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The Course of the Employment-At-Will Doctrine In Utah: *Berube v. Fashion Centre, Ltd.*— A Turning of the Tide

I. INTRODUCTION

Unless an employment contract contemplates that it is for a specified period of time, the relationship between the employer and employee is deemed to be that of "employment-at-will."¹ Under employment-at-will relationships, "an employer may discharge an employee for a good cause, a bad cause, or no cause at all."²

During the last quarter of the Nineteenth Century, most states judicially adopted the employment-at-will doctrine, justifying it on grounds of freedom of contract and freedom of enterprise.³ The rationale given to the adoption of the employment-at-will rule is not particularly surprising since at the time of its inception employment law was "hostile to collective employee action, worker tort claims for job related injuries, and legislative attempts to regulate employment terms."⁴ Today, however, legislative exceptions to freedom of contract idealism have been enacted to encourage collective bargaining⁵ and to establish substantive prohibitions on certain types of conduct⁶ giving employees a more equal bargaining position with their employers.⁷ In the absence of a collective bargaining agreement, a written or oral employment contract, or a statutory prohibition on the reason for termination of em-

1. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 335 (1974).

2. *Id.* (footnote omitted); see also *Garcia v. Aetna Finance Co.*, 752 F.2d 488 (10th Cir. 1984); *Continental Air Lines v. Keenan*, 731 P.2d 708 (Colo. 1987); Note, *Continental Air Lines v. Keenan: Employee Handbooks as a Modification to Employment at Will*, 60 U. COLO. L. REV. 169, 169 (1989).

3. Note, *supra* note 1, at 335.

4. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 637 (1988) (citing Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 127-32 (1976); McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Y.B. SUP. CT. HIST. SOC'Y 20, 20-33)).

5. Labor Management and Relations Act, 29 U.S.C. §§ 141-197 (1988).

6. *Id.*; Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp.); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982 & Supp. III 1985); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985); Civil Rights Act of 1964, Title VII (Equal Employment Opportunities), 42 U.S.C. § 2000e to 2000e-17 (1982); Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (Supp. 1991)

7. Leonard, *supra* note 4, at 642.

ployment, the common law rule of employment-at-will has endured in theory. Recently, however, the exceptions to the employment-at-will doctrine have been construed so broadly and applied so liberally that the doctrine now provides little more than an analytical framework for adjudication of claims. In reality, the rule seems to be that an employer must have "just cause" for terminating an employee.

This note discusses the development of the employment-at-will doctrine in Utah and the Utah Supreme Court's recent recognition of exceptions to the doctrine that place the traditional employment-at-will presumption in jeopardy. Part II of this note discusses the traditional underpinnings of the employment-at-will presumption. Part III traces the employment-at-will doctrine's development in the Utah Supreme Court. Part IV analyzes *Berube v. Fashion Centre, Ltd.*⁸ Part V examines Utah employment-at-will cases decided since *Berube* and offers guidelines for employers who wish to preserve their employment-at-will status.

II. HISTORY AND DEVELOPMENT OF THE EMPLOYMENT-AT-WILL DOCTRINE

A. *Adoption of Employment-At-Will in America*

Like most common law theories, the employment-at-will doctrine finds its roots in English common law.⁹ In nineteenth century England, courts almost universally held that a general hiring¹⁰ amounted to an employment contract one year in duration.¹¹ Early American cases followed the English rule;¹² however, by the 1870s American courts had strayed from the English rule and used varying approaches to define employment relationships.¹³

In 1877, Horace Gray Wood authored a treatise¹⁴ that became the cornerstone of the employment-at-will doctrine in America.¹⁵ Wood's treatise formulated the rule as follows:

8. 771 P.2d 1033 (Utah 1989).

9. See Note, *supra* note 1, at 340.

10. In England, the term "general hiring" refers to a hiring without a specified time period. In America, the phrase "indefinite hiring" is employed. *Id.* (citing Annotation, *Duration of Contract of Hiring Which Specified No Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year*, 11 A.L.R. 469 (1921)).

11. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1040 (Utah 1989) (citing Note, *supra* note 1, at 340); Leonard, *supra* note 4, at 640.

12. Note, *supra* note 1, at 340-41 (citing *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891); *Davis v. Gorton*, 16 N.Y. 255 (1857); *Bascom v. Shillito*, 37 Ohio St. 431 (1882)).

13. Leonard, *supra* note 4, at 640 (citations omitted).

14. H. WOOD, MASTER AND SERVANT, § 134 (1877).

15. *Berube*, 771 P.2d at 1040 (citing Note, *supra* note 1, at 341).

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.¹⁶

Wood cited four American cases as authority for his proposition;¹⁷ however, these cases are "apparently inapposite authority on [his proposition's] behalf."¹⁸ Moreover, Wood offered no real analysis to support his formulation of the rule.¹⁹

Despite the criticism that Wood's formulation has received in recent years,²⁰ most courts in the late 1800s and early 1900s adopted the statement as correct.²¹ Although Wood did not critically analyze his formulation of the rule, several commentators have speculated as to why the rule was so adopted.²²

B. Justifications for Adoption of the Employment-At-Will Doctrine

1. Principles of contract

Courts usually approach employment-at-will cases by applying traditional contract principles such as "consideration, mutuality of obligation, and express or implied covenants."²³ Contract analysis arguably justifies the doctrine since conceptually the employer gives as consideration a promise to pay the employee for the work performed and the employee returns as consideration the promise to perform work for the

16. H. WOOD, *supra* note 14, at § 134.

17. *Wilder's Case*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds sub nom.* *United States v. Wilder*, 80 U.S. 254 (1872); *De Briar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871), *cited in Note, supra* note 1, at 341 n.53.

18. *Berube*, 771 P.2d at 1040 (citing *Note, supra* note 1, at 340-41).

19. *Note, supra* note 1, at 340-41.

20. *See, e.g., Berube*, 771 P.2d at 1040-41; *Leonard, supra* note 4, at 640-41; *Note, supra* note 1, at 341-43.

