both of these were deemed to be unconstitutional reasons for termination of a state employee. The *Haley* court found implicit in the employment contract the state's promise not to terminate for an unconstitutional reason. This promise "is analogous to the covenant of good faith and fair dealing we recently implied in a private sector at-will employment contract."[57] The court held that when the state terminates an employee for an unconstitutional reason it amounts to unfair dealing as a matter of law, giving rise to contract remedies.[58]

The public policy theory was first addressed by the Alaska Supreme Court in *Knight v. American Guard & Alert, Inc.*[59] The case concerned the discharge of a security guard who was employed by a security company guarding the Trans-Alaska Pipeline. At the close of employee Knight's case, the trial court dismissed the complaint because "it, as phrased, does not state a cause of action."[60] The court also rejected Knight's motion to amend the complaint. The Alaska Supreme Court, upon review, found that the trial court had erred in granting the employer's motion to dismiss. The court stated:

> Although paragraph V of the complaint alleges that [the pipeline operator] caused [Knight's employer] to fire Knight, the complaint does allege that [Knight's employer] did, in fact, fire Knight and goes on to allege in paragragh VI that his termination was (1) in violation of public policy, (2) in breach of an implied covenant of fair dealing and good faith, and (3) not based upon good or just cause.[61]

After mentioning the growing acceptance of the public policy theory, the court in *Knight* stated that it had never rejected the theory.[62] The court then concluded that claims under the public policy theory, like

56. 687 P.2d 305 (Alaska 1984).
57. *Id.* at 318.
58. *Id.*
59. 714 P.2d 788 (Alaska 1986).
60. *Id.* at 791.
61. *Id.*
62. *Id.* at 792.

the implied contract and implied covenant of good faith and fair dealing theories, may afford terminated employees relief.[63] Because the lower court had granted the employer's motion to dismiss, however, there was not a full record on which to determine whether the public policy theory was applicable to the case. Nevertheless, the statements of the court in the *Knight* opinion suggest that the public policy theory may be an additional avenue of complaint for the unjustly dismissed employee in Alaska.

The *Knight* decision also contains language suggesting that the Alaska Supreme Court had an unorthodox view concerning the application of the public policy separating the overlap of the three theories. The *Knight* court stated that "it seems that the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing which we accepted in *Mitford.*"[64] The public policy theory is generally regarded as a tort theory.[65] While the covenant of good faith and fair dealing has been predicated upon both contract and tort,[66] the Alaska decisions applying this theory had only given rise to contract remedies.[67] By stating that a tort theory — the public policy approach — was included within the covenant of good faith and fair dealing, was the court suggesting that it would recognize tort remedies for a breach of the covenant? Moreover, could the breach of the covenant of good faith itself be considered as being violative of state public policy? Unfortunately for the Alaska plaintiffs' employment relations bar, the court failed to provide any guidelines on how the public policy theory could be articulated as a judicially recognized avenue of complaint. Consequently, beginning with the *Knight* opinion, the precise parameters of many wrongful discharge claims in Alaska became confusing and unclear.

In *ARCO Alaska, Inc. v. Akers,*[68] the Alaska Supreme Court recognized the need both for a clarification on the boundaries of wrongful discharge in Alaska and for a delineation of the available avenues of complaint for the discharged employee. In *ARCO,* after a jury award of both compensatory and punitive damages for the breach of the implied duty of good faith and fair dealing, the employer, ARCO Alaska, Inc., appealed. On appeal, the supreme court held that a breach of the covenant of good faith and fair dealing does not constitute a tort for

63. *Id.*

64. *Id.*

65. *See* Feinman, *supra* note 7, at 131-35.

66. *See supra* note 23, and Leonard, *supra* note 9, at 662.

67. *See* Wien Air Alaska v. Bubbel, 723 P.2d 627, 631 (Alaska 1986); Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983); Skagway City School Bd. v. Davis, 543 P.2d 218, 225 (Alaska 1975); Long v. Newby, 488 P.2d 719, 724 (Alaska 1971).

