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Employee Benefits and the Employment-at-Will Rule

Diane M. Cornell*

Mary Green worked as a manager for the Edward J. Bettinger Company, a sole proprietorship.¹ When a sales manager left in 1972 to establish a competing business, Bettinger persuaded Green, a former employee, to return to work to help meet the serious threat of competition.² As incentive, Bettinger offered Green a commission based on the productivity of the department she would manage.³ Productivity increased over the eight years that Green worked for the company.⁴ Consequently, Green's income rose.⁵

In 1977 Bettinger brought his son into the business, and in 1980, he promoted his son to a position with duties similar to Green's, but Bettinger's son earned less money.⁶ Bettinger then unilaterally reduced Green's commission.⁷ Green objected to the reduction, which resulted in a drop in her annual income from \$44,000 to \$25,000.⁸ Green objected, maintaining that she had a written contract that set the commission rate and required negotiation in the event business exigencies demanded a reduction in her pay.⁹ The court ruled, however, that because Bettinger had the right to fire her, he had the right to reduce her benefits unilaterally.

* B.A., Hamline University, *Summa Cum Laude*; M.A., University of Minnesota; J.D., University of Minnesota.

1. *Green v. Bettinger Co.*, 608 F. Supp. 35, 37 (E.D. Pa. 1984).

2. *Id.* at 38.

3. Green's salary was \$180 per week. In addition, she was to be paid 1% commission on client billings between \$30,000 and \$45,000 per month; 2% commission on billings between \$45,000 and \$55,000; and 3% commission on billings in excess of \$55,000. *Id.* at 39.

4. Monthly billings did not exceed \$30,000 from 1973 through 1975, so Green received no commissions during those years. By 1977, however, monthly billings began to exceed \$55,000 per month. *Id.* at 39-40.

5. Green earned commissions of \$12,783 in 1978, \$19,764 in 1979, and \$25,940 in 1980. *Id.* at 39.

6. Green earned \$33,443 in 1980, while Bettinger's son earned \$22,481 in the same year. *Id.* at 40.

7. The new commission schedule paid 1/2% on monthly billings between \$10,000 and \$50,000 and 1% on billings over \$50,000. *Id.*

8. *Id.*

9. *Id.* at 40.

ally, despite the written contract.¹⁰ The court agreed with Bettinger.¹¹ Though her income was cut nearly in half in contravention of her written contract with her employer, Marcy Green was forced to accept the pay cut or give up her job, she had no judicial remedy.

In recent years, a significant number of employees have sought judicial remedies for loss or reduction of benefits.¹² Employees have sued to recover vacation pay,¹³ commissions,¹⁴ bonuses,¹⁵ pensions,¹⁶ severance pay,¹⁷ promotions,¹⁸ and salary

10. *Id.* at 41.

11. *Id.* at 42.

12. Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 ALR4th 1131, § 5 (commissions and bonuses), (1986); Annotation *Vacation Pay Rights of Private Employees Not Covered by Collective Labor Contract*, 33 ALR 4th 264, §§ 5,6,8 (vacations and vacation pay) (1986); Annotation, *Unemployment Compensation as Affected by Vacation or Payment in Lieu Thereof*, 14 ALR4th 1175, § 4 (1986); See Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 ALR4th 544, § 8 (pension and retirement benefits), § 9 (stock options), § 10 (profit sharing plans), § 11 (commissions and bonuses) (1986); Annotation, *Sufficiency of Consideration for Employee Stock Option Contract*, 57 ALR3rd 1241 (1968); Annotation, *Construction and Effect of Severance or Dismissal Pay Provisions of Employment Contract or Collective Labor Agreement*, 40 ALR2d 1044 (1955) (severance pay).

Typical benefits employers offer include vacation, vacation pay, commissions, bonuses, pensions, severance pay, promotions, and stock options.

13. See, e.g., *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978) (denying plaintiff vacation pay for vacation he was scheduled to take two weeks after discharge).

14. See, e.g., *Green v. Bettinger Co.*, 608 F. Supp. 35 (E.D. Pa. 1984) (holding employer has unilateral right to modify employee's commissions). See *supra* notes 1-11 and accompanying text.

15. See, e.g., *Muller v. Stromberg Carlson Corp.*, 427 So.2d 266 (Fla. Dist. Ct. App. 1983) (holding employer's policy of giving annual bonus not contractually binding on employer).

16. See, e.g., *Hablas v. Armour & Co.*, 270 F.2d 71 (8th Cir. 1959) (denying pension to employee fired after forty-five years of service to company). The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1976 & Supp. IV 1986), now protects pensions of employees who work for private employers.

Courts have yet to determine whether to extend ERISA to other employee benefits. The Ninth Circuit stated:

ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits.

Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501-02 (9th Cir. 1985) (upholding regulation promulgated by Department of Labor that interpreted severance pay as "employee benefit plan" within meaning of ERISA).

The Ninth Circuit limited ERISA coverage by excluding ordinary vacation-with-pay programs in *California Hosp. Ass'n v. Henning*, 770 F.2d 856 (1985). ERISA did not protect an executive retirement and death benefit in *Belsky v. First Nat'l Life Ins. Co.*, 818 F.2d 661 (8th Cir. 1987).

The Supreme Court recently decided three cases brought under ERISA but has

increases.¹⁹ Courts deciding these cases often employ principles derived from the employment-at-will doctrine.²⁰

The employment-at-will doctrine has governed the employer employee relationship since the late nineteenth century.²¹ The doctrine provides that if a contract does not fix the term of employment, either party may terminate the relationship at any time.²² Because the doctrine is potentially harsh to employees,²³ courts have developed exceptions to the rule in recent years.²⁴ Courts generally have based exceptions on either public policy or implied contract theories.²⁵

Most at-will cases have dealt with discharge from employ-

not determined the range of benefits ERISA covers. See *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825 (1988) (holding ERISA does not forbid garnishment of welfare benefits plan); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (holding ERISA does not preempt Maine statute requiring severance pay in event of plant closing); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (holding ERISA preempted employee's commonlaw contract and tort claims in suit involving wrongful termination of disability benefit).

17. See, e.g., *Kolka v. Atlas Chem. Indus.*, 13 Mich. App. 580, 164 N.W.2d 755 (1968) (denying severance pay).

18. See, e.g., *Servamerica, Inc. v. Rolfe*, 318 So.2d 178 (Fla. Dist. Ct. App. 1975) (holding employer had right to discharge employee who left previous job relying on promised promotion).

19. See, e.g., *Lieber v. Union Carbide Corp., Nuclear Div.*, 577 F. Supp. 562 (E.D. Tenn. 1983) (statement in policy manual does not give rise to implied contract for annual employee performance review).

20. Horace G. Wood articulated the rule:

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

Horace G. Wood, *Master and Servant* § 136 (2d ed. 1886).

The effect of the at-will doctrine is to create a rebuttable presumption that there is no binding agreement regarding the duration of employment. Wood based his rule upon only four cases and questionable analysis. See *infra* note 40.

21. William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 Idaho L. Rev. 201, 202 (1985).

22. Horace G. Wood, *supra* note 20, at § 136.

23. See *infra* note 46-52 and accompanying text.

24. See generally Andrew Hill, "Wrongful Discharge" and the Derogation of the At-Will Employment Doctrine, vii-ix (1987) (describing growing trend of courts abrogating at-will doctrine).

25. A.B.A. Litigation Section, Employment and Labor Relations Law Committee, *Employment-At-Will: A State-by-State Survey*, 1984 Report of the Employment-At-Will Subcommittee, at 5. Some courts have recognized public policy exceptions to at-will discharges for whistleblowing, refusing to commit illegal acts, and jury duty or military service, among others. *Id.* Some courts have interpreted wording in employee handbooks, personnel manuals, or oral promises given to employees to be "implied contracts" that create a definite term of employment. *Id.* Courts often have been ambiguous about whether the claims lie in tort or contract. See Andrew Hill, *supra* note 24, at 17.

ment rather than recovery of benefits.²⁶ Yet employers often promise benefits, just as they promise job security, as inducements to the employee to begin²⁷ or to continue work for the employer,²⁸ to work more productively,²⁹ or to work for a lower salary.³⁰ In dealing with suits for benefits, courts have faced the same dilemma they face in contested discharge cases.³¹ Some have applied the employment-at-will doctrine, holding that employers may unilaterally grant, modify, or withdraw benefits to at-will-employees.³² Other courts have developed exceptions to protect employment benefits which are similar to the exceptions they have applied to protect at-will employees from certain types of discharges.³³ Still other courts have ignored the at-will rule in the disposition of benefits cases and have applied principles from contract law.³⁴

This article examines the relationship between the employment-at-will doctrine and employee benefits. Part I discusses the historical development and current trends of the at-will rule in discharge cases. Part II analyzes how courts have applied the at-will doctrine to employee benefits and the difficulties that follow the application. Part III argues that courts should analyze benefits claims according to established contract principles rather than applying the at-will rule and its exceptions. The article concludes

26. See *supra* note 12.

27. See, e.g., *Servamerica, Inc. v. Rolfe*, 318 So.2d 178 (Fla. Dist Ct. App. 1975).

28. See, e.g., *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (N.J. Super Ct. App. Div. 1958).

29. See *Leone v. Precision Plumbing & Heating of S. Ariz., Inc.*, 121 Ariz. 514, 591 P.2d 1002 (Ariz. Ct. App. 1979) (bonus based on reduced cost of construction); *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (Cal. Ct. App. 1972), *aff'd*, 414 U.S. 117 (1973) (profit sharing plan).

30. See, e.g., *Hablas v. Armour & Co.*, 270 F.2d 71 (8th Cir. 1959) (employee accepted lower salary in order to avoid jeopardizing retirement benefits).

31. Courts have been unsure whether to apply the at-will doctrine, sometimes with harsh results, or to find an exception. See *supra* note 24.

32. See, e.g., *Flint v. Youngstown Sheet & Tube Co.*, 143 F.2d 923 (2d Cir. 1944) (court, in applying employment law doctrine to agency relationship, stated if plaintiffs were not content with defendant employer's unilateral modification of contract, they could have refused to continue work).

33. See, e.g., *Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221 (1976) (finding implied contract for benefits based on written policy statement); see also *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (finding implied covenant of good faith and fair dealing in promise of bonus); *Cook v. Alexander & Alexander of Conn., Inc.*, 40 Conn. Supp. 246, 488 A.2d 1295 (Conn. Super. Ct. 1985) (finding public policy basis for employer to pay bonus to at-will employee).

34. See, e.g., *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967) (finding employer unjustly enriched and employees entitled to pensions on quasi-contract theory). Employment relationships have been treated as a special branch of contract law and not subject to the same principles as other contractual relationships. See *infra* note 37.

that application of the suggested analysis will lead to more equitable results because it takes into consideration the expectations of the parties at the time of employment and because it is applicable whether or not the employment is for a fixed duration.