21. *See, e.g., Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895) (citing the following cases as also adopting Wood's rule: *Haney v. Caldwell*, 35 Ark. 156 (1879); *De Briar v. Minturn*, 1 Cal. 450 (1879); *Evans v. St. Louis, Iron Mountain & S. Ry. Co.*, 24 Mo. App. 114 (1887); *Finger v. Koch & Shilling Brewing Co.*, 13 Mo. App. 310 (1883); *Prentiss v. Ledyard*, 28 Wis. 131 (1871); *see also Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (E.D.N.Y. 1908); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. (1 Penn.) 581, 43 A. 609 (1899); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887)).

22. *See Leonard, supra* note 4, at 640-41; *Comment, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980); *Note, supra* note 1, at 342-47.

23. *Leonard, supra* note 4, at 636.

employer. Accordingly, to ensure that the employee will not be discharged, except for cause, some courts have held that the employee must give additional independent consideration.²⁴ Moreover, since an employee seldom promises to quit only for just cause, arguably, mutuality of obligation allows the employer to terminate the employee at any time for any reason.

Contracts between employers and employees, however, are not so simple. Unlike parties to most contracts, employees and employers closely interact for the greater part of each day. Furthermore, jobs provide the livelihood upon which most people rely. Without jobs, people and their families would lack even the basic necessities of life. Indeed, the loss of a job, for many, can be one of the most traumatic and devastating experiences one might face. Perhaps this reason alone explains why so much legislation has been enacted to protect employees from termination for certain reasons.²⁵

Since employment contracts involve such dissimilar circumstances than do most other contracts, the doctrine of employment-at-will requires a basis other than contract analysis to justify its continued existence.

2. *Freedom of contract*

Probably the most justifiable basis for adherence to the employment-at-will doctrine is America's strong belief in freedom of contract. During the late Nineteenth Century and early Twentieth Century, the principle of freedom of contract was even more prevalent than today. In *Adair v. United States*,²⁶ the United States Supreme Court held that an employer's right to terminate an employee should be equated with the employee's right to quit.²⁷ In doing so, the Court struck down a federal regulation barring common carriers from firing employees for unionizing.²⁸

The influence of contractual freedom in employment agreements was fostered by the government's laissez-faire attitude toward industry.²⁹ Policies allowing employers and employees freedom to dissolve their contractual relationships as they wished allowed industrial capi-

24. See, e.g., *Rose v. Allied Dev. Co.*, 719 P.2d 83 (Utah 1986) (citing Annotation, *Validity and Duration of Contract Purporting to Be for Permanent Employment*, 60 A.L.R.3d 226, 233 (1974)).

25. See statutes cited *supra* note 6.

26. 208 U.S. 161 (1908).

27. *Id.* at 174.

28. *Id.* at 179-80.

29. Leonard, *supra* note 4, at 641.

talism to flourish.³⁰ Since employers could terminate employees at any time for any reason, employee productivity increased due to the tremendous motivation for employees to produce or lose their job.³¹

Today, however, attitudes of both the government and the populace have changed. Federal and state governments are increasingly restricting employers' freedom to contract as they wish.³² Collective bargaining is now encouraged to reduce the great disparity in the negotiating positions of employers and employees.³³ Yet "while labor unions have succeeded in obtaining a just cause standard for employment termination in most collective bargaining agreements, such agreements cover [only] a small and declining portion of the work force."³⁴ Nevertheless, because of the changes in attitude and the disparity among the rights of workers protected by statute or collective bargaining agreements and those excluded from such job security schemes, several exceptions to the employment-at-will doctrine have been judicially adopted.

C. *Common Law Exceptions to the Employment-At-Will Doctrine*

Both enactment of statutory regulations prohibiting the discharge of employees for certain reasons³⁵ and protection afforded by collective bargaining agreements have often subjected employees in the same labor pool, or perhaps of the same employer, to vast disparities in job security. One commentator has stated:

Under the at will presumption, employees who lack union representation, do not belong to protected minority groups, or do not engage in protected activities have no enforceable right to continued employment—regardless of the quality of their work and the continued existence of their jobs—while the employee at the next work station may have such a right by virtue of minority group membership, and the employee of a neighboring company will have the protection due to union representation. . . . Furthermore, public sector employees, whose salaries and benefits are paid from taxes extracted from the unprotected private sector employees, may have enforceable employment rights due to federal or state civil service regulations and constitutional protections against arbitrary decision making by their governmental employers.³⁶

30. *Id.*

31. *See id.*

32. *See, e.g.*, statutes cited *supra* note 6.

33. *See* Labor Management and Relations Act, 29 U.S.C. §§ 141-197 (1988).

34. Leonard, *supra* note 4, at 644 (footnote omitted).

35. *See, e.g.*, statutes cited *supra* note 6.

36. Leonard, *supra* note 4, at 647 (footnote omitted).

Perhaps these inequalities among co-workers have been the primary motivating factor for judicially-created exceptions to the employment-at-will doctrine. Exceptions to the doctrine can be placed into three primary categories:³⁷ (1) the public policy exception, (2) the express or implied contract term exception, and (3) the implied covenant of good faith and fair dealing exception.³⁸

1. *The public policy exception*

Until the late 1950s, the employment-at-will presumption remained unpenetrated unless legislation explicitly prohibited employee discharge for a specific reason.³⁹ The practices of some employers were so subversive to modern principles of employment law and ideals of fairness that one could scarcely imagine a more capricious doctrine of law.

Not until 1959, in *Petermann v. International Brotherhood of Teamsters*,⁴⁰ did a court look beyond the explicit language of a statute to identify its underlying rationale or policy and apply it as an exception to the at-will doctrine.⁴¹ In *Petermann*, the California Court of Appeal held that termination of an employee for his refusal to commit perjury before the California legislature gave rise to a claim for wrongful termination.⁴² While not expressly prohibited by statute, termination of Mr. Petermann for refusing to perjure himself so undermined legislative policy that the court grafted a public policy exception to the employment-at-will doctrine.⁴³

Since *Petermann*, the public policy exception to the employment-at-will doctrine has been further expanded. The logical and fundamental reason for the public policy exception

is that the traditional formulation of the at will rule . . . would undermine legislative attempts to enhance social welfare if too rigidly observed, or would sanction behavior inimical to general societal interests embraced in the common law. As with the statutory exceptions,⁴⁴ the public policy exception does not replace the at will presumption, but instead provides a mechanism for identifying

37. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1041 (Utah 1989).