68. 753 P.2d 1150 (Alaska 1988).

which punitive damages are recoverable.[69] The court observed that it had previously allowed the awarding of contract damages only in wrongful discharge cases, and that only when "a party's conduct in breaching a contract rises to the level of a traditionally recognized tort, such as intentional infliction of emotional distress, [will] an action in tort . . . lie."[70] Accordingly, the court reversed the jury award of punitive damages. Although not stated in *ARCO,* "the extension of tort remedies to the employment relation . . . involves 'policy' choices which may 'profoundly' affect social and commercial relations."[71] Therefore, by failing to extend tort damages to a breach of the implied covenant of good faith, the Alaska Supreme Court may merely be suggesting that the contemplation of such an extension "is a matter best left to the Legislature."[72]

The court in *ARCO* also addressed the public policy theory. In dicta, the court first emphasized that it has "neither accepted nor rejected the public policy theory."[73] This statement retreats from the conclusion in *Knight*[74] that a claim under the public policy theory "at least possibly"[75] would afford wrongful discharge relief. The *Knight* conclusion seemed to suggest that the public policy theory had been accepted by the court, and would afford relief, if the theory was adequately supported by the facts on record. The trial court in *ARCO* had held that "[b]ad faith breach of employment contracts should . . . be deemed violative of state public policy."[76] The trial judge's finding was a reasonable interpretation of the supreme court's stated belief in *Knight* that the public policy theory is encompassed within the covenant of good faith and fair dealing.[77] However, according to the *ARCO* court, "this approach is unsound"[78] because "[u]nder this theory, any breach of the covenant of good faith and fair dealing would come under the public policy exception."[79] Therefore, before the plaintiffs' employment relations bar is informed as to the availability of the public policy theory in Alaska, a wrongfully terminated worker must allege an explicit public policy,[80] which the plaintiff in *ARCO* had failed to do.

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69. *Id.* at 1153.
70. *Id.* at 1154.
71. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 719, 765 P.2d 373, 415, 254 Cal. Rptr. 211, 253 (1988) (Kaufman, J., dissenting).
72. *Id.*
73. *ARCO,* 753 P.2d at 1153.
74. 714 P.2d 788 (Alaska 1986).
75. *Id.* at 792.
76. 753 P.2d at 1153 n.1.
77. *Id.*
78. *Id.*
79. *Id.*
80. *ARCO,* 753 P.2d at 1153.

In *Luedtke v. Nabors Alaska Drilling, Inc.*, the Alaska Supreme Court considered for the first time "some parameters of the tort of wrongful discharge."[81] In *Luedtke,* two employees were fired after they refused to submit to urinalysis under their employer's drug testing program. The employees claimed, *inter alia,* that the employer's drug testing demands violated the covenant of good faith and fair dealing implicit in all Alaska employment relationships.

The *Luedtke* court set out the key distinction between at-will employees and employees hired for a determinable length of time: "Employees hired on an at-will basis can be fired for any reason that does not violate the implied covenant of good faith and fair dealing. However, employees hired for a specific term may not be discharged before the expiration of the term except for good cause."[82] Furthermore, the court concluded that "there is a public policy supporting the protection of employee privacy."[83] In so ruling, the court stated that it "look[s] to the entire body of law in the state of Alaska for evidence of citizen rights, duties and responsibilities, to determine the public policy with regard to employee privacy."[84] Violation of that policy *may* rise to the level of a breach of the implied covenant of good faith and fair dealing. Although the *Luedtke* decision helps identify who makes the public policy for application of a public policy exception, the court has yet to accept the public policy theory. Moreover, Alaska's highest court continues to view the tort-based public policy theory as a possible sub-theory of relief under the covenant of good faith.

Thus, after *Luedtke,* the parameters of a wrongful discharge challenge in Alaska are the following: (1) employees hired for a specific term cannot be fired without "good cause;" (2) at-will employees in Alaska may be terminated for any reason not violating the implied covenant of good faith; (3) the tort-based public policy theory is a possible sub-theory of relief for at-will workers under the covenant of good faith and fair dealing; and (4) contract damages, and not punitive damages, are the only recoverable measure of damages for breach of the covenant of good faith and fair dealing.

The Alaska Supreme Court has created a "management paradise" by refusing either to require "good cause" for an at-will termination or to allow the recovery of punitive damages under an independent public policy basis. The serious consequences that result from making particular employer conduct actionable in tort may explain the court's

81. 768 P.2d 1123, 1125 (Alaska 1989).
82. *Id.* at 1131 (footnote omitted).
83. *Id.* at 1130.
84. *Id.* at 1132.

reluctance to recognize the public policy theory of wrongful discharge.[85] In fact, the court may simply be deferring to the state legislature the consideration and difficult application of a tort-based public policy exception.[86] Nevertheless, reforms are necessary in the laws of the Alaska workplace to ensure that the employment relationship in Alaska adheres to society's general values of fairness. The necessary contemplation and drafting of those reforms should be a legislative, rather than a judicial, undertaking. The Alaska Legislature is better able to balance the establishment of desirable employee rights with the economic costs that would result to the employer and, as a consequence, to the public.