Part I. Employment-At-Will and Exceptions to the Doctrine

A. *Development of Employment-At-Will*

The employment-at-will doctrine is a fairly recent departure from the English tradition. That tradition, established in fourteenth-and fifteenth-century England, held that hirings were presumed to be for one year in the absence of a specified term.³⁵ Laws enacted in the mid-fourteenth century in response to a critical shortage in the work force³⁶ regulated employment relationships by fixing wages, compelling the unemployed to work, and forbidding termination of employment before the end of a term.³⁷ Later enactments expanded employment regulations, and the one year presumption continued through the nineteenth century.³⁸ Statutory regulation of labor continues in England to this day.³⁹ American courts departed from this tradition in the late nineteenth century, when they embraced the employment-at will doctrine and made it part of the common law.⁴⁰ The at-will doctrine, because it

35. Timothy Heinsz, *The Assault on the Employment At will Doctrine: Management Considerations*, 48 Mo. L. Rev. 855, 859 (1983) (citing 1 William Blackstone, *Commentaries* 425-26 (1765)).

36. The "Black Death" devastated the work force and left masters without servants and crops unharvested. Mark Rothstein, Andria Knapp, & Lance Liebman, *Cases and Materials on Employment Law*, 28 (1987).

37. The Ordinance of Labourers was passed in 1349 and the Statute of Labourers in 1351. *Id.* They are significant because they made employment contracts different from other contracts by regulating the terms of employment contracts and removing the employment relationship from the common law of contracts. *Id.*

38. *Id.*

39. Susan Marrinan, *Employment At-Will: Pandora's Box May Have An Attractive Cover*, 7 Hamline L. Rev. 155, 157 (1984) (citing Trade Union and Labour Relations Act, 1974, Schedule I, paragraph 10). England's labor laws require an employer to provide, upon request, a written statement of reasons for discharge if the employee has been employed continuously for twenty-six weeks. *Id.* If a tribunal determines that the reasons are "unfair," the employee may recover back pay or reinstatement. *Id.*

40. Before embracing the at-will rule, American courts used two additional approaches in discharge cases. One analyzed the circumstances surrounding the employment to infer the terms of the contract. The other approach presumed the term of employment was the pay interval; thus, an employee paid a monthly salary was presumed hired for one month. See Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335, 341 n.50 (1974).

Wood's Rule of employment-at-will, see *supra* note 20, became the dominant doctrine. Note, *Implied Contract Rights*, *supra* note at 342. Commentators have criticized Wood's rejection of the English rule and adoption of employment-at-will,

permitted employers to discharge employees in response to business needs,⁴¹ suited the laissez faire business climate of late-nineteenth century America.⁴² The "freedom of contract" doctrine inherent in the at-will rule presumed that employer and employee were in equal bargaining positions.⁴³ The at-will doctrine became the law in almost all states.⁴⁴ Courts have held that even "permanent" or "lifetime" employment is at-will because the term is indefinite.⁴⁵

arguing that Wood cited only four cases as authority, and those cases were decided on their facts or touched only tangentially on the employment relationship. *Id.* See also Joseph DeGuiseppe, *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 Fordham Urb. L.J. 1, 6 (1981) (criticizing Wood's analysis).

An early case adopting the rule was *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895) (holding employee hired at annual salary and paid monthly was at-will and subject to dismissal at any time). The Supreme Court followed the doctrine in *Adair v. United States*, 208 U.S. 161, 175 (1907) (holding unconstitutional federal statute making it a crime to discharge employee for union membership). *Adair* was overruled in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding constitutionality of National Labor Relations Act).

41. The fourteenth century Statute of Labourers also responded to the employer's needs by compelling servants to work a fixed term at fixed wages during a time when labor was scarce. See *supra* notes 36-37 and accompanying text. By fixing the term for one year, the English rule guaranteed that workers would be available to employers during both the planting and harvesting seasons. *Id.* Workers also benefited from the rule because employers provided for them during the winter.

42. Kenneth Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 Harv. J. on Legis. 48, 53 (1982).

In most cases, American courts adopting the at-will rule cited Wood's treatise, *supra* note 20, as authority, or they cited cases that cited Wood. See, e.g., *The Pokanoket*, 156 F. 241, 243-44 (4th Cir. 1907) (quoting Wood). See, e.g., *Summers v. Phenix Ins. Co.*, 50 Misc. 181, 182, 98 N.Y.S. 226, 223 (Sup. Ct. 1906) ("hiring at so much a year...is an indefinite hiring," citing *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895)) (cited in Note, *Implied Contract Rights, supra*, at 342 n.58). Other courts applied contemporary contract law. See, e.g., *St. Louis, Iron Mountain & S. Ry. v. Matthews*, 64 Ark. 398, 42 S.W. 902 (1897) (employee gave no consideration for job security provision); *Louisville & N.R.R. v. Offutt*, 99 Ky. 427, 36 S.W. 181 (1896) (no mutuality of obligation); *Durgin v. Baker*, 32 Me. 273 (1850) (contract for definite term "if parties could agree" was too indefinite to establish term of employment); *Edwards v. Seaboard & Roanoke R.R.*, 121 N.C. 490, 491, 28 S.E. 137, 137 (1897) (parties would have included duration of contract in written document if they had intended definite term).

43. *Marrinan, supra* note 39, at 158, citing *Adair*, 208 U.S. at 174-75. The Supreme Court portrayed the employment-at-will doctrine as a step toward equalizing the bargaining power of employees who had no freedom to leave their jobs except on the employer's terms. *Adair*, 208 U.S. at 172-73.

44. *Heinsz, supra* note 35, at 859. During the substantive due process era the United States Supreme Court found a constitutional basis for the doctrine. See *Adair*, 208 U.S. at 173 (striking down as unconstitutional federal statute that limited employer's right to discharge employee). See also *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down as unconstitutional state law which made it illegal for employer to discharge employee for union membership).

45. See *Page v. Carolina Coach Co.*, 667 F.2d 1156, 1158 (4th Cir. 1982).

The at-will doctrine allows employers to take unreasonable advantage of employees.⁴⁶ One court, for example, ruled in favor of an employer who discharged an employee employed for forty-five years.⁴⁷ By firing the employee one year before he was eligible for retirement, the employer denied him all pension rights.⁴⁸ Courts also have found employers to be within their rights when they have fired workers for reporting illegal acts of other employees,⁴⁹ filing workers compensation claims,⁵⁰ refusing to take psychological tests,⁵¹ or serving on grand juries.⁵²

B. Exceptions to the At-Will Doctrine

Because of the at-will doctrine's harsh results, some courts have modified the rule using various tort and contract theories.⁵³

46. See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967) (employees threatened with discharge if they did not incriminate themselves); *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir.), cert. denied, 345 U.S. 941 (1953) (court found no tort claim for employees fired after testifying against employer when subpoenaed); *Mims v. Metropolitan Life Ins. Co.*, 200 F.2d 800 (5th Cir. 1952), cert. denied, 345 U.S. 940 (1953) (employee fired after 32 years with company when he refused to contribute to political campaign of supervisor's candidate; court ruled against employee in libel suit). See also Lawrence Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1405-12 (1967) (giving examples of employers' use of threat of discharge to coerce employees).

47. *Hablas v. Armour & Co.*, 270 F.2d 71 (8th Cir. 1959).

48. *Id.* at 76. The employee argued the employer had induced the employee to turn down more lucrative offers by reminding him he would lose pension benefits and by assuring him he could work until retirement. *Id.* The court held he was an at-will employee and could be terminated without cause. *Id.* at 79.

49. *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) (plaintiff's complaint that he was fired after reporting bribes, accounting discrepancies, and misuse of funds held not sufficient to state cause of action for wrongful discharge).

50. See, e.g., *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (en banc) (holding employee had no cause of action against employer who allegedly violated statutory provision against discharging employee who filed worker's compensation claim).

51. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977) (holding employer justified in terminating employees who refused to take psychological tests).

52. *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594 (Ala. 1980) (holding employer could terminate employee who served on grand jury). The Alabama legislature overruled the *Bender* decision by statute. See Ala. Code § 12-16-8.1 (1986).

53. Legislatures also have modified the at-will rule. See National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 157, 158(a)(3) (1982) (prohibiting retaliatory discharge for union activity and layoff or terminations under certain circumstances); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 2(a)(1) (1982); Federal Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (1982); Occupational Safety and Health Act § II(c), 29 U.S.C. § 660(c) (1982); Vietnam Era Veterans Readjustment Act, 38 U.S.C. § 2021 (1982).

State legislatures have created additional protection for certain groups of employees. Some have enacted "whistleblower" statutes which protect employees who report violations of the law. See, e.g., Minn. Stat. § 181.932 (1988 & Supp.). Several

The theories sometimes overlap, and courts do not always state clearly which theory they are using.⁵⁴

1. The Public Policy Exception

Most states finding an exception to the at-will doctrine have used public policy as a basis,⁵⁵ holding that an employer may not discharge an employee for a reason that offends public policy.⁵⁶ The usual sources of public policy are constitutions, administrative regulations, statutes, or judicial decisions.⁵⁷ Courts have applied the public policy exception⁵⁸ to cases where an employee was fired for refusing to commit an unlawful act,⁵⁹ performing a public obli-

states prohibit discharge for political activities. *See, e.g.,* Mass. Gen. Laws Ann. ch. 56 § 33 (West 1988). Others have laws against retaliatory discharge for filing worker's compensation claims. *See, e.g.,* Mo. Ann. Stat. § 287.780 (Vernon Supp. 1988). Legislation that would protect employees who are not covered by collective bargaining agreements has been introduced in Michigan, Pennsylvania, and Wisconsin. *See* The Employment-At-Will Issue, Lab. Rel. Rep. (BNA) (Special Report) Vol. III, No. 23 (Nov. 22, 1982) at 11-12.

54. Courts often use the terms "wrongful discharge," "abusive discharge," "retaliatory discharge," "bad faith discharge," and "discharge against public policies" interchangeably. The ambiguity becomes more confusing because of a "tendency to combine tort and contract theories and the inclination to plead causes-of-action in general rather than specific terms." Mauk, *supra* note 21 at 207.

55. *See infra* notes 56-62. Twenty-nine states have recognized a public policy exception as of 1986. *See generally*, Andrew Hill, *supra* note 24 (summarizing status of at-will rule in each state). Since Hill's study, Minnesota has recognized a public policy exception. *See Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987) (employee discharged after refusing to pump leaded gasoline in violation of federal Clean Air Act). Minnesota has codified a "whistleblower" exception to protect employees who report illegal acts of their employers. *See* Minn. Stat. § 181.932 (1988). Montana had codified its public policy exception into state law, *see* Mont. Code Ann. § 39-2-505 (1985), but repealed the statute in 1987.

56. Andrew Hill, *supra* note 24 at 27.

57. *See Townsend v. L.W.M. Management, Inc.*, 64 Md. App. 55, 61, 494 A.2d 239, 242 (1985). A few courts have defined public policy more broadly: "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the state collectively. . . . [A] matter must strike at the heart of a citizen's social rights, duties, and responsibilities." *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 130, 421 N.E.2d 876, 878 (1981).