38. *Id.*

39. Note, *Remedies for Employer's Wrongful Discharge for an Employee from Employment of an Indefinite Duration*, 21 IND. L. REV. 547, 556 (1988).

40. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

41. Note, *supra* note 39, at 556-57.

42. *Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 28.

43. *Id.*

44. See statutes cited *supra* note 6.

illegitimate reasons for discharge.⁴⁶

Just what is "public policy"—or a violation thereof—is a question that has troubled courts in many areas of the law. The primary source of guidance for the courts as to what constitutes public policy is legislative action and the constitutional principles that underlie statutory schemes.⁴⁶ It is not surprising that legislative declarations are the source most often looked to for guidance since, theoretically, legislatures act in accordance with public attitudes and sentiment. Thus, legislative actions should reflect the social and moral ideals of the general populace.

Legislative enactments, however, are not the exclusive source for determining "public policy."⁴⁷ Courts also look to executive orders, rules, and regulations for enlightenment in defining the bounds of "public policy."⁴⁸ Quite often courts examine their own prior holdings and the holdings of other courts to see if a discharge has violated judicially-created public policy.⁴⁹ In formulating public policy out of the common law, courts attempt to derive principles from the common law that reflect "notions of evolving standards of conduct appropriate in society."⁵⁰ Standards of appropriate conduct of one generation, however, may differ from the socially desirable standards embodied in the public policy of another generation.⁵¹

That public policy exceptions to the employment-at-will doctrine did not surface until the late 1950s does not mean such exceptions were not inherent in the doctrine when Wood's formulation was adopted.⁵² At the turn of the century, many of the interests protected today were socially undesirable.⁵³ Thus, the protection of such interests and rights was not embodied in the "public policy" of the era, and an employee discharge for reasons now viewed as capricious and subversive did not violate public policy.

While what constitutes public policy may be difficult to discern, one court declared that "public policy" is "that principle of law which holds that no citizen can lawfully do that which has a tendency to be

45. Leonard, *supra* note 4, at 657-58 (footnote added) (citations omitted).

46. *See id.* at 659.

47. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah 1989).

48. Leonard, *supra* note 4, at 659.

49. *Berube*, 771 P.2d at 1043.

50. Leonard, *supra* note 4, at 658.

51. *See Berube*, 771 P.2d at 1043 (quoting *Patton v. United States*, 281 U.S. 276, 306 (1930)).

52. *See supra* note 16 and accompanying text.

53. *See supra* note 4 and accompanying text.

injurious to the public or against the public good.”⁵⁴ However, a court may define “public policy,” it is almost universally held that a discharge in violation of discernable public policy falls within an exception to the employment-at-will rule and, the employee can thereby pursue a claim for wrongful termination.

2. *The express or implied contract term exception*

The rule stated in Wood’s 1877 treatise⁵⁵ that “a general or indefinite hiring is prima facie a hiring at will”⁵⁶ remains theoretically intact today. Under most state’s laws, however, the employment-at-will presumption is rebuttable and is not a substantive rule of law.⁵⁷ Obviously, if an employment contract expressly states that it is for a specified term, no employment-at-will presumption arises. Similarly, however, even when there is an indefinite hiring, an employee may rebut the at-will presumption by producing extrinsic evidence that the parties intended employment to continue for a definite time or that the employee would be discharged only for just cause.

In *Thompson v. American Motor Inns*,⁵⁸ the Federal District Court for the District of Virginia stated:

In absence of an express provision or specific contract setting a definite period of employment, the presumption of an employee’s at will status may be rebutted by presenting evidence which shows that the parties intended and/or understood that the term of employment was fixed by reference to some articulable standard or procedure. There must be evidence of a custom, practice or policy that governs the employer-employee relationship. Evidence sufficient to establish an implied contract concerning duration of employment effectively rebuts the presumption of at will status and binds the employer to the terms of such a contract.⁵⁹

The California Court of Appeal similarly stated the rule. “The presumption that an employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence. This [evidence] may take the form of an agreement, *express or implied*, that the relationship will continue for some fixed period of time.”⁶⁰

54. *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959), cited in *Berube*, 771 P.2d at 1042.

55. See *supra* note 14 and accompanying text.

56. H. Wood, *supra* note 14, at § 134.

57. See, e.g., *Thompson v. American Motor Inns*, 623 F. Supp. 409, 413-16 (W.D. Va. 1985).

58. 623 F. Supp. 409 (W.D. Va. 1985).

59. *Id.* at 416.

60. *Pugh v. See’s Candies*, 116 Cal. App. 3d 311, 324, 171 Cal. Rptr. 917, 924 (1981)

Recently, courts have begun to abandon the historic prerequisites—mutuality of obligation and/or independent consideration—to establish “for cause” employment.⁶¹ Addressing the mutuality of obligation and independent consideration issues, the *Thompson* court stated:

[e]ven if the employee can still quit at will, the contract is not void for lack of consideration; there is no requirement of complete mutuality of obligation.

[A]n employee's continued service and his failure to exercise his power to terminate his employment is sufficient consideration for an additional promise by the employer [to not terminate except for cause].⁶²

Courts are now increasingly looking to other extrinsic facts that readily imply a durational hiring or termination “for cause” only standard. They find intent to impose such restrictions through informal statements by (or assurances of) managers and supervisors⁶³ through policy directives,⁶⁴ personnel policies or practices of the employer,⁶⁵ the length of time the employee has worked for the employer,⁶⁶ practices within the particular industry,⁶⁷ statements contained in employment manuals,⁶⁸ or any other circumstances which might demonstrate the intent of the parties.⁶⁹

The recognition of a court's ability to look not only for mutuality of obligation and/or independent consideration but also for any other circumstance demonstrating the intent of the parties has bolstered litigation under the employment-at-will doctrine.⁷⁰ Now, more than half of the states have recognized the express or implied contract term exception to the employment-at-will doctrine.⁷¹

Despite the expansion of the express or implied contract exception, most courts have not allowed an exception where an employment con-

(citing *Millsap v. National Funding Corp.*, 57 Cal. App. 2d 772, 775, 135 P.2d 407, 409 (1943)) (emphasis added).