V. WRONGFUL DISCHARGE LEGISLATION

A. The Need for Legislation

Justice William O. Douglas once said: "Employability is the greatest asset most people have."[87] Only three groups of employees, however, have historically been protected from arbitrary discharge, either in situations where the employee has substantial bargaining power or through limitations established by legislation. First, employees who are covered by collective bargaining agreements negotiated by

85. The availability of punitive awards before juries which are frequently hostile to employers has often meant excessive, arbitrary, inconsistent judgments. *See generally* K. LOPATKA & J. MARTIN, DEVELOPMENTS IN WRONGFUL DISCHARGE, ABA NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS 13-18 (1986); Jung & Harkness, *The Facts of Wrongful Discharge,* 4 LAB. LAW. 257 (Spring 1988). From the employee's perspective, actions before juries are often financial trials by combat in which, even for plaintiffs who retain representation on contingency, the cost of proceeding is substantial.

86. *See* Leonard, *supra* note 9, at 663. Professor Leonard writes:

> Traditional tort elements appear irrelevant to some of the issues central to a termination dispute, and the common-law tort compensation scheme may provide an inappropriate measure for damages. Thus, the equivocal embrace of tort as a basis for the public policy exception is quite understandable, and it is not surprising that some courts have expressed reluctance to recognize a tort-based public policy exception without legislative backing.

Id. Professor Leonard argues for a restructuring of the common law presumption that "would require employers to advance a plausible reason for termination when an employee could show that the job continued to exist and the employee was qualified to continue performing it, and would award suitable make-whole damages if threatened litigation could not be settled." *Id.* at 685. This presumption, argues Professor Leonard, would force the legislatures or Congress to come up with a better solution to the problem of job termination if it disapproved of the new "just cause" presumption. *Id.* at 685-86.

87. Sampson v. Murray, 415 U.S. 61, 95 (1974) (Douglas, J., dissenting).

their respective unions are typically not fired except for "just cause."[88] Second, entertainers, corporate executives and other highly paid individuals have sufficient independent bargaining power to negotiate written contracts with fixed and definite provisions. In such arrangements, the employer's duty to discharge only for "just cause" is implied by law or expressly set forth in the employment agreement.[89] Third, public employees covered by state and federal civil service statutes generally cannot be discharged unless for "just cause" and not until they have had a hearing, which is subject to court review.[90]

The remaining nonunion private sector exceeds sixty percent of the American work force and consists of over sixty-five million employees, and, yet, for them there has been no blanket protection from the employment-at-will doctrine.[91] In fact, the United States remains the last major industrial democracy that has not enacted unjust discharge legislation.[92]

The courts have provided some relief through the modest expansion and modification of well-established common law principles.[93] However, as the discussion of the Alaska Supreme Court decisions indicates,[94] the three theories of wrongful discharge provide only limited and inadequate remedies to the wrongfully discharged, nonunion, at-will employee. Nevertheless, the judicial responses demonstrate a recognition that "[t]he employee has a valuable interest in his or her job which ought not be arbitrarily taken away."[95] Motivated by the courts and the academic commentators, American legislatures are now beginning to realize that a job satisfies many social, emotional and psychological needs for the American worker.

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88. For a discussion of the "just cause" provisions in labor agreements as interpreted by arbitrators, see F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 650-707 (4th ed. 1985).

89. Bartlett v. Doctors Hosp., 422 So. 2d 660 (La. Ct. App. 1982).

90. *See, e.g.,* Federal Civil Service Reform Act, 5 U.S.C. §§ 7501-7514 (1982).

91. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective,* 67 NEB. L. REV. 178, 180 (1988).

92. For at least a decade, protection against wrongful discharge has been provided by statute in at least 60 countries, including all the Common Market countries, Sweden, Norway, Japan, Canada and others in Africa, Asia and South America. *See* Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal,* 36 THE RECORD 170, 175 (1981).

93. *See supra* text accompanying notes 3-48.

94. *See supra* text accompanying notes 50-87.