58. *See* Andrew Hill, *supra* note 24 at 28.

59. *See Winther v. DEC Int'l, Inc.*, 625 F. Supp. 100 (D. Colo. 1985) (employee alleged he was dismissed for refusing to take part in activities violating antitrust laws); *Hansrote v. American Indus. Technologies, Inc.*, 586 F. Supp. 113 (W.D. Pa. 1984) (applying Delaware law) (employee discharged for refusing to participate in illegal conduct of company); *Petermann v. International Brotherhood of Teamsters*, 174 Ca. App. 2d 184, 344 P.2d 25 (1959) (employee discharged after refusing to commit perjury); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987) (employee had cause of action for wrongful discharge for refusing to pump leaded gasoline in violation of federal Clean Air Act); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978) (technician discharged after refusing to perform catheterization of patient when state law required procedure to be performed by physician or nurse); *Watson v. Cleveland Chair Co.*, 122 L.R.R.M. 2076 (Tenn. Ct. App. 1985) (employees discharged after refusing to violate vehicle speed limits).

gation,⁶⁰ exercising a statutory right or privilege,⁶¹ and reporting an employer's unlawful conduct.⁶² A few courts have found a public policy exception based in common law when the employer acted in bad faith or against community standards.⁶³

2. The Implied Unilateral Contract Exception

A growing number of jurisdictions have used the theory of implied unilateral contract⁶⁴ to modify the at-will rule. Under this

60. *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (employee allegedly fired to prevent her from testifying against employer); *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (Ill. 1981) (employee dismissed after giving information to police); *Bartley v. University Asphalt Co., Inc.*, 129 Ill. App.3d 231, 472 N.E.2d 499 (1984), *rev'd on other grounds*, 111 Ill. 2d 318, 489 N.W.2d 1367 (1986) (material issue of fact as to employee was dismissed for cooperating in FBI investigation of employer precluded summary judgment for employer).

61. *See Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (Employee allegedly discharged for refusing to lobby for eliminating no-fault automobile insurance. Court found cause of action may arise under constitution if state law did not provide remedy.); *Smith v. Piezo Technology & Professional Adm'rs*, 427 So.2d 182 (Fla. 1983) (employee discharged filing worker's compensation claim); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 249, 384 N.E.2d 353 (1978) (employee discharged for filing worker's compensation claim); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Serv.*, 6 Kan. App.2d 488, 630 P.2d 186 (1981) (employee discharged for filing worker's compensation claim held to have cause of action); *DeBleecker v. Montgomery County*, 292 Md. App. 498, 438 A.2d 1348 (1982) (employee discharged by public employer allegedly in violation of first amendment rights), *but see Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E.2d 484 (1986) (refusing to recognize public policy exception where employee discharged for filing worker's compensation claim).

62. *See Kistler v. Life Care Centers of America, Inc.*, 620 F. Supp. 1268 (D. Kan. 1985) (facts existed to preclude summary judgment for employer; employee discharged after testifying against employer at administrative hearing); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (employee allegedly discharged for reporting employer's violation of statute regulating labels on food products held to have cause of action); *Schmidt v. Yardney Elec. Corp.*, 4 Conn. App. 69, 492 A.2d 512 (1985) (employee discharged for reporting employer's fraudulent insurance claim stated cause of action for wrongful discharge); *Brown v. Physicians Mut. Ins. Co.*, 679 S.W.2d 836 (Ky. Ct. App. 1984) (employee allegedly discharged for reporting illegal conduct had cause of action for wrongful discharge); *Boyle v. Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (employee dismissed after threatening to report employer's violation of federal safety regulations stated claim for wrongful discharge).

63. *See, e.g., Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1958) (holding public policy based on "principles under which freedom of contract or private dealing is restricted by law for good of community").

64. Every contract has at least two parties. The contract is bilateral if both parties have made promises. A contract in which only one party has made a promise, and therefore only that party is subject to a legal obligation, is a unilateral contract. For example, if A offers B ten dollars to walk across the Brooklyn Bridge, A has made an offer for a contract which B accepts by performing the act, and the contract is unilateral. If A had asked B instead to make a promise to do something, the contract would have been bilateral. John Calamari & Joseph Perillo, *Contracts* 3d § 1-10 (1987).

theory, employer representations in employee handbooks,⁶⁵ personnel policy statements,⁶⁶ and oral promises⁶⁷ to discharge employees only for just cause or only after following specified procedures may create contractual obligations even absent mutual consent.⁶⁸

Courts typically have followed a four-part test in determining the existence of an implied unilateral contract.⁶⁹ The terms of the offer must be definite in form, communicated to the offeree, accepted by the offeree, and enforceable by reason of adequate con-

65. See, e.g., *Vinyard v. King*, 728 F.2d 428 (10th Cir. 1984) (applying Oklahoma law); *Hass v. Picker Int'l*, 122 L.R.R.M. 2367 (D. Mass. 1986); *Thompson v. American Motor Inns, Inc.*, 623 F. Supp. 409 (W.D. Va. 1985); *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978) (applying Pennsylvania law), but see *Richardson v. Charles Cole Memorial Hosp.*, 320 Pa. Super. 106, 466 A.2d 1084 (1983) (expressly rejecting possibility that handbook could give rise to enforceable promise); see also *Breedon v. City of Nome* 628 P.2d 924 (Alaska 1981); *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170 (Ariz. 1984); *Wing v. JMB Property Management Corp.*, 714 P.2d 916 (Colo. App. 1985); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 613 (D.C. App. 1985); *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110 (Haw. 1986); *Harkness v. City of Burley*, 658 P.2d 883 (Idaho 1986); *Duldulao v. St. Mary of Nazareth Hosp. Center*, 115 Ill. 2d 482 (1987); *Larabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d (Me. 1984); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. App. 1983); *Morris v. Lutheran Medical Center*, 340 N.W.2d 388 (Neb. 1983); *Southwest Gas Corp. v. Ahmad*, 668 P.2d 261 (Nev. 1983); *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985); *Forrester v. Parker*, 606 P.2d 191 (N.M. 1980); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985); *Wyss v. Inskeep*, 699 P.2d 1161, *rev. denied*, 707 P.2d 582 (Ore. 1985); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (S.D. 1983); *Abbott v. Kellwood Co.*, No. 38-30 (Tenn. Ct. App. Aug. 3, 1985) (LEXIS, States library, Tenn. file); *Benoit v. Ethan Allen, Inc.*, 514 A.2d 716 (Vt. 1986); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Wash. 1977); *Cook v. Heck's Inc.*, 342 S.E.2d 453 (W.Va. 1986); *Ferraro v. Koelsch*, 368 N.W.2d 666 (Wis. 1985); *Armstrong v. American Colloid Co.*, 721 P.2d 1069 (Wyo. 1986).

66. See *Flowers v. Area Agency on Aging of Southeast Arkansas, Inc.*, 574 F. Supp. 71 (E.D. Ark. 1983); *Pima College v. Sinclair*, 17 Ariz. App. 213, 496 P.2d 639 (1972); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982); *Tiranno v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984); *Hedrick v. Center for Comprehensive Alcoholism Treatment*, 7 Ohio App. 3d 211, 454 N.E.2d 1343 (1982).

67. See *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251 (Ala. 1985); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983); *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978); *Terrio v. Millenocket Community Hospital*, 379 A.2d 135 (Me. 1977) (hospital personnel manual, retirement policy, and oral statements by administrator were sufficient evidence to support finding of contract for definite term); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E. 441 (1982).

68. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 614, 292 N.W.2d 880, 892 (1980) (stating employer representation in personnel manual created "contractual rights in the employees without evidence that the parties mutually agreed that the policy statements would create contractual rights").

69. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626-27 (Minn. 1983).

sideration.⁷⁰ In a recent case,⁷¹ for example, a court held an employee handbook outlining disciplinary procedures constituted a binding unilateral contract.⁷² An employee accepted by continuing to work after receiving the handbook and thus provided consideration.⁷³ When the employer discharged an employee without following the procedures, the court found a breach of contract.⁷⁴

3. Promissory Estoppel

A related contract-based theory is promissory estoppel. Under this theory, detrimental reliance may make a promise enforceable.⁷⁵ A small minority of courts has applied promissory estoppel in at-will discharge cases.⁷⁶ These courts have held that an employer is estopped from discharging an at-will employee without cause when the employer has promised permanent employment in return for the employee transferring his business to the employer,⁷⁷ giving up a former job,⁷⁸ transferring property to the

70. *Id.*

71. *Id.*

72. *Id.* at 627.

73. *Id.*

74. *Id.* at 631.

75. John Calamari & Joseph Perillo, *supra* note 64, § 6-1 (1987). The promissory estoppel doctrine was born in the First Restatement, which stated, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts § 90 (1952). The Second Restatement expanded the doctrine by liberalizing its application. Restatement (Second) of Contracts § 90 (1970) made four changes which created a more flexible doctrine. It removed the words "of a definite and substantial character" from the text. Comment b indicates that the definite and substantial nature of the reliance is one of several factors to consider. It permitted greater flexibility of remedy so that a promise reasonably relied upon is enforceable to the extent of the reliance. It allowed for third party reliance on a promise that the promisor made to the promisee. Finally, it provided that a charitable contribution or a marriage settlement is binding without proof that the recipient acted or abstained from acting. See Charles Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 Colum. L. Rev. 52 (1981).

76. See *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983); *Shetts v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Chantelier v. Robertson*, 118 So.2d 241 (Fla. Dist. Ct. App. 1960), *but see* *Servamerica, Inc. v. Rolfe*, 318 So.2d 178 (Fla. Dist. Ct. App. 1975) (employer not estopped from discharging employee who left former job in reliance on promise of promotion); *Revelo v. County of Hawaii*, 658 P.2d 883 (Haw. 1983); *Martin v. Federal Life Ins. Co.*, 490 N.E.2d 998 (Ill. App. Ct. 1982); *Lopp v. Peerless Serum Co.*, 382 S.W.2d 620 (Mo. 1964); *Burkhimer v. Gealy*, 250 S.E.2d 678 (N.C. App. 1979), *rev. denied*, 254 S.E.2d 918 (N.C. 1979); *Jones v. East Center for Community Mental Health, Inc.*, 482 N.E.2d 969 (Ohio Ct. App. 1984).

77. *Chantelier v. Robertson*, 118 So.2d 241 (Fla. Dist. Ct. App. 1960).

78. See *Murphree v. Alabama Farm Bureau Ins. Co.*, 449 So.2d 1218 (Ala. 1984); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981).

employer,⁷⁹ relocating,⁸⁰ or giving up a legal claim against the employer.⁸¹

4. Covenant of Good Faith and Fair Dealing

Finally, a few jurisdictions have recognized an implied covenant of good faith and fair dealing as an exception to employment-at-will.⁸² Modern contract law requires parties to a contract to act in good faith.⁸³ In an early case addressing the good faith issue,⁸⁴ a court held that firing an employee to avoid paying commissions violated an implied covenant of good faith and therefore constituted a breach of contract.⁸⁵

Of states adopting the covenant of good faith exception, only California expressly has adopted it as part of all employment con-

79. *Lopp v. Peerless Serum Co.*, 382 S.W.2d 620 (Mo. 1964).