61. “For cause employment” refers to an employment relationship where the employee will only be discharged when his/her performance is insufficient in some way.

62. *Thompson*, 623 F. Supp. at 414 (quoting *Barger v. General Elec. Co.*, 599 F. Supp. 1154, 1161 (W.D. Va. 1984)).

63. Leonard, *supra* note 4, at 649.

64. *Id.*

65. *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925 (1981).

66. *Id.* (citing *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980)).

67. *Pugh*, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 926.

68. *See, e.g.*, *Thompson v. American Motor Inns*, 623 F. Supp. 409 (W.D. Va. 1985).

69. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989).

70. *See Leonard, supra* note 4, at 635.

71. *Id.*

tract bases compensation on a monthly or annual salary.⁷² Nevertheless, in *Hartman v. C.W. Travel, Inc.*⁷³ the court held that summary judgment for the employer was improper since the written employment agreement contained a provision for annual employee review.⁷⁴ The reference to an annual employee review was the *only* fact from which an implied-in-fact relationship could arise.⁷⁵ If this "implied-in-fact" exception to the employment-at-will doctrine continues to expand, it is probable that the entire notion of employment-at-will might be wholly abandoned.

3. *Implied covenant of good faith and fair dealing exception*

Many courts have recognized that inherent in every contract is an implied covenant that the parties will deal fairly and in good faith with each other.⁷⁶ In this regard, some states have held employment contracts to be no different than other contracts in allowing the covenant of good faith and fair dealing to be imposed by force of law.⁷⁷ Other state courts only imply such a covenant "where the conduct or words of the parties indicate that they contemplated such a covenant."⁷⁸ Still, other courts have construed the implied covenant even more narrowly, applying it only where previously earned obligations are owed.⁷⁹ In *Monge v. Beebe Rubber Co.*,⁸⁰ however, the New Hampshire Supreme Court expanded the implied covenant exception by adopting a balancing test. The court formulated a breach of the covenant as follows:

In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the em-

72. See, e.g., *Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179 (D.C. Cir. 1986).

73. 792 F.2d 1179 (D.C. Cir. 1986).

74. *Id.* at 1181.

75. See *id.*

76. See, e.g., *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985).

77. See *Rees v. Bank Bldg. and Equip. Corp. of America*, 332 F.2d 548 (7th Cir. 1964), cert. denied, 379 U.S. 932 (1964); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033, 1046 (Utah 1989).

78. *Berube*, 771 P.2d at 1046 (discussing *Dare v. Montana Petroleum Mktg. Co.*, 212 Mont. 274, 687 P.2d 1015 (1984)).

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

80. 114 N.H. 130, 316 A.2d 549 (1974).

ployment contract. Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.⁸¹

Another court expanded the theory of an implied covenant of good faith and fair dealing even further. It reasoned that an employee's longevity alone—eighteen years—provided a basis for breach of the implied covenant.⁸²

The Utah Supreme Court, in *Berube v. Fashion Centre, Ltd.*,⁸³ stated that termination of an at-will employee without cause may not be tantamount to a breach of the implied covenant of good faith and fair dealing.⁸⁴ The court instead felt that whether the implied covenant was breached must "be determined in light of all relevant circumstances, including the contract's terms, the employer's conduct, and the employee's reasonable expectations."⁸⁵

Courts have not applied the implied covenant of good faith and fair dealing exception to the employment-at-will doctrine consistently. A significant minority of courts have, however, recognized its existence and applied it to do justice in wrongful termination cases.⁸⁶

III. DEVELOPMENT OF THE EMPLOYMENT-AT-WILL DOCTRINE IN UTAH

The Utah Supreme Court first considered the employment-at-will doctrine in *Price v. Western Loan & Savings Co.*⁸⁷ *Price* involved an attorney who, after representing Western Loan for several years, was hired as an employee at a salary of \$100 per month.⁸⁸ In a letter dated May 3, 1904, Mr. Price confirmed the salary and other terms of the employment contract.⁸⁹ The letter stated that Mr. Price's services were "to continue so long as [they] are as satisfactory as they have been the past two years."⁹⁰ In holding that Mr. Price was terminable at the will of Western Loan, the court stated that since Mr. Price "could terminate the contract at will" and since "[t]he only consideration that

81. *Monge*, 114 N.H. at 133, 316 A.2d at 551-552 (citations omitted), *quoted in* Leonard, *supra* note 4, at 654.

82. *Cleary*, 111 Cal. App. 3d at 443, 168 Cal. Rptr. at 722.

83. 771 P.2d 1033 (Utah 1989).

84. *Id.* at 1046 (dicta).

85. *Id.* at 1046-47 (footnote omitted).

86. See cases cited *supra* notes 77-79.

87. 35 Utah 379, 100 P. 677 (1909).

88. *Id.* at 382, 100 P. at 678.