95. Summers, *Labor Law as the Century Turns: A Changing of the Guard,* 67 NEB. L. REV. 7, 15 (1988).

B. Legislative Developments

The last five years have produced a multitude of legislative activity concerning wrongful discharge. A special committee of the Labor and Employment Law Section of the State Bar of California has recommended statutory regulation of unjust termination.[96] Under the proposed regulation, any employee who worked twenty hours a week for at least two years would have the right to challenge his dismissal by filing a complaint with the state Mediation and Conciliation Service. If mediation failed to resolve the dispute, the bill would require that the dispute be submitted to binding arbitration. The Individual Rights Committee of the ABA Labor and Employment Law Section, Committee on Employee Rights and Responsibilities, Subcommittee on At-Will Legislation, drafted a questionnaire concerning the critical issues to be considered in any proposed legislation.[97] The Committee is now studying the issues and developing "cafeteria" model statutes containing alternative options for interested state legislators. The AFL-CIO's Executive Council has reversed organized labor's long-standing opposition by advocating strong support for the concept of wrongful discharge legislation.[98] Commentators suggest that legislation prohibiting dismissal without cause should actually prove to be both directly and indirectly beneficial to labor unions.[99] Finally, the Commissioners on Uniform State Laws have decided to draft a model statute.[100]

Bills forbidding wrongful discharge have been introduced in at least a dozen legislatures.[101] Broad dismissal statutes have been adopted in Puerto Rico[102] and the Virgin Islands;[103] in 1987, Montana became the first state to enact a comprehensive law protecting employees against wrongful discharge.[104]

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96. St. Antoine, *supra* note 47, at 58.

97. 1 LAB. LAW. 784 (1985).

98. 1 Lab. Rel. Rep. (BNA), Mar. 2, 1987, at 1.

99. *See* St. Antoine, *supra* note 47, at 69-70; Gould, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective,* 67 NEB. L. REV. 28, 41 n.73 (1988).

100. St. Antoine, *supra* note 47, at 58.

101. California, Colorado, Connecticut, Illinois, Massachusetts, Michigan, Montana, New Jersey, Ohio, Pennsylvania, Washington, Wisconsin and the United States Congress. *See* St. Antoine, *supra* note 47, at 58.

102. P.R. LAWS ANN. tit. 29, § 185a (1985).

103. V.I. CODE ANN. tit. 24, § 65 (1970).

104. Wrongful Discharge From Employment Act, 1987 Mont. Laws ch. 641 (now codified at MONT. CODE ANN. § 39-2-901 (1987)).

C. Analysis of Legislative Proposals

The Alaska Supreme Court has been struggling for nearly a decade to articulate legal rules governing worker terminations. The court, however, lacks the capacity to construct an administrative apparatus for enforcement purposes. Therefore, in order to protect fully the interest most nonunion Alaska employees have in their employment, specialized legislation is necessary.

A federal statute applying uniformly to employers nationwide, while clearly the most effective solution, seems unlikely in the near future.[105] Consequently, bills are increasingly being drafted and considered by the state legislatures. The Alaska Legislature should consider a bill of its own, taking what it believes to be the best features from the alternatives represented by the various other state bills and the draft by the Commissioners on Uniform State Laws.[106]

In addition to the statute enacted in Montana,[107] bills have been drafted in other states in the past decade to provide "just cause" protection to nonunion, at-will employees.[108] In this section, the principal issues confronted by Montana's statutory proposal will be discussed. Finally, if a provision in the Montana statute differs significantly from the alternative responses of the other states' bills, the differing legislative responses will be mentioned.

Compared to most statutory enactments, the Montana statute is brief, consisting of only nine sections. The first section merely states the title of the law: "Wrongful Discharge From Employment Act."[109] In the second section, the legislature articulates its purpose as setting forth the rights and remedies with respect to wrongful discharge. Additionally, this section provides that, apart from the rights and remedies set forth in the statute, employment in Montana will still be considered at-will provided it has "no specified term."[110]

105. St Antoine, *supra* note 47, at 71; Tobias, *supra* note 91, at 191.

106. The Commissioners on Uniform State Laws have recently formed a committee to draft a model statute on employment termination. When this proposed model statute is completed, it will provide a valuable additional resource in the drafting of a bill to protect the nonunion worker in Alaska. *See supra* note 101 and accompanying text.

107. MONT. CODE ANN. § 39-2-901 (1987).

108. *See* St. Antoine, *supra* note 47, at 71.

109. MONT. CODE ANN. § 39-2-901 (1987).

110. *Id.* § 39-2-902.