80. *Burkheimer v. Gealy*, 250 S.E.2d 678 (N.C. Ct. App. 1979), *rev. denied*, 254 S.E.2d 918 (N.C. 1979).

81. *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818 (N.C. Ct. App. 1985).

82. *See Grayson v. American Airlines, Inc.*, 803 F.2d 1097 (10th Cir. 1986) (applying Oklahoma law); *Savage v. Holiday Inn Corp., Inc.*, 603 F. Supp. 311 (D. Nev. 1985) (applying Nevada law) (covenant implied in contracts where there is "special element of reliance"); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983) (applying Illinois law); *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985); *Mafnan v. Anaconda Indus., Inc.*, 479 A.2d 781 (Conn. 1984); *Kulins v. Malco, a Microdot Co., Inc.*, 459 N.E.2d 1038 (Ill. App. 1984); *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487 (Mont. 1984); *Hall v. Farmer's Ins. Exchange*, 713 P.2d 1027 (Okla. 1985); *Wyss v. Inskeep*, 699 P.2d 1161, *rev. denied*, 707 P.2d 582 (Ore. 1985). *But see Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002 (8th Cir. 1982) (applying Missouri law) (refusing to recognize implied covenant in at-will employment contract); *Salazar v. Furr's Inc.*, 629 F. Supp. 1403 (D.N.M. 1986) (applying New Mexico law); *Smith v. Hartford Ins. Co., No. 85-2323*, slip op. (E.D. Pa. 1985) (applying New Jersey law); *Satterfield v. Lockheed Missiles & Space Co., Inc.*, 617 F. Supp. 1359 (D.S.C. 1985) (applying South Carolina law); *Hunter v. H.D. Lee Co., Inc.*, 563 F. Supp. 1006 (N.D.N.Y. 1983) (applying Kansas law) (refusing to recognize implied covenant exception); *Kempe v. Prince Gardner, Inc.*, 569 F. Supp. 9 (E.D. Mo. 1983) (applying Missouri law); *Vasques v. National Geographic Soc'y, No. J. 81-3008* (D. Md. 1982) (applying Maryland law) (holding every employment contract does not include implied covenant); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1983) (specifically rejecting implied covenant claim); *Larabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984); *Hunt v. IBM Mid-America Employees Union*, 384 N.W.2d 853 (Minn. 1986); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985).

83. *See generally*, Eric Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. Pitt. L. Rev. 381 (1978).

The Second Restatement provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1979).

Similarly, the Uniform Commercial Code states, "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).

84. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

85. *Id.* at 101, 364 N.E.2d at 1256.

tracts.⁸⁶ Other courts and some commentators have criticized the doctrine of implied covenant as unworkable and inappropriate⁸⁷ or disapproved of it as an abrogation of the at-will rule.⁸⁸ Still others have criticized the doctrine because it combines contract and tort theories.⁸⁹ Despite controversy surrounding the doctrine, some jurisdictions continue to apply the implied covenant exception.⁹⁰

Thus, although some courts have recognized public policy exceptions to the at-will rule, and other jurisdictions have recognized exceptions based on contract principles including implied unilateral contracts, promissory estoppel, and the implied covenant of good faith and fair dealing, a few states have adhered strictly to the at-will doctrine.⁹¹ The result is a doctrine riddled with excep-

86. James Dawson & Paul Zech, *The Covenant of Good Faith and Fair Dealing*, Bench & B. Minn., Apr. 1986, at 15-16. The seminal case is *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The court ruled that the termination of an employee after eighteen years of service without just cause violated the implied covenant, giving rise to an action in tort as well as in contract. *Id.* at 455-56, 168 Cal. Rptr. at 729.

87. "[T]here simply is no need for this additional and confusing claim." Dawson & Zech, *supra* note 86, at 18. Appellate courts in Alabama, Hawaii, Indiana, New Jersey, New York, Ohio, and Wisconsin have rejected the implied covenant as part of employment contracts. *Id.* The Wisconsin supreme court stated that courts should not become "arbiters of any termination that may have a tinge of bad faith attached." *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wis. 1983).

88. The New York Court of Appeals rejected the theory, saying that such an agreement between the parties could not exist, because "it would be incongruous to say that . . . the employer impliedly agreed to a provision which would be destructive of his right to termination." *Murphy v. American Home Prods., Inc.*, 58 N.Y.2d 293, 304-05, 448 N.E.2d 86, 91 (1983).

89. Courts have contorted their reasoning "to try to fit the holdings within the framework of contract law principles generally recognized as governing employment relationships." Robert Williams & Thomas Bagby, *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (1986), at 22.

In one of the first cases departing from the at-will rule, the court blended contract and tort theories in its holding, stating that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

90. See *supra* note 82.

91. States that adhere to the at-will doctrine include: Alabama: Has declined to recognize public policy or implied contract exceptions, but an employer may be estopped from discharging an employee at will if the employee has relocated or given up a former job in reliance on employer's promise. See, e.g., *Scott v. Lane*, 409 So.2d 791 (Ala. 1982). Delaware: Has held employee handbooks are unilateral expressions of company policy and not contractually binding; see *Heidick v. Kent General Hosp., Inc.*, 446 A.2d 1095 (Del. 1982). The Delaware courts have not recognized a public policy exception. Georgia: Has refused to find public policy exceptions or to recognize implied contract claims except in one instance, see *Fletcher v. Amax, Inc.*, 160 Ga. App. 692, 288 S.E.2d 49 (1981), *aff'd sub nom.* *Amax, Inc. v. Fletcher*, 166 Ga. App. 789, 305 S.E.2d 601 (App. 1983) (promissory estoppel). Iowa: Has not recognized either implied contract or public policy exception. Louisiana:

tions based on differing tort, contract, and policy theories, depending upon the jurisdiction and the facts of each case.⁹²

Part II. Employment-At-Will and Employee Benefits

A. *The At-Will Rule and Denial of Benefits*

Some jurisdictions adhere strictly to the employment-at-will doctrine and allow no exceptions either for discharge or for employees seeking benefits.⁹³ Other jurisdictions, although finding exceptions to the at-will rule with respect to terminations, have not extended those exceptions to cases involving benefits of at-will employees.⁹⁴ The theory supporting denial of benefits is that be-

Has rejected implied contracts under handbooks, *see* *Thibodeaux v. Southwest Louisiana Hosp. Ass'n*, 488 So.2d 743 (La. Ct. App. 1986); oral promises, *see* *Baynard v. Guardian Life Ins. Co.*, 339 So.2d 1200 (La. Ct. App. 1981); promissory estoppel, *see* *Griffith v. Sollat Found. Drilling, Inc.*, 373 So.2d 979 (La. App. 1979). Louisiana also has rejected all public policy exceptions; *see, e.g.*, *Gil v. Metal Serv. Corp.*, 412 So.2d 706 (La. Ct. App. 1982), *cert. denied*, 414 So.2d 397 (La. 1982) (no public policy exception for employee discharged for refusing to break law). Mississippi: Has refused to recognize public policy exception, *see* *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874 (compensation claim); implied contract claim will be recognized only if employee provides additional consideration, *see* *Sartin v. Columbus Utils. Comm'n*, 421 F. Supp. 393 (N.D. Miss. 1976). *See also* *Shaw v. Burchfield*, 481 So.2d 247 (Miss. 1985) (court refused to recognize implied contract claim but noted harsh result of at-will rule). New York: Has held tenaciously to at-will doctrine established in landmark case *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). Courts have resisted both public policy and implied contract exceptions. North Dakota: Has not recognized public policy exceptions; rejected implied contract claim based on handbook in *Wadson v. American Family Mut. Ins. Co.*, 343 N.W.2d 267 (N.D. 1984). Rhode Island: Has rejected public policy claim in *Brainard v. Imperial Mfg. Co.*, 571 F. Supp. 37 (D.R.I. 1983). Utah: Has refused to find implied contract in handbook or to apply promissory estoppel, *see* *Bullock v. Desert Dodge Truck Center, Inc.*, 354 P.2d 559 (Utah 1960). No public policy exceptions have been recognized.

92. Pennsylvania is the most inconsistent jurisdiction on the issue. State courts have found a cause of action for wrongful discharge in five of seven times such claims were brought, but federal courts applying Pennsylvania law have upheld the at-will rule in twenty-eight of the thirty-seven cases they have adjudicated. *See, e.g.*, *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (recognizing public policy exception to at-will rule for employee discharged for missing work to serve on jury). *But cf.* *Wolk v. Saks Fifth Avenue*, 728 F.2d 221 (3d Cir. 1984) (applying Pennsylvania law) (holding no public policy exception granted for woman discharged after refusing sexual advances). Uncertainty and ambiguity infuse both implied contract and tort areas. *See* Andrew Hill, *supra* note 24, at 115-17.

93. *See supra* note 91.

94. *See, e.g.*, *Lieber v. Union Carbide Corp., Nuclear Div.*, 577 F. Supp. 562 (E.D. Tenn. 1983) (applying Tennessee law) (annual performance appraisal described in manual did not create contract); *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 150 A.2d 607 (1958) (bonus described in handbook could be withheld at board of directors' discretion); *Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208 (Me. 1987) (vacation policy does not constitute contract); *Dahl v. Brunswick Corp.*, 227 Md. 471, 356 A.2d 221 (1976) (laid off employees not entitled to vacation pay as provided in pol-

cause the employer may discharge the employee at any time, the employer also has the right to modify the employment relationship unilaterally at any time.⁹⁵ The employee has the choice of accepting the new conditions or terminating the employment.⁹⁶ Courts have extended this rationale to find that when an employer denies or modifies benefits and employees continue to work, the parties have modified the employment contract.⁹⁷

For example, in *Green v. Bettinger*,⁹⁸ an employer unilaterally reduced an employee's commission schedule that had been in effect for eight years, despite the employee's objection.⁹⁹ The employee resigned and brought suit, claiming the owner's unilateral modification of the commission schedule, and the employee's "constructive discharge" for refusing to accept it, were breaches of her employment contract.¹⁰⁰ The court ruled in favor of the employer, concluding that the "undoubted right to terminate an at-will contract necessarily includes the right to insist upon changes in the compensation arrangements as a condition of continued employment."¹⁰¹

When applied to employee benefits, the at-will doctrine imposes a hardship on one party, the employee, that would be unacceptable in other areas of contract law. In non-employment agreements both parties must agree to a modification. If one party proposes a modification—to pay the other party less than origi-

icy and procedure manual); *Kolka v. Atlas Chem. Indus.*, 13 Mich. App. 580, 164 N.W.2d 755 (1968) (denying severance pay); *Skramstad v. Otter Tail County*, 417 N.W.2d 124 (Minn. Ct. App. 1987) (retired employee not entitled to severance pay as promised in policy manual); *Edwards v. County of Hennepin*, 397 N.W.2d 584 (Minn. Ct. App. 1986) (oral promise of working schedule not enforceable contract); *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380 (Minn. Ct. App. 1985) (denying overtime meal allowances as described in personnel manual); *Hance v. United Family Life Ins. Co.*, 725 S.W.2d 680 (Tenn. Ct. App. 1986) (promise in letter of Caribbean cruise if employee met sales quota not binding contract); *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978) (discharged employee not entitled to vacation pay); *Douglass v. Panama, Inc.*, 504 S.W.2d 776 (Tex. 1974) (oral promise of bonus not binding contract).