89. *Id.*

90. *Id.* (quoting Letter from C.S. Price to Western Loan & Savings Co. (May 3, 1904)).

passed from [Mr. Price] . . . was his promise to perform the services," the contract "lacked the essential element of mutuality of obligation and was terminable at will by either party."⁹¹

Like most states adopting the doctrine of employment-at-will, Utah did so without any effort to define an underlying rationale for the doctrine. In *Price*, the court simply referred to "a line of well-reasoned cases"⁹² and adopted the doctrine as stated in Wood's 1877 treatise.⁹³

In 1918, the court had the opportunity to reevaluate the rule adopted in *Price*. In *Hancock v. Luke*,⁹⁴ the plaintiff sought rescission of a contract that, in addition to other terms, provided for employment.⁹⁵ Speaking through Justice Corfman, the majority followed *Price* stating, "the contract lacked the . . . element of mutuality, and therefore was terminable by either party at will."⁹⁶

The issue of employment-at-will was not again revisited by the Utah Supreme Court until 1957 in *Held v. American Linen Supply Co.*⁹⁷ *Held* involved an employee covered under the terms of a union's collective bargaining agreement.⁹⁸ The collective bargaining agreement was intended, *inter alia*, "[t]o effectuate a spirit of fair dealings between employer and employee"⁹⁹ The provision of the collective bargaining agreement pertinent to Ms. Held's claim stated, "The Company agrees not to suspend, discipline, *discharge* or discriminate against any employee for lawful union activities."¹⁰⁰

When Ms. Held was discharged, she brought an action claiming that the "discharge was without just cause and therefore in violation of the terms and conditions of the collective bargaining agreement."¹⁰¹ After an arbitrator found that the discharge was not motivated by her union activities, Ms. Held brought an action in state district court for wrongful discharge.¹⁰² The district court denied the employer's motion to dismiss, holding that "even in the absence of an express provision [in the collective bargaining agreement] an employee covered by it could

91. *Id.* at 387, 100 P. at 680.

92. *Id.* at 386, 100 P. at 680.

93. H. WOOD, *supra* note 14, at § 134.

94. 52 Utah 142, 173 P. 137 (1918).

95. *Id.* at 144, 173 P. at 137.

96. *Id.* at 152, 173 P. at 140.

97. 6 Utah 2d 106, 307 P.2d 210 (1957).

98. *Id.* at 107, 307 P.2d at 210.

99. *Id.* (quoting Collective Bargaining Agreement between American Linen Supply Co. and Amalgamated Clothing Workers Local Union No. 562).

100. *Id.* at 108, 307 P.2d at 211 (quoting from article III of the collective bargaining agreement) (emphasis added).

101. *Id.* at 107, 307 P.2d at 210.

102. *Id.* at 108-09, 307 P.2d at 211.

not be discharged without just cause."¹⁰³ The employer appealed to the Utah Supreme Court.

The supreme court, apparently adopting the express or implied contract term exception, stated that whether an employee has a cause of action for being discharged without just cause "depends upon the terms of the contract, either express or implied"¹⁰⁴ The court, however, was reluctant to imply a durational term or discharge for cause only term into the contract, absent ambiguity in the collective bargaining agreement, because if such had been intended "it could easily have been incorporated in the agreement"¹⁰⁵

In *Bullock v. Deseret Dodge Truck Center, Inc.*,¹⁰⁶ the court continued its strong reluctance to imply durational terms of employment absent ambiguity in a written employment contract. There, the court refused to allow the employee to introduce parol evidence that the employment contract was for a minimum specified time period.¹⁰⁷ Instead, the court unanimously held that "[t]he fact that [the employee's] option to subscribe to stock only existed as long as she was employed suggests that either party could terminate such employment at will."¹⁰⁸ In *Crane Co. v. Dahle*,¹⁰⁹ the court restated the employment-at-will doctrine: "In the absence of a contract for a definite term, an employee may quit whenever he desires, the same as the employer may fire him."¹¹⁰

Again in 1979, the court adhered to the traditional employment-at-will presumption in *Bihlmaier v. Carson*.¹¹¹ In *Bihlmaier*, the court stated that since "the final oral employment contract contained no express terms concerning the duration of the plaintiff's employment," the employment relationship was terminable at the will of either party.¹¹² The court justified its reasoning on the lack of a stipulated duration

103. *Id.* at 107, 307 P.2d at 210.

104. *Id.* at 109, 307 P.2d at 211. The court stated:

In the absence of something in the contract of employment to fix a definite term of service, or other contractual provision to restrict the right of the employer to discharge, or some statutory restriction upon this right, an employer may lawfully discharge an employee at what time he pleases and for what cause he chooses, without thereby becoming liable to an action against him. A general contract of hiring is ordinarily deemed a contract terminable at the will of either the employer or the employee.

Id. (quoting 35 AM. JUR. *Master and Servant* § 34 (1941)).

105. *Id.*

106. 11 Utah 2d 1, 354 P.2d 559 (1960).

107. *Id.* at 6, 354 P.2d at 562.

108. *Id.*

109. 576 P.2d 870 (Utah 1978).

110. *Id.* at 872.

111. *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979).

112. *Id.* at 792.

and the lack of "good consideration in addition to the services contracted to be rendered."¹¹³

While in early cases the Utah Supreme Court's attention was focused primarily on the prerequisites of "mutuality of obligation" and "independant consideration,"¹¹⁴ in *Held, Bullock, and Crane Co.*, the court seemed to focus more on discerning whether an intent for durational employment existed. In *Bihlmaier*, however, the court again raised the issue of additional consideration.¹¹⁵ The "additional good consideration" exception to the at-will doctrine became one of the court's primary focuses in *Rose v. Allied Development Co.*¹¹⁶

Rose involved an employee who, after becoming manager of the shoe departments at three of the employers' stores, wished to return to school while continuing his employment.¹¹⁷ When Rose expressed his desire to attend school to his supervisor, he was told that it would be fine so long as he continued to work forty-five hours per week and made sure that the sales floor was supervised at all times.¹¹⁸ Rose, who was able to make the required arrangements,¹¹⁹ was nevertheless discharged due to his unavailability at peak sales times and the inflexibility of his schedule.¹²⁰ Rose sued, "alleging breach of contract, promissory estoppel, contractual wrongful discharge, tortious wrongful discharge, and breach of the implied covenant of good faith and fair dealing."¹²¹ Affirming summary judgment for the defendant employer, the court deemed the relationship as "employment-at-will."¹²²

The court began its analysis by recognizing that the traditional "absolute right [of the employer] to discharge employees has been somewhat limited by subsequent federal and state legislation."¹²³ Thus, for the first time the court implicitly adopted the "public policy exception"¹²⁴ to the employment-at-will doctrine.