Section three provides definitions of "discharge,"[111] "constructive discharge,"[112] "employee"[113] and "fringe benefits."[114] The section also defines "good cause"[115] and "public policy."[116]

Section four provides three distinct causes of action for wrongful discharge. The first subsection creates an action for "the employee's refusal to violate public policy or for reporting a violation of public policy."[117] This action contains the main features of the public policy theory discussed above. Subsection two establishes an action on behalf of employees who have passed "the employer's probationary period"[118] if their discharge "was not for good cause."[119] In essence, this action substitutes a just cause standard for the at-will doctrine. The third action, created by subsection three, protects against discharges that violate the express provisions of written personnel policies.[120] This action essentially adopts the implied contract theory discussed above.

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111. *Id.* § 39-2-903(2). " 'Discharge' includes a constructive discharge as defined in subsection (1) and any other termination of employment including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason." *Id.*

112. *Id.* § 39-2-903(1).

> "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

Id.

113. *Id.* § 39-2-903(3). " 'Employee' means a person who works for another for hire. The term does not include a person who is an independent contractor." *Id.*

114. *Id.* § 39-2-903(4). " 'Fringe benefits' means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination." *Id.*

115. *Id.* § 39-2-903(5). " 'Good cause' means 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." *Id.*

116. *Id.* § 39-2-903(7). " 'Public policy' means 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." *Id.*

117. *Id.* § 39-2-904(1).

118. It is generally recognized in collective bargaining agreements and elsewhere that so-called "probationary" employees are not entitled to just cause protections because until an employee has been part of an organization for some measurable time he cannot reasonably feel he possesses a right in his position. St. Antoine, *supra* note 47, at 73. *See also* Howlett, *Due Process for Non-Unionized Employees: A Practical Proposal,* PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 164, 167 (B. Dennis, ed. 1980).

119. MONT. CODE ANN. § 39-2-904(2) (1987).

120. *Id.* § 39-2-904(3).

Section five provides the remedies for a wrongful discharge.[121] The basic remedy is "lost wages and fringe benefits for a period not to exceed four years from the date of discharge, together with interest thereon." If the discharge violates the "public policy" cause of action, section 39-2-904(2), and the employer "engaged in . . . actual malice in the discharge of the employee," the court may award punitive damages.[122] The Montana statute makes no mention of possible reinstatement, thereby avoiding the problem of compelling an unwanted association.

Alternatively, the California bill provides an elaborate set of remedies including reinstatement, back pay with interest, income and related losses for two years if reinstatement is inappropriate and attorneys' fees and costs to the prevailing party.[123] The Michigan bill is very similar; it includes a "severance payment" but not attorney's fees.[124] By providing limited remedies for wrongful discharge, the various legislative responses should provide an incentive for settlement and effectively discourage frivolous litigation.

The last four sections of the Montana wrongful discharge statute concern the administration of the wrongful discharge action. Section six provides a one-year statute of limitations[125] and requires a plaintiff to exhaust all internal appeals procedures before resorting to litigation. Section seven avoids encroachment on existing statutory remedies and preemption problems. The section provides that any discharge subject to state or federal procedures for "contesting the dispute," or any discharge involving an employee covered by a written collective bargaining agreement, will not be covered by the Wrongful Discharge from Employment Act. Section eight expressly preempts claims brought pursuant to common law tort or contract theories.[126] Lastly, section nine authorizes the disputing parties to agree to submit the dispute to final and binding arbitration. To encourage arbitration, subsection four of section nine provides that attorney's fees may be awarded to a prevailing party whose offer to arbitrate was refused.[127] In addition, section nine provides that, if the discharged employee makes an offer to arbitrate and wins the arbitration, the costs of the arbitration will be paid by the employer.[128] Finally, while submission of the dispute to

121. *Id.* § 39-2-905(3).
122. *Id.* § 39-2-905(2).
123. St. Antoine, *supra* note 47, at 79.
124. *Id.*
125. MONT. CODE ANN. § 39-2-911(1) (1987).
126. *Id.* §§ 39-2-912, 39-2-913.
127. *Id.* § 39-2-914(4).
128. *Id.* § 39-2-914(5).

arbitration terminates the right to litigate the discharge, the arbitrator's decision is subject to review under provisions of the Uniform Arbitration Act.[129]

While the Montana statute clearly makes arbitration the preferred dispute resolution alternative, the California and Michigan bills specifically provide for arbitration of unjust dismissal disputes. Additionally, the California and Michigan bills provide for a preliminary mediation stage of minimum duration, designed to facilitate settlements and the elimination of weak complaints along the way.[130] By either providing incentives for, or requiring the parties to submit their disputes to, arbitration, wrongful discharge legislation seeks to reduce the flood of lawsuits currently burdening the courts.