95. See, e.g., *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17, 19 (1st Cir. 1961) (holding "[s]ince defendant could discharge plaintiff at any time, it could equally initiate modification at any time").

96. *Flint v. Youngstown Sheet & Tube Co.*, 143 F.2d 923, 925 (2d Cir. 1944) (agency contract was terminable at will, and if employees didn't like modification, they should have refused to continue work).

97. See *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961) (employee accepted change in commission rate by continuing to work and accepting reduced pay).

98. 608 F. Supp. 35 (E.D. Pa. 1984). See *supra* notes 1-11 and accompanying text.

99. *Id.* at 40.

100. *Id.*

101. *Id.* at 42.

nally agreed—the new terms would be unenforceable under common law because there would be purported modification without consideration.¹⁰² Modern contract law permits modification to meet changed circumstances,¹⁰³ but any modification must be “fair and equitable.”¹⁰⁴ In employment contracts, however, courts do not require any modification to be “fair and equitable.”¹⁰⁵ They do not require employers to furnish additional consideration when they unilaterally reduce or withdraw benefits, nor do they require that employees assent to the proposed modification.

B. Application of Employment-At-Will Exceptions to Employee Benefits

1. Public Policy

Courts have attempted to soften the hardships for employees whose benefits are denied by applying the exceptions to the employment-at-will doctrine.¹⁰⁶ Few plaintiffs have litigated cases on

102. *W.L. Thaxton Constr. Co. v. O.K. Constr. Co.*, 295 S.E.2d 822 (W. Va. 1982).

103. “A promise modifying a duty under a contract not fully performed on either side is binding a) if the modification is fair and equitable . . . b) to the extent provided by statute; or c) to the extent that justice requires enforcement. . . .” Restatement (Second) of Contracts § 89 (1979).

See also U.C.C. § 2-209 comment 2 (1977) (contracts for sale of goods may be effectively modified without consideration but must meet test of good faith. “Extortion of ‘modification’ without legitimate commercial reason is ineffective as violation of duty of good faith”). “The presence or absence of good faith will be proved by circumstantial evidence and may in some situations require an objectively demonstrable reason for seeking a modification.” There must be a good business reason for asking for readjustment. The proposal to modify may not be a form of extortion. *Hawland U.C.C. Series* § 2-209 at 129 (1984).

104. “The limitation to a modification which is ‘fair and equitable’ goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification. . . . The reason for modification must rest in circumstances not anticipated as part of the context in which the contract was made.” Restatement (Second) of contracts § 89 comment b. (1979).

105. See *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961). An employee objected to unilateral modification of his commission rate. He told the court that he accepted the reduced amount of pay “because he had to,” but he never agreed to any change, and so the original agreement remained in effect. The court commented, “[i]t is difficult to think that even a layman could believe this.” *Id.* at 19. *Contra*, *Simpson v. Norwesco, Inc.*, 442 F. Supp. 1102 (D. S.D. 1977), *aff’d*, 583 F.2d 1007 (8th Cir. 1978).

Although courts have not required consideration when an employer reduced or withheld benefits, they have required consideration from an employee who attempted to collect promised benefits. In *Kolka v. Atlas Chem. Indus.*, 13 Mich. App. 580, 164 N.W.2d 755 (1968), an employee was on a disability leave of absence when the plant where he had worked for fifteen years closed. The employee sued for severance pay. The court refused to award it, saying, “[a]n offer of separation pay, to be accepted by an employee, requires the giving up or forbearance to exercise some legal right.” *Id.* at 581, 164 N.W.2d at 756. Because the employee was not working when the plant closed he had nothing to give up as consideration. *Id.*

106. See *supra* notes 55-56, 65-68, 75, 83.

the theory that the employer violated public policy by withholding benefits.¹⁰⁷ While many jurisdictions have recognized public policy exceptions for employee discharges,¹⁰⁸ the exception is more applicable to discharges than to benefits. First, discharges that offend public policy are generally retaliatory.¹⁰⁹ Employers rarely reduce benefits in retaliation when they have the power to fire an employee. Second, even when withholding of benefits accompanies a discharge, in order to award relief, courts generally have required a "clear mandate of a specific public policy."¹¹⁰ Courts have avoided defining public policy themselves.¹¹¹ While statutes frequently define illegal discharges,¹¹² few statutes address denial of employee benefits.¹¹³ In a rare example, a Connecticut court found a public policy exception enabling an employee to collect bonuses and thrift plan benefits, by ruling that those benefits constituted unpaid wages for which the employer was liable under a statute requiring employers to pay all wages.¹¹⁴ Generally, however, plaintiffs have not found a cause of action for benefits under the public policy exception.¹¹⁵

2. Implied Unilateral Contract

Plaintiffs frequently have found a cause of action for recov-

107. See *supra* note 12.

108. See *supra* note 55.

109. See *supra* notes 59-63 and accompanying text.

110. *Burns v. Preston Trucking Co.*, 621 F. Supp. 366 (D. Conn. 1986) (applying Connecticut law).

111. See Note, *At-Will Termination—Contractual Limitation of an Employer's Right to Terminate: Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983), 7 Hamline L. Rev. 463, 468 (1984) [hereinafter Note, *At-Will Termination*]. But see *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), in which the court recognized a cause of action based on non-statutory policies. "No other jurisdiction has adopted this broad view of the public policy exception." Note, *At-Will Termination*, *supra* note 24, at 468. New Hampshire's broad definition has been attacked for being based on "social and moral judgments" rather than on public policy as defined by statute. See *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1146 (N.H. 1981) (Bois, J., dissenting).

112. See *supra* notes 59-62 and accompanying text.

113. ERISA, *supra* note 16 protects pension benefits of employees of private businesses. In addition, some states have passed constitutional amendments to protect pensions of public employees. See Mark Rothstein, Andria Knapp, & Lance Liebman, *supra* note 36, at 1025. Statutes require employers to pay FICA (Social Security) taxes, unemployment compensation, and worker's compensation. *Id.* at 384. Although states may legislate some benefits, most benefits are customary or voluntary. *Id.*

114. *Cook v. Alexander & Alexander of Conn., Inc.*, 488 A.2d 1295 (Conn. Super. 1985).

115. Plaintiffs more frequently have brought suit in tort to recover benefits under the theory of the implied covenant of good faith and fair dealing. See *infra* notes 165-78.

ery of benefits, nonetheless, in jurisdictions where courts have applied the implied unilateral contract exception. In those jurisdictions courts look for an offer for benefits made either in an oral promise¹¹⁶ or implied in employee handbooks,¹¹⁷ personnel manuals, or policy and procedure statements.¹¹⁸ The employee demonstrates his consent to the offer by not quitting the job, he accepts by performance rather than by promise,¹¹⁹ and he meets the requirement of consideration by continuing to work when he has a right to resign.¹²⁰

Employers have defended against benefits claims by arguing that the benefits are gratuitous promises with no mutuality of obligation,¹²¹ no consideration,¹²² and no bargaining.¹²³ Although lack of mutuality of obligation remains a successful defense in employment cases,¹²⁴ the modern view is that a contract does not require exchange of identical promises.¹²⁵ Instead, "the requirement for mutuality of obligation [is]. . . simply the requirement that there be consideration."¹²⁶

In finding the consideration requirement has been met, some

116. See, e.g., *Hartung v. Billmeier*, 243 Minn. 148, 66 N.W.2d 784 (1954). *But see* *Edwards v. County of Hennepin*, 397 N.W.2d 584 (Minn. Ct. App. 1986) (hiring officer's oral promise not enforceable contract).

117. See *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976).

118. See *Fujimoto v. Rio Grande Pickle Co.*, 414 F.2d 648 (5th Cir. 1969).

119. See *supra* note 64 and accompanying text.

120. See, e.g., *Brydges v. Coast Wide Land, Inc.*, 2 Wash. App. 223, 467 P.2d 209 (1970).

121. See, e.g., *Alfaro v. Stauffer Chem. Co.*, 173 Ind. App. 89, 362 N.E.2d 500 (1977).

122. See, e.g., *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (1958).

123. See, e.g., *Lieber v. Union Carbide Corp., Nuclear Div.*, 577 F. Supp. 562 (E.D. Tenn. 1983).

124. See, e.g., *Simmons v. Westinghouse Elec. Corp.*, 311 So.2d 28, 31 (La. Ct. pp. 1975).

125. "[T]here is no analytical reason why an employee's promise to render services, or his actual rendition of services over time, may not support an employer's promise both to pay a particular wage (for example) and to refrain from arbitrary dismissal." *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925, 116 Cal. App. 3d 311, 325-26 (1981).

126. *Langdon v. Saga Corp.*, 569 P.2d 524, 526-27 (Okla. Ct. App. 1976). The court applied this theory of consideration to a case in which plaintiffs who lost their jobs brought suit for severance pay. See *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (1958). The employer argued that publication and distribution of the severance pay rule was a "mere gratuitous promise of a bonus," not supported by consideration to the employer or detriment to the employees, and the employees were free to quit at will. *Id.* at 143, 143 A.2d at 764. The court said the employer's argument contemplated a bilateral contract, in which a promise is exchanged for a promise, when in fact the employer submitted an offer in return for rendition of services—a unilateral contract. *Id.* See *supra* note 64. The employees were able to bind the employer to his promise of severance pay by continuing to work after the employer offered new terms. *Id.* at 146, 143 A.2d at 766.

courts have suggested the employer received consideration because benefit plans tend "to better employee morale, improve performance and lessen turnover, all to the distinct advantage of the employer."¹²⁷ More recent decisions specifically have held that an at-will employee offers consideration for benefits by increased productivity and continued work,¹²⁸ and as in other contract relationships, the court will not inquire into the adequacy of consideration.¹²⁹ The rule is not settled, however, and some courts have required additional consideration from the employee for additional benefits.¹³⁰

In regard to bargaining, employers also have argued successfully that they should not be held to promises made in policy statements or employee handbooks because employees did not bargain for them.¹³¹ One court, for example, refused to find provisions for an annual review and consequent increased benefits as detailed in a personnel manual to be contractually binding on the employer.¹³² The court found no "meeting of the minds by the parties."¹³³

Another employer defense has been based on lack of communication. The implied unilateral contract theory requires the employer communicate the offer to the employee,¹³⁴ but courts have not agreed on how she must do it. Courts have reached differing results on the issues of whether the employer must communicate the offer of benefits to each employee, whether the employee is entitled to a benefit she learns about from a manual or from another employee, and whether the employer must actually intend to offer a benefit.¹³⁵

Some courts have held that a benefit must be communicated to each employee individually.¹³⁶ Thus, when an employer com-

127. *Id.* at 144, 143 A.2d at 764.