The court then specifically discussed its prior recognition of the "express or implied contract term exception" to the doctrine.¹²⁵ Stating

113. *Id.*; see also *supra* notes 23-25 and accompanying text.

114. See *Hancock v. Luke*, 52 Utah 142, 152, 173 P. 137, 140 (1918); *Price v. Western Loan & Sav. Co.*, 35 Utah 379, 382, 100 P. 677, 678 (1909).

115. *Bihlmaier*, 603 P.2d at 792.

116. 719 P.2d 83, 86-87 (Utah 1986).

117. *Id.* at 83-84.

118. *Id.* at 84.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 85.

124. See *supra* notes 36-51 and accompanying text.

125. *Rose*, 719 P.2d at 85-86 (citing *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979)).

that the "totality of the circumstances and the intent of both parties"¹²⁶ did not contemplate a definite term of employment, the court held that this case did not fall into the "implied contract" exception. The court's ruling in this regard, however, differed from prior employment-at-will cases.¹²⁷ In prior cases, the court was demonstratively reluctant to examine factors extrinsic to the actual contract terms, unless those terms were ambiguous.¹²⁸ In contrast, the *Rose* court stated, "We must look at the alleged 'understanding,' the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case to ascertain the terms of the claimed agreement."¹²⁹

Nevertheless, the *Rose* court ruled that the existence of contract terms altering the presumption of employment-at-will status must be established by something more than an employee's "subjective understandings or expectations."¹³⁰ Despite the court's failure to recognize the case as falling within the "express or implied contract term exception," *Rose* signaled the court's desire to expand the exception. The court undertook this expansion in *Berube*.¹³¹

The *Rose* court also gave considerable attention to whether the employee had given consideration to the employer "*in addition* to the services already required"¹³² Finding that Allied, the employer, "did not accrue any benefit by plaintiff's attendance at school," the court held that no additional consideration had been given to effect a rebuttal of the employment-at-will presumption.¹³³

Finally, the *Rose* court addressed the plaintiff's contention that the doctrine of promissory estoppel should allow him recovery.¹³⁴ The plaintiff claimed that his detrimental reliance on his supervisor's promise that his attending school would be fine was compensable.¹³⁵ The court held that invoking promissory estoppel would be improper since *Rose* was not justified in assuming that Allied intended to alter the at-

126. *Id.* at 85.

127. See e.g., *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979); *Bullock v. Deseret Dodge Truck Center, Inc.* 11 Utah 2d 1, 354 P.2d 559 (1960); *Held v. American Linen Supply Co.*, 6 Utah 2d 106, 307 P.2d 210 (1957).

128. See cases cited *supra* note 127.

129. *Rose*, 719 P.2d at 86 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

130. *Id.*

131. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989) (discussed *infra*).

132. *Rose*, 719 P.2d at 86 (emphasis in original).

133. *Id.*

134. *Id.* at 87.

135. *Id.* The damages claimed to be suffered by the plaintiff were the cost of his tuition and books (\$1,742.81) and, of course, the loss of his job. *Id.* at 84.

will relationship.¹³⁶ In sum, the court adhered to its prior holding in *Bullock* where it "refused to override the at-will doctrine to imply a term of employment in the contract to which the employer had not expressly agreed."¹³⁷

One significant contention raised by the employee in *Rose* that the court simply did not address was the alleged breach of the implied covenant of good faith and fair dealing. The court's failure to reach the issue is particularly peculiar since a significant number of courts had previously recognized the covenant in employment contracts¹³⁸ and the Utah court had itself recognized the inherent existence of the implied covenant in every contract.¹³⁹

Why the court did not address whether a breach of the implied covenant had occurred is unknown. What is apparent, however, is that the court was not yet ready to recognize or even discuss breach of the implied covenant as an exception to the employment-at-will doctrine. Recall that in *Held* the court failed to address this same issue, even when the express aim of the collective bargaining agreement was "[t]o effectuate a spirit of fair dealings between employer and employee."¹⁴⁰

To summarize Utah law prior to *Berube*,¹⁴¹ the Utah Supreme Court had recognized the "public policy" and "express or implied contract term" exceptions to the employment-at-will doctrine. More important, however, was the Court's demonstrated reluctance to imply durational terms into employment contracts. Moreover, the court had implicitly refused to even consider whether a breach of the implied covenant of good faith and fair dealing would form an exception to the employment-at-will doctrine.

136. *Id.* at 87.

137. *Id.* (emphasis added).

138. See *Rees v. Bank Bldg. and Equip. Corp. of America*, 332 F.2d 548 (7th Cir. 1964), cert. denied, 379 U.S. 932 (1964); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Dare v. Montana Petroleum Mktg. Co.*, 212 Mont. 274, 687 P.2d 1015 (1984); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

139. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985).

140. *Held v. American Linen Supply Co.*, 6 Utah 2d 106, 107, 307 P.2d 210, 210 (1957).

141. 771 P.2d 1033 (Utah 1989).

IV. BERUBE V. FASHION CENTRE, LTD.

A. *Facts*

Berube v. Fashion Centre, Ltd.,¹⁴² involved an employee who, after beginning work in 1979 as a sales clerk, had been promoted to assistant manager of the employer's Fashion Gal clothing store located in Ogden, Utah.¹⁴³ Ms. Berube's past promotions had been based on her job performance and demonstrated ability.¹⁴⁴ At one point, Ms. Berube was even told "she could expect to be a store manager someday."¹⁴⁵

The employer had a written disciplinary policy providing that employees would not be terminated "without prior warning except for specific reasons, including failure to pass or refusal to take a polygraph examination."¹⁴⁶ Employees were promised "a warning and an opportunity to improve performance" in all other circumstances.¹⁴⁷ Ms. Berube's agreement with Fashion Centre did not contemplate a specified term of employment.¹⁴⁸ However, Ms. Berube believed that she would only be terminated for cause because of the procedures outlined in the written disciplinary policy and other representations made to her.¹⁴⁹

Due to an apparent inventory shortage in the fall of 1981, Fashion Centre conducted an investigation.¹⁵⁰ Pursuant to the investigation, Fashion Centre requested all employees at the Ogden store to submit to a polygraph examination.¹⁵¹ After submitting to two polygraph examinations, the first of which showed signs of deception on one of fifteen questions, Fashion Centre asked Ms. Berube to undergo a third examination.¹⁵² Feeling nervous and apprehensive about the third examination, Ms. Berube asked that it be rescheduled for the following day.¹⁵³ Ms. Berube's request was denied, and she was terminated for not taking the third examination on the requested day.