The elimination of jury trials and unregulated punitive awards should be attractive to employers, even in states such as Alaska where the court has not yet advocated a tort-based theory or punitive damages. Corporate insurance policies rarely cover liability related to firings.[131] A wrongful discharge statute provides a framework whereby the employment relationship rules are known by all involved parties. To avoid the "just cause" standard in most wrongful discharge legislation, an employer may still hire independent contractors.[132] Contractors would remain subject to the at-will doctrine because they lack the reasonable employment expectations characteristic of permanent employees that gave rise to erosion of the common law rule.

Montana's worker discharge statute, not unlike the reaction to most unique legislation, has recently been subjected to constitutional challenge. The Montana Supreme Court reviewed the Montana Wrongful Discharge from Employment Act after two cases questioned the constitutional propriety of the Act.[133] In *Meech v. Hillhaven West, Inc.,* the Montana Supreme Court was asked to address two questions: (1) whether the Act "serves to wrongfully deprive an individual falling within the purview of the Act from his or her right to 'full legal redress' within the meaning of Article II, § 16 of the Montana Constitution;"[134] and (2) whether "provisions of the [Act] which expressly prohibit recovery of noneconomic damages, and limit the recovery of punitive damages, [are] violative of an individual's right to 'full legal

129. *Id.* § 39-2-914(6).

130. St. Antoine, *supra* note 47, at 78.

131. *See* Barrett, *Wrongful-Dismissal Laws May Feel Effect of Dispute Before Montana's High Court,* Wall St. J., Nov. 8, 1988, at B1, col. 3.

132. *See supra* note 118 and accompanying text.

133. Meech v. Hillhaven West, Inc., — Mont. —, 776 P.2d 488 (1989); Johnson v. Montana, — Mont. —, 776 P.2d 1221 (1989).

134. *Meech,* — Mont. —, 776 P.2d 488, 489 (1989).

redress' within the meaning of Article II, § 16 of the Montana Constitution."[135] The *Meech* court answered "no" to both questions.[136]

The *Meech* court held that there is no "fundamental right" to full legal redress created by article II, section 16 of the Montana Constitution; therefore, the Act does not violate this section.[137] In addition, the court held that the Act is rationally related to a legitimate state interest, thereby surviving equal protection scrutiny.[138] According to a majority of the Montana Supreme Court, Montana's worker discharge statute provides greater certainty in the law and may alleviate problems experienced by both employers and employees.[139] The court stated:

> "[T]he employees who benefit [under common-law causes of action] are few and far between, first, because of the difficulties involved in staying the course of a lengthy and expensive judicial process, and second, because of limitations inherent in the legal doctrines adopted by the courts." Therefore, Meech's argument that the Act provides an inadequate trade for prior common-law actions fails to provide authority for finding the Act unconstitutional.[140]

Thus, the first wrongful discharge legislation to be enacted has survived state constitutional challenge. It is yet to be seen whether this setback will discourage opposition and court challenges to wrongful discharge legislation being considered elsewhere.

VI. CONCLUSION

The employment-at-will doctrine is no longer consonant with the modern employment relationship. Recognizing this development, the Alaska Supreme Court has struggled to establish exceptions to the common law rule on a piecemeal basis. However, the highest court in Alaska has created a "management paradise" both by its reluctance to accept the tort-based public policy theory as a distinct ground for relief and by its refusal to allow punitive damages for breach of the implied covenant of good faith. The Alaska Supreme Court's position essentially caps damage awards for wrongful termination while providing the Alaska at-will employee minimal protection from unjust dismissal.

Wrongful discharge disputes involve the perception and declaration of public policy considerations better explored and resolved by the

135. *Id.* at —, 776 P.2d at 489.
136. *Id.*
137. *Id.* at —, 776 P.2d at 491.
138. *Id.* at —, 776 P.2d at 501.
139. *Id.* at —, 776 P.2d at 506.
140. *Id.* (quoting Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration,* 13 EMP. REL. L.J. 404, 413 (1988)).

legislature. Through legislation, the Alaska Legislature can broaden the protections afforded Alaska employees while restricting the available remedies at the same time, thus striking a middle ground consistent with the modern employment relationship. If the Alaska Legislature fears that excessive damage awards would discourage business development, it should place restrictions on the remedies available under its version of a wrongful discharge act. However, contrary to the current position of the Alaska Supreme Court, at-will employees in Alaska should be entitled to a "just cause" discharge standard in exchange for any remedy limitations imposed upon them.

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