128. *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976).

129. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 924-25 (1981) (holding that independent consideration requirement "is contrary to general contract principle that courts should not inquire into the adequacy of consideration").

130. *See, e.g., Kolka v. Atlas Chem. Indus.*, 13 Mich. App. 580, 164 N.W.2d 755 (1968) (requiring extra consideration from employees). *See supra* note 105.

131. *See McQueeney v. Glenn*, 400 N.E.2d 806 (Ind. Ct. App. 1980), *cert. denied*, 449 U.S. 1125 (1981) (employee handbook not contractually binding because no mutual bargaining over terms).

132. *Lieber v. Union Carbide Corp., Nuclear Div.*, 577 F. Supp. 562 (E.D. Tenn. 1983).

133. *Id.* at 564.

134. *See supra* notes 69-70 and accompanying text.

135. *See infra* notes 136-41 and accompanying text.

136. *See Alfaro v. Stauffer Chem. Co.*, 173 Ind. App. 89, 362 N.E.2d 500 (1977). Severance pay was a gratuitous benefit according to the court, because the em-

municated an offer of severance pay to some employees and not to others, the employer was bound contractually only to those to whom the offer was made.¹³⁷ Other courts have found that benefits described in manuals were not communicated to all employees when the employer distributed the manuals only to supervisors¹³⁸ or personnel managers.¹³⁹

Other courts have held that written policies regarding benefits are contractual obligations, even if the employer did not communicate them directly to employees¹⁴⁰ and even if the employees had not seen the policies and did not know the particulars but knew the policies existed.¹⁴¹

Thus, by using the implied unilateral contract theory, courts have been able to find an implied contract where an employer appeared to have offered a benefit which he later unilaterally modified or withdrew,¹⁴² or when the employer gave a benefit to some employees but not equally to all similarly situated employees.¹⁴³

There are three major problems with the implied unilateral contract theory. The first is the matter of communicating the offer for a unilateral contract.¹⁴⁴ Courts have not agreed on whether the employer must communicate the offer¹⁴⁵ and whether she must have actual intent to make an offer in the communication.¹⁴⁶

ployer put information about it into a confidential memo. *Id.* at 96-97, 362 N.E.2d at 505.

137. See *Hilton v. Alexander & Baldwin, Inc.*, 66 Wash. 2d 30, 400 P.2d 772 (1965) (employer promised severance pay to some but not all employees in office to be closed).

138. See *Skramstad v. Otter Tail County*, 417 N.W.2d 124 (Minn. Ct. App. 1987).

139. See *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380 (Minn. Ct. App. 1985). The plaintiffs learned about a benefit, meal allowances for managers who worked overtime, from a personnel policy manual. The court declined to award the benefit to the employees, reasoning that the employer had not communicated the offer to them. Two of the three plaintiffs were personnel managers and had copies of the manual for use in their work.

140. See *Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221 (1976).

141. *Id.* See also *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494 (Mo. Ct. App. 1971). The employer contended that it did not intend to communicate an offer of severance pay to all employees when it distributed a policy statement only to department heads and managers. The court rejected the employer's argument, finding it sufficient that the information was otherwise disseminated to employees. *Id.* at 501. See also *Wyss v. Inskeep*, 73 Or. App. 661, 699 P.2d 1161 (1985) (employee knowledge of written bonus plan sufficient, even if employees had not seen it, so long as terms of plan were definite enough to be ascertained); *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208 (Tex. Civ. App. 1978) (binding employer to severance pay benefit even though employee learned of benefit from other employees).

142. See, e.g., *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762, 766-67 (App. Div. 1958).

143. See, e.g., *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494 (Mo. Ct. 1971).

144. See *supra* notes 134-41 and accompanying text.

145. See *supra* notes 134-41 and accompanying text.

146. See *supra* notes 134-41 and accompanying text.

Courts have constructed legal fictions to deal with the communication issues.¹⁴⁷

The concept of the unilateral contract as opposed to a bilateral contract also may be invalid. Recent authorities, including the Second Restatement of Contracts¹⁴⁸ and the Uniform Commercial Code,¹⁴⁹ have abandoned the terminology. In doing so, these authorities made an attempt to avoid the rigidity of mechanical application of one concept or the other.¹⁵⁰ Thus, when courts have based a finding in favor of an employee on a distinction between bilateral and unilateral contracts in employment-at-will cases, they may have drawn an artificial dichotomy.¹⁵¹

A third problem confronting courts is the matter of interpreting language generally, and disclaimers specifically, in employee handbooks. Courts generally have found that disclaimers in manuals preclude employees from the right to promised benefits.¹⁵² Courts have been forced to interpret the language of handbooks case by case in order to determine whether the employer stated an offer,¹⁵³ whether the offer was definite in form,¹⁵⁴ or whether the

147. One court capsulated the legal fiction of communicating an offer, when it said about a benefit described in a memo, "This being the case, there was no communication of the offer to appellants. And, there can be no acceptance of an offer the existence of which is unknown." *Alfaro v. Stauffer Chem. Co.*, 173 Ind. App. 89, 96-97, 362 N.E.2d 500, 505 (1977). Employees who bring suit, of course, know about the benefit. Another court denied that the offer of benefits noted in a personnel manual was communicated to personnel managers to whom the employer gave the manual for use in their work. *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380 (Minn. Ct. App. 1985).

148. Restatement (Second) of Contracts § 32 (1979).

149. U.C.C. § 2-206(1)(a) (1987). "[A]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances," i.e., acceptance either by promise or performance.

150. See Reporter's Note to § 12 in Restatement (Second) of Contracts (Tent. Draft No. 1, 1964).

151. See *supra* note 126.

152. Andrew Hill, *supra* note 24, at 23.

153. In one case, a booklet called "Know Your Company" informed employees that an annual bonus had been given every year for thirteen years. Because the booklet stated that the amount of the bonus was at the discretion of the board of directors, the board could decide to award no bonus, according to the court. *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 150 A.2d 607 (1958).

Another court, however, found an employer's bonus plan created a binding contract, even though the board of directors had discretion to grant the bonus and decide the amount. See *Wyss v. Inskeep*, 73 Or. App. 661, 667-68, 699 P.2d 1161, 1165 (1985).

Another company's policy and procedure manual provided pay for unused vacation when an employee voluntarily terminated employment. See *Dahl v. Brunswick Corp.*, 277 Md. 471, 490, 356 A.2d 221, 232 (1976). Reading the words "voluntarily terminated" literally, the court ruled that employees who were laid off were not included. *Id.* at 490-91, 356 A.2d at 232. Still another company promised "vacation with pay" in its employee handbook. See *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493, 495 (Tenn. Ct. App. 1978). The court found, based on the

employer withdrew the offer in a disclaimer. As a result, both employer and employee are uncertain about the terms of their agreement. The resulting ambiguity is unfair to employees. Handbooks and personnel policies raise expectations, but these "promises" are illusory if the employer has exclusive control over applying the promised benefits.¹⁵⁵

3. Promissory Estoppel

Promissory estoppel, a doctrine which discharged employees have argued successfully in egregious circumstances,¹⁵⁶ has been less successful in enforcing delivery of employee benefits. The leading case in the employee benefits area is *Feinberg v. Pfeiffer Co.*,¹⁵⁷ in which the company awarded an employee a pension of \$200 per month for life. Seven years after the employee had retired, the company reduced her pension to \$100 per month.¹⁵⁸ The court held that the promise to pay \$200 per month was binding under the promissory estoppel theory because the employee had reasonably and detrimentally relied on it. Her reliance was in choosing to retire rather than continue to work, and in the meantime she became disqualified from working as a result of age and poor health.¹⁵⁹

For types of benefits other than pensions, however, the promissory estoppel theory has not served plaintiffs well. For example, the same court that recognized promissory estoppel in a discharge case¹⁶⁰ refused to grant relief to an employee who had relied on a

handbook language, that an employee who had been discharged two weeks before his scheduled vacation was not entitled to "vacation pay" in lieu of "vacation with pay." *Id.*

154. See *Wyss v. Inskeep*, 73 Or. App. 661, 699 P.2d 1161 (1985). The employer argued the terms of the bonus plan were not definite enough to be contractually binding because the board of directors had discretion whether to grant a bonus and in what amount. The court rejected the argument. *Id.* at 1165. *Contra*, *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 150 A.2d 607 (1958) (annual bonus described in booklet was given at discretion of board of directors; terms of bonus held too indefinite to enforce).

155. *Mauk*, *supra* note 21, at 218.

Mauk views the development of implied unilateral contract theory as a small advance toward "greater honesty in the workplace." *Id.* at 217. "Employers can no longer offer attractive benefits and elaborate disciplinary procedures to employees, reaping the advantages of a more stable, productive, and loyal work force, and when challenged, pretend that the offerings were mere gratuities." *Id.*

156. See *supra* notes 76-81 and accompanying text.

157. 322 S.W.2d 163 (Mo. Ct. App. 1959).

158. *Id.* at 165.

159. *Id.* at 168-69 (citing Restatement (Second) of Contracts § 90 (1979)).

160. *Chantelier v. Robertson*, 118 So.2d 241 (Fla. Dist. Ct. App. 1960) (employer estopped from discharging employee who transferred his business to employer in return for lifetime employment).

promise of promotion and left his previous job.¹⁶¹ Other courts have tied detrimental reliance to communication of the offer. One court observed that when an employer has not intentionally communicated an offer of severance pay to an employee, no offer exists, "nor can there be reliance on such an offer."¹⁶² Courts have required that employees suffer substantial detriment as their part of the bargain.¹⁶³ Employees do not risk such detriment for a benefit alone, so the benefits sued for on the promissory estoppel theory generally accompany claims for wrongful discharge.

4. Covenant of Good Faith and Fair Dealing

Finally, employees have argued that an implied covenant of good faith and fair dealing entitles them to promised benefits.¹⁶⁴ In the leading case, *Fortune v. National Cash Register Co.*,¹⁶⁵ a Massachusetts court held an employee was entitled to commissions on the goods he had sold. California courts have found the implied covenant in discharges without just cause¹⁶⁶ and to a benefits case in which the employer egregiously eliminated a retiree's pension.¹⁶⁷ Connecticut adopted the doctrine of implied covenant in a benefits case in which the employer fired an employee to avoid paying him bonuses and vested benefits.¹⁶⁸

The implied covenant provides the basis for a cause of action in contract for employees whose benefits have been withheld or withdrawn.¹⁶⁹ The implied covenant also provides relief for an

161. *Servamerica, Inc. v. Rolfe*, 318 So.2d 178 (Fla. Dist. Ct. App. 1975).