Ms. Berube subsequently filed suit alleging, among other things, wrongful discharge and breach of her employment contract.¹⁵⁴ At trial, the jury found for Fashion Centre and Ms. Berube appealed based on

142. *Id.*

143. *Id.* at 1035.

144. *Id.*

145. *Id.* at 1036.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1037.

154. *Id.*

the trial court's refusal to allow jury instructions on the exceptions to the employment-at-will doctrine.¹⁵⁵

B. The Court's Analysis

After undertaking an analysis of the surreptitious examination and negligence claims,¹⁵⁶ Justice Durham, writing for a plurality, reexamined the status of the employment-at-will doctrine in Utah.¹⁵⁷ After briefly reviewing the historical background of the doctrine,¹⁵⁸ Justice Durham turned her attention to the exceptions to the rule,¹⁵⁹ summarily recognizing "the development of three primary categories of exceptions to the at-will rule."¹⁶⁰

Reviewing the "public policy" exception, Justice Durham stated that it was "[p]erhaps the most logical."¹⁶¹ Quoting *Petermann v. International Brotherhood of Teamsters*,¹⁶² the plurality opinion stated that "'public policy' is . . . that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."¹⁶³

The plurality recognized that the source of discerning public policy includes both legislative and judicial pronouncements.¹⁶⁴ This expansion of the source of public policy was limited, however, by requiring that any quality deducible as "public policy, must be 'fundamental and permanent' and not merely 'superficial and transitory' changing from one generation to the next."¹⁶⁵ Justice Durham formulated the application of the public policy exception as follows: "we will construe public policies narrowly and will generally utilize those based on prior legislative pronouncements or judicial decisions, applying only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public

155. *Id.* Berube also appealed the trial court's denial of her motion to amend her complaint to add a cause of action based on statutory prohibitions of surreptitious examinations (UTAH CODE ANN. § 34-37-16 (1988)) and the granting of summary judgment to another named defendant. *Berube*, 771 P.2d at 1037.

156. *Id.* at 1037-39.

157. *Id.* at 1040.

158. *Id.* at 1040-41.

159. For a more complete discussion of the history and development of the doctrine, see *supra* notes 9-79 and accompanying text; see also Note, *supra* note 1; Leonard, *supra* note 4.

160. *Berube*, 771 P.2d at 1041.

161. *Id.* at 1042.

162. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

163. *Berube*, 771 P.2d at 1042 (citations omitted).

164. *Id.* at 1042-43.

165. *Id.* at 1043.

good.”¹⁶⁶

Holding that all principles of “public policy” should apply to durational hiring as well as indefinite hiring,¹⁶⁷ the court unanimously agreed that the public policy exception had no application in the present case and should not be applied broadly to make it routinely a violation of public policy to discharge an employee in breach of an employment-for-cause agreement.¹⁶⁸

Turning to the implied or express contract exception, Justice Durham’s opinion characterized the at-will presumption as “merely a rule of contract construction and not a legal principle.”¹⁶⁹ Stating that “rigid adherence to the at-will rule is no longer justified or advisable,” the plurality held that the traditional presumption could be rebutted by evidence found in “employment manuals, oral agreements, and *all* circumstances of the relationship which demonstrate the intent to terminate only for cause or to continue employment for a specified period.”¹⁷⁰ Such factors include “conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances which show the existence of such a promise.”¹⁷¹

On this point, however, Justice Durham carried but one other vote. Justices Howe and Hall, concurring, found it unnecessary and inappropriate to look beyond the written policy manual of the employer since they believed that a reasonable jury could find that Ms. Berube’s termination violated Fashion Centre’s written policy manual.¹⁷² Similarly, Justice Zimmerman’s concurring opinion stated “representations made by the employer in employee manuals, bulletins, and the like are legitimate sources for determining the apparent intentions of the parties. Because we need go no further than this to decide the present case, I see no need to fix the precise parameters of the implied-in-fact exception.”¹⁷³ Justice Zimmerman then stated that if the case presented such an issue, he would not give an expansive application of the exception and would not allow every fact to be offered in rebuttal since such an application would afford little predictability to employers.¹⁷⁴

166. *Id.* (footnote omitted).

167. *Id.* at 1043 n.10.

168. *Id.* at 1043, 1051. See *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483 (Utah 1989).

169. *Id.* at 1044 (citing *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 628 (Minn. 1983)).

170. *Berube*, 771 P.2d at 1044 (emphasis added).

171. *Id.* (citing *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Pugh v. See’s Candies*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981)).

172. *Id.* at 1050 (Howe, J. concurring).

173. *Id.* at 1052 (Zimmerman, J. concurring).

174. *Id.*

Thus, it appears that presently two justices, Durham and Stewart, would allow *all* facts and circumstances to be considered in determining if an implied-in-fact "for-cause" employment relationship has been established. Justice Zimmerman would allow only manuals, bulletins, and other legitimate writing to be offered to rebut the presumption. Justice Howe and Hall have not spoken on the issue but rather have reserved that question for a more appropriate case.

A three member majority of the court expressly disavowed the requirement of "mutuality of obligation" before a "termination "for cause" only relationship could arise.¹⁷⁵ Justice Durham stated that the fundamental assumption of mutuality of obligation—that "because an employee may terminate . . . at any time, the employer should likewise be free to do so"—is unfounded and illusory in a modern economy.¹⁷⁶ Presumably, the principle would be illusory because the employee's motivation to quit is much less than the employer's motivation to fire since the burden the employer faces in replacing an employee is light compared to the tremendous reliance employees place on maintaining their jobs.