162. *Alfaro v. Stauffer Chem. Co.*, 173 Ind. App. 89, 96-97, 362 N.E.2d 500, 505 (1977). See also *Hilton v. Alexander & Baldwin, Inc.*, 66 Wash.2d 30, 400 P.2d 772 (1965) (employer's oral communication to some employees of offer to pay severance pay did not constitute an offer to other employees).

163. "[I]n a majority of jurisdictions, relinquishment by the employee of a job, business or profession in order to accept. . . does not constitute special consideration sufficient to support the contract." *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 258, 283 N.W.2d 713, 715 (1979).

164. See *supra* notes 83-86 and accompanying text.

165. 373 Mass. 96, 364 N.E.2d 1251 (1977). See *supra* notes 84-85 and accompanying text.

166. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

167. *Wallis v. Superior Ct.*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984). But see *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (rejecting tort claim for wrongful discharge and implied covenant of good faith and fair dealing claim for stock option benefits).

168. *Cook v. Alexander & Alexander of Conn., Inc.*, 40 Conn. Supp. 246, 488 A.2d 1295 (Conn. Super. 1985). The employee won on public policy grounds as well as an implied covenant theory. See *supra* note 104 and accompanying text.

169. *Robert Williams & Thomas Bagby*, *supra* note 89, at 22.

employer's bad faith actions,¹⁷⁰ in tort as well as contract, in areas where courts cannot find a statute to support a public policy exception.¹⁷¹ Thus, the implied covenant theory offers flexibility because it lies in both contract and tort. It is this very flexibility of the doctrine, which commentators have criticized as confusing.¹⁷²

In a California benefits case,¹⁷³ the court sought to end the confusion by clarifying the distinction between contract and tort claims in the implied covenant. The court identified the factors necessary for an implied contract claim as specified by the leading California case¹⁷⁴ — the employee's long service and the company's established policies — and found the plaintiff had not established either factor.¹⁷⁵ Then the court defined the cause of action in tort as a "bad faith action extraneous to the contract, combined with the obligor's intent to frustrate the obligee's enjoyment of contract rights."¹⁷⁶ The court acknowledged that the covenant of good faith and fair dealing was a "developing and confusing area of the law,"¹⁷⁷ and subsequent California decisions have further clouded the concept.¹⁷⁸

Because of this confusion and unpredictability, as well as lack of widespread judicial acceptance, the theory of implied covenant of good faith and fair dealing has limitations in its application to employee benefits suits.

C. *Problems With Application of At-Will Exceptions to Benefits*

Applying the at-will exceptions to benefits cases fails on two

170. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (providing relief for employer's retaliatory acts).

171. See *supra* notes 110-115 and accompanying text.

172. See *supra* note 87 and accompanying text. The elements of proof, defenses, and remedies differ under contract and tort theories. See *Mauk, supra* note 21, at 208.

173. *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

174. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980).

175. *Shapiro*, 152 Cal. App. 3d at 478-79, 199 Cal. Rptr. at 619.

176. *Id.* at 479, 199 Cal. Rptr. at 619.

177. *Id.* note 7, 199 Cal. Rptr. at 619, note 7.

178. See *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 262, 215 Cal. Rptr. 860, 867 (1985) (*Cleary* factors not necessary to establish breach of covenant); *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of Calif.*, 36 Cal. 3d 752 n.6 (1984) (implying relief may be available without bad faith action by employer).

Recognizing whether an employment case, whether for discharge or for benefits, is a tort or contract claim is important. The elements of proof, the nature of arguments and defenses, and the remedies available differ in tort and contract cases. See *Mauk, supra* note 21, at 208.

levels. First, none of the individual exceptions applies to all situations in which an employee has formed a reasonable expectation of benefits but the employer withholds or modifies the benefits.¹⁷⁹ Second, the entire analysis is misdirected because it fails to take into consideration the difference between discharge and benefits cases.¹⁸⁰

1. Ineffectiveness of the Exceptions

Each of the at-will exceptions, while perhaps appropriate in employee discharge cases, lacks universal application to employee benefits. The case of *Green v. Bettinger*¹⁸¹ offers an example. The employer unilaterally reduced Green's commission rate which had been in effect for eight years.¹⁸² During those years Green's commission depended upon the productivity of the department she managed.¹⁸³ Over the eight-year period, Green's department increased the company's billings from less than \$30,000 per month to over \$50,000 per month,¹⁸⁴ with consequent increases in Green's compensation.¹⁸⁵ The court held the employer had the right to reduce Green's commission rate unilaterally because he had the "undoubted right" to fire her.¹⁸⁶

The result in *Green v. Bettinger* was unfair to the employee. The employer lured the employee into the job by promising a commission. She increased departmental productivity which brought more income to the employer. The employer received the benefit of the incentives he offered but then withdrew those incentives.

None of the at-will exceptions could have been called upon to achieve a just result for Green. The public policy exception is inapplicable because reducing Green's commission was neither retaliatory¹⁸⁷ nor contrary to a statutory or constitutional right or privilege.¹⁸⁸ The implied unilateral contract theory also is inappropriate because Green and the employer had a written document that specifically set out the terms of the commission, including a provision that if business losses made reductions in Green's commission or salary necessary, the two parties would negotiate a rea-

179. See *infra* notes 187-98 and accompanying text.

180. See *infra* notes 198-204 and accompanying text.

181. 608 F. Supp. 35 (E.D. Pa. 1984). See *supra* notes 98-101 and accompanying text.

182. *Id.* at 40.

183. *Id.*

184. *Id.* at 39.

185. *Id.*

186. *Id.* at 42.

187. See *supra* notes 106-13 and accompanying text.

188. See *supra* notes 116-43.

sonable reduction.¹⁸⁹ The implied contract theory is not applicable where the agreement is express.¹⁹⁰

The application of promissory estoppel¹⁹¹ does not achieve a better result. The employer persuaded Green to work for him and offered an attractive commission rate as incentive. Presumably Green relied upon the promise. Courts generally have required substantial detriment to the employee, however, for promissory estoppel to apply.¹⁹² Green was unemployed at the time the employer induced her to work for the company, and she showed no evidence of other offers at the time the employer reduced her commission,¹⁹³ so a court would have held that she suffered no detriment.

The implied covenant of good faith and fair dealing¹⁹⁴ does not apply because the theory requires bad faith intentions on the part of the employer.¹⁹⁵ Lack of just cause for the employer's act is not necessarily bad faith.¹⁹⁶ When he reduced the commission rate, Green's employer did not intend to retaliate against her or to deprive her of compensation she had earned already.¹⁹⁷ The standard for good faith is subjective rather than objective.¹⁹⁸

Thus, all at-will exceptions have limited applicability in benefits situations and consequently offer limited relief to employees whose benefits have been reduced or withdrawn.

2. Conceptual Difficulties

Applying the at-will exceptions to employee benefits cases is inappropriate as a general approach. First, the at-will doctrine by its terms does not apply to benefits. The doctrine has so dominated employment law that the policy underlying the rule is overlooked. The purpose of the rule is to promote freedom of contract,

189. 608 F. Supp. at 41.

190. See *supra* notes 64-74 and accompanying text.

191. See *supra* notes 156-63 and accompanying text.

192. See *supra* note 163.

193. 608 F. Supp. at 40.

194. See *supra* notes 164-68.

195. See *supra* notes 170-71.

196. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981) (finding employer acted on incorrect information but not with bad motive).

Good cause is a substantial reason, one which is not arbitrary or capricious. Good faith considers the superior power and advantage of the employer and prohibits abusive use of the employer's position. See generally *Mauk, supra* note 21, at 253-54 (distinguishing between good cause and good faith).

197. See *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (finding employer terminated employee to avoid paying commissions on cash registers employee had already sold).

198. See *Gram*, 384 Mass. at 664-65, 429 N.E.2d at 24-25.

to allow both employer and employee the right to terminate an unsatisfactory relationship.¹⁹⁹ Applying the at-will rule to benefits does not further freedom of contract. Moreover, applying the doctrine to benefits cases and then searching for an exception to modify the doctrine to achieve a desired end leads to inconsistent results.²⁰⁰

Finally, applying at-will exceptions has led to a focus on employer conduct rather than an examination of the agreement between the parties. Under the public policy exception²⁰¹ and the implied covenant of good faith and fair dealing,²⁰² courts have looked for the employer's bad actions and malicious intentions. Under the implied unilateral contract exception, courts have scrutinized how the employer expressed the offer and how she communicated it, rather than looking for the reasonable expectations of the parties.²⁰³ Under the promissory estoppel theory, courts have considered employer conduct in inducing the employee to rely on a promise to the employee's detriment.²⁰⁴ The court should focus in each situation on what the employee's understanding was and whether it was reasonable.

Part III. Proposed Method of Analyzing Benefits Cases

The employment-at-will doctrine may apply to employee discharge, but courts should not impose it on benefits cases, in which there is an ongoing employment relationship. This article proposes that issues of employee benefits be separated from issues of employee discharge. It also proposes that benefits be examined from the standpoint of accepted contract law. Courts should analyze benefits without reference to the nature of at-will employment, applying the same analysis to contracts with a fixed term as to those without a fixed term.

199. The employment-at-will rule "stands for the proposition that if the relationship does not work out, for whatever reason, either party should be free to walk away with a minimum of trouble." J. Ronald Petrikin, *In Defense of Employment At Will*, 53 Okla. B.J. 2209, 2213 (1982).

200. See *supra* notes 136-41 and accompanying text.

201. See *supra* notes 55-63 and accompanying text.

202. See *supra* notes 83-85 and accompanying text.

203. See *supra* notes 65-74 and accompanying text.

204. Promissory estoppel is applied more reluctantly in employment cases than in other contract relationships. See John Calamari & Joseph Perillo, *supra* note 64, § 6-5, at 287. Detrimental reliance on a void employment agreement creates no rights because reliance on a void employment agreement creates no rights because reliance on a void contract is considered to be unreasonable. *Id.* at 287, n.15. This is not the usual rule for other contracts. *Id.* See *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E.2d 698 (1976) (holding "doctrine of promissory estoppel does not apply in action for breach of employment contract").

Employee benefits should be treated as part of the compensation for the employee's work.²⁰⁵ Under this reasoning, the benefit is not a gratuity but is additional wages.²⁰⁶ The employee provides consideration by working for vacation,²⁰⁷ pension,²⁰⁸ severance pay,²⁰⁹ or other benefits, just as for wages, but the time of receiving the "wages" is postponed. The deferred compensation is earned in part each week that the employee works.²¹⁰ The right to employee benefits thus vests as soon as the employee has performed substantial services for the employer.²¹¹

There are several advantages to this approach. First, there would be more reasonable results in the interpretation of benefits because well-established contract principles would apply.²¹² If an employer and employee disputed whether a benefit was part of

205. Only a few jurisdictions have viewed employee benefits as part of the employee's compensation. See, e.g., *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 371 (6th Cir. 1972) (vacation pay); *Local Union No. 186 v. Armour & Co.*, 446 F.2d 610, 612 (6th Cir. 1971) cert. denied, 405 U.S. 955 (1972) (vacation pay); *United States v. Munro-Van Helms Co.*, 243 F.2d 10, 13 (5th Cir. 1957) (vacation pay); *In re Willow Cafeterias*, 111 F.2d 429, 432 (2d Cir. 1940) (vacation); *Simpson v. Norwesco, Inc.*, 442 F. Supp. 1102 (D.S.D. 1977) (applying Illinois law) (commission); *Suarez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 183 Cal. Rptr. 846 (1982) (vacation pay); *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 111 Cal. Rptr. 369, 371, 517 P.2d 449, 451 (1974) (retirement benefits); *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 198-99, 107 Cal. Rptr. 111, 116 (1973) (severance pay); *Kulins v. Malco, a Microdot Co., Inc.*, 459 N.E.2d 1038 (Ill. App. 1984) (severance pay); *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981) (commission); *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208, 210 (Tex. Civ. App. 1978) (severance pay); *Valeo v. J.I. Case Co.*, 18 Wis. 2d 578, 583-87, 119 N.W.2d 384, 387-89 (1963) (vacation pay).

206. See *Suarez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 183 Cal. Rptr. 846 (1982) (vacation pay "is not gratuity or gift, but is, in effect, additional wages for services performed").

207. See *In re Willow Cafeterias*, 111 F.3d 429, 432 (2d Cir. 1940).

208. See *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 111 Cal. Rptr. 369, 371, 517 P.2d 449, 451 (1974) (retirement benefits "do not derive from beneficence of employer, but are properly part of consideration earned by employee").

209. See *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208, 210 (Tex. Civ. App. 1978) (severance pay is "benefit for which employees work as much as they work for any other benefits held out to them as compensation by employer").

210. See *Kulins v. Malco, a Microdot Co., Inc.*, 459 N.E.2d 1038, 1043 (Ill. App. 1984).

211. See *Suarez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 183 Cal. Rptr. 846 (1982).

A Massachusetts court successfully separated the employment-at-will rule, which governs discharge of the employee, from benefits earned as deferred compensation. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981). The court discussed whether the firing of the employee was based on "actual malice" and whether the covenant of good faith and fair dealing or public policy considerations applied to the discharge. The court then made a separate disposition of the employee's claims to compensation for commissions. The court stated the employee "lost reasonably ascertainable future compensation based on his past services." *Id.* at 671, 429 N.E.2d at 29.

212. See *supra* note 155 and accompanying text.

their contract, the court could ascertain the intent of the parties by examining their external manifestations of intent, using an objective standard.²¹³ The court would not need to determine the employer's subjective intent as to whom he intended the offer to be communicated,²¹⁴ whether he actually intended to make an offer of a benefit,²¹⁵ or whether his actual intentions were malicious.²¹⁶ Instead, the court would determine what each party understood and whether each party's understanding was reasonable.²¹⁷

The court would be able to fill in gaps and ambiguities by reference to the usual practices of the employer and the industry.²¹⁸ If unanticipated circumstances arose, the court could imply a meaning of the contract by determining what would have been the intent of the parties if they could have foreseen the circumstances.²¹⁹

Another advantage is that when benefits are considered part of compensation, courts can avoid the pitfalls of the at-will exceptions. The ambiguities that arose under the legal fiction of unilateral contract theory can be resolved. Consideration is no longer an issue because the employee has earned the benefits, just as she has earned wages, through her labor. Mutual consent is not an issue because the employee agrees to benefits as well as salary when she agrees to work for the employer. Without the encumbrances of unilateral contract theory, communication of an offer of benefits is not at issue; the compensation package is whatever both parties reasonably believe it to be. Whether the benefits are communicated in a written contract, by oral promise, or in an employee handbook does not matter, as long as the employee has formed a reasonable expectation of what the benefits are, based on the employer's external manifestations of intent.²²⁰

213. The objective interpretation has dominated contract theory for the past century. John Calamari & Joseph Perillo, *supra* note 64, § 2-2, at 26. Learned Hand wrote of the objective approach, "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

214. See *supra* notes 134-41 and accompanying text.

215. See *supra* notes 145-47 and accompanying text.

216. See *supra* notes 195-98 and accompanying text.

217. See *Embry v. Hargadine-McKittrick Dry Goods Co.*, 127 Mo. App. 383, 105 S.W. 777 (1907).

218. The process of filling in gaps in the employment contract is analogous to a court applying "industrial common law" in a labor law context. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

219. See *Spaulding v. Morse*, 322 Mass. 149, 153, 76 N.E.2d 137, 139 (1947) ("defect may be supplied by implication and underlying intention...may be effectuated").

220. Based upon this reasoning, a Texas court reached the correct result in *Mar-*

Applying traditional contract principles to benefits avoids confrontation with the ambiguities of quasi-contract and tort inherent in the doctrines of promissory estoppel²²¹ and the implied covenant of good faith and fair dealing²²². Leaving aside the issue of whether an employee had been wrongfully discharged or discharged for cause, the court could still find the employee was entitled to benefits she had earned up to the time of termination, using contract theories of substantial performance or quantum meruit.²²³

A third advantage is that courts could focus on the agreement itself rather than on the conduct of the parties. Finally, this approach provides a better framework for dealing with employee benefits because it is applicable to all employment relationships that include benefits, whether the employment contract is at-will or for a fixed term.

Using this approach, court more easily could resolve the issue of unilateral modification of benefits. Applying contract principles to the facts of *Green v. Bettinger*,²²⁴ in which an employer unilaterally reduced an employee's commission,²²⁵ a court could have found the employee had a reasonable expectation that her commission schedule would continue unchanged after eight years at the same rates, unless modified by mutual agreement as her contract described.²²⁶ What the intent of the parties was when they origi-

tin v. Mann Merchandising, Inc., 570 S.W.2d 208 (Tex. Civ. App. 1978). Even though the employee learned about a severance pay provision from other employees, the method of communicating the benefit did not matter because it was part of the contract. *Id.* at 211. Another court, however, should have found that personnel managers who read in the personnel manual that employees were entitled to meal allowances when they worked overtime, should be awarded those benefits. See *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380 (Minn. Ct. App. 1985). A court could find it was reasonable for the employees to interpret a promise of benefits printed in a manual and distributed by the employer as an external manifestation of intent to grant those benefits.

221. See *supra* notes 75-83 and accompanying text.

222. See *supra* note 89 and accompanying text.

223. *Hadden v. Consolidated Edison Co. of N.Y., Inc.*, 356 N.Y.S.2d 249 (1974) (holding employee entitled to pension because doctrine of substantial performance applies to employment contracts), 34 N.Y.2d 88, 312 N.E.2d 445, *app. after remand*, 396 N.Y.S.2d 210, 58 A.2d 154, *modified on other grounds*, 410 N.Y.S.2d 274 (1978) 45 N.Y.2d 466, 382 N.E.2d 1136.

224. 608 F. Supp. 35 (E.D. Pa. 1984). See *supra* notes 98-102 and accompanying text.

225. See *supra* notes 1-11 and accompanying text.

226. See *Simon v. Riblet Tramway Co.*, 8 Wash. App. 289, 505 P.2d 1291 (1973), *cert. denied*, 414 U.S. 975 (1973) (finding payment of bonus over a ten-year period constituted implied contractual obligation when bonus was substantial part of employee's total compensation).

The Michigan Court of Appeals recently decided *Dumas v. Auto Club Ins. Ass'n*, 168 Mich. App. 619, 425 N.W.2d 480 (1988) by applying contract principles.

nally contracted and whether the terms were modified validly would have been questions for the trier of fact.²²⁷ If there were extenuating business reasons for doing so, the employer could modify the commission schedule following the guidelines of the Second Restatement.²²⁸

Whenever an employer chooses to provide employee benefits in policies and practices, presumably the employment relationship is enhanced. The employer gains a more productive, cooperative, and loyal work force. The employer may change its policies from time to time. The employee need not know the particulars of company policy for them to be enforceable, but he should be able to have a sense that whatever policies are established at the time, they will be applied fairly, consistently, and uniformly to each employee.²²⁹

Conclusion

The employment-at-will doctrine originally was based on the philosophy of freedom of contract. The rule was intended to allow either the employer or the employee to terminate an unsatisfactory relationship. The rule has so dominated the employment relationship, however, that courts have lost sight of the fact that by its terms, the rule governs only terminations. Courts have imposed the rule blindly and rigidly on all aspects of employment, holding

The employees brought suit against the insurance company challenging the employer's change of commission terms. The court stated that the employees might have formed a legitimate and reasonable expectation that the commission was a term of their employment. Whether they had such an expectation, "which bears directly on the question of whether defendant was free to unilaterally change the system," was a question for the trier of fact. *Id.* at 486.

227. *Bullock v. Automobile Club of Mich.*, 146 Mich. App. 711, 719-20, 381 N.W.2d 793, 797 (1985).

228. *See supra* notes 103-104.

The court followed contract principles in interpreting a modification of commission rates in *Simpson v. Norwesco, Inc.*, 442 F. Supp. 1102 (D. S.D. 1977) (applying Illinois law). The court found the employee was entitled to the higher commission rate he had received before the employer unilaterally modified it. The court observed that "one party to a contract cannot by his own acts release or alter its obligations. The intention must be mutual." *Id.* at 1106. Illinois has held this rule applicable "to any labor or employment contract." *Id.*

The court further observed that when the employee refused to accept the change in commissions, the employer could have terminated the employment relationship, but "evidently, defendant considered plaintiff too valuable to do that." *Id.* Because the plaintiff specifically rejected the proposed modification, his acceptance of reduced paychecks did not constitute acceptance of the smaller commission. *Id.* at 1107. *Accord*, *Bartinikas v. Clarklift of Chicago North, Inc.*, 508 F. Supp. 959 (N.D. Ill. 1981) (employer could have discharged employee when he rejected modification of contract, but it could not *ex parte* impose modification).

229. *See Dumas v. Auto Club Ins. Ass'n*, 168 Mich. App. 619, 425 N.W.2d 480 (1988).

that because an employer may unilaterally discharge an employee, she may unilaterally set all other terms of the agreement. The result has been employees who are deprived of earned compensation, employers who are unjustly enriched, and an inconsistent state of the law.

Rigid application of the at-will doctrine to employee benefits makes employment contracts different from all other contracts. The better view is that benefits are part of the compensation for which the employee works and not a gratuity from the employer. Under this construction, issues of benefits can be approached and adjudicated by established contract principles. Courts would not need to search for exceptions to the at-will rule in order to award employees what they sense is earned compensation. This approach is applicable to all employment relationships, whether for a fixed duration or not. The result would be consistency and certainty, without eliminating the principle of freedom of contract.