Justice Durham also discounted the traditional requirement of independent consideration. Instead of making independent consideration a "prerequisite" to finding "for cause" employment, Justice Durham considered it just another factor among the totality of circumstances to be considered in finding an implied contract of "for cause" employment.¹⁷⁷ Justice Zimmerman agreed that logically there is no reason to require mutuality of obligation or separate consideration as prerequisites to an employment for cause relationship.¹⁷⁸ Justices Howe and Hall did not address the issue.

The plurality, per Justice Durham, applied this expanded formulation of the implied contract exception broadly, finding that, in addition to some express terms,¹⁷⁹ implied terms from favorable performance reviews, comments that she had a promising future and would advance in the company, and the fact that Ms. Berube had advanced rapidly, created both a justified expectation and implied contract that

175. See *Berube*, 771 P.2d at 1045, 1051 (The majority consists of Justices Durham, Stewart, and Zimmerman).

176. *Id.* at 1045.

177. *Id.*

178. *Id.* at 1051 (Zimmerman, J. concurring).

179. The express terms were contained in the disciplinary action policy distributed to employees of Fashion Centre that an employee would be terminated without prior warning only for certain reasons (i.e., refusal to take or failure to pass a polygraph), but that in all other circumstances, employees would be given a proper warning and an opportunity to improve performance. *Id.* at 1047.

Ms. Berube would be terminated only for cause.¹⁸⁰

It is somewhat unclear, however, whether the implied contract exceptions to the at-will presumption will be applied so expansively. Justice Zimmerman would not do so. Justices Howe and Hall seem reluctant to do so and in the midst of Justice Durham's broad formulation of the exception, she states "[a]n implied-in-fact promise cannot, of course, contradict a written contract term."¹⁸¹ Thus, it would seem that if an employer distributes a manual or bulletin expressly stating that the relationship was to be that of employment-at-will, an employee could not even introduce extrinsic evidence of comments or assurances to form an implied contract of "for cause" employment. In *Berube*, the employer's disciplinary policy listed the circumstances specifying when an employee would be terminated without warning. Therefore, the issue remains open as to whether the distinguishable case of an employment manual or memorandum simply stating that the relationship is "at-will" without enunciating specific reasons for termination will allow the employee to introduce extrinsic evidence to prove an implied contract of "for cause" employment. How the court will rule on this issue remains to be seen. The author, however, believes the "implied contract" exception will continually broaden until it eventually swallows the "at-will" presumption.

Finally, the *Berube* court addressed whether it would recognize a breach of the implied covenant of good faith and fair dealing as an exception to the employment-at-will rule. Justice Durham opened by stating that Utah has implied such a covenant into *every* contract, and that implication, in her belief, included employment contracts.¹⁸² Recognizing that there is no clear majority application of the exception, Justice Durham asserted that the correct application is to examine "the employer's conduct viewed in the context of the relevant contractual terms, express or implied, and the employee's reasonable expectations."¹⁸³ Justice Durham then stated that the exception should "be used sparingly and with caution"¹⁸⁴ and that damages should be determined by contract law, which limits damages to only reasonable foreseeable consequential damages.¹⁸⁵

Applying her formulation of the exception, Justice Durham be-

180. *Id.* at 1048.

181. *Id.* at 1044 (citing *Shapiro v. Wells*, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613, 622 (1984)).

182. *Id.* at 1046 (citing *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)).

183. *Id.* at 1046 (citing *Rulon-Miller v. International Business Mach. Corp.*, 162 Cal. App. 3d 241, 253, 208 Cal. Rptr. 524, 533 (1984)).

184. *Id.* at 1047.

185. *Id.* at 1046.

lieved that Ms. Berube had stated a claim for relief under the exception.¹⁸⁶ The basis for this finding was her feeling that Fashion Centre had acted arbitrarily and capriciously in requiring Ms. Berube to submit to three polygraph examinations over the course of several months based on one inventory shortage and that this was done despite Ms. Berube's willingness to submit to the third test if it were rescheduled.¹⁸⁷ The case was remanded for final determination by a jury on this issue.

While Justices Howe and Hall did not address the implied covenant of good faith and fair dealing exception, Justice Zimmerman sharply disagreed with its application.¹⁸⁸ Justice Zimmerman, while appearing hostile to recognizing the exception due to the unpredictability employers would face, did not wholly reject the exception's application if it were required to do justice in a particular case.¹⁸⁹ Thus, while not completely rejecting the notion, a three member majority declined to recognize a cause of action for breach of the implied covenant of good faith and fair dealing in employment contracts.¹⁹⁰

V. DOCTRINE OF EMPLOYMENT-AT-WILL IN UTAH SINCE *Berube*

A series of cases decided since *Berube* gives some indication as to how the three exceptions to the employment-at-will rule will be applied. The "public policy" exception has not been seriously considered since *Berube*. In *Caldwell v. Ford, Bacon & Davis Utah, Inc.*,¹⁹¹ however, Justice Zimmerman, in a four-to-one decision,¹⁹² stated that the court had not adopted the "public policy" exception broadly and that the exception would not "routinely make it a violation of public policy to discharge an employee in breach of an employment agreement [of "for cause" termination only]."¹⁹³ As for the "implied covenant of good faith and fair dealing" exception, three separate decisions—two of the Utah Supreme Court and one from the Federal District Court for the District of Utah—have expressly held that this exception has not yet been recognized in Utah.¹⁹⁴

The "express or implied-in-fact contract" exception, however, has

186. *Id.* at 1047.

187. *Id.* at 1049.

188. *Id.* at 1051 (Zimmerman, J. concurring).

189. *Id.* at 1052 (Zimmerman, J., concurring).

190. See *Howcroft v. Mountain States Tel. and Tel. Co.*, 712 F. Supp. 1514, 1522 (D. Utah 1989); *Loose v. Nature-All Corp.*, 785 P.2d 1096, 1097 (Utah 1989); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 485 (Utah 1989).

191. 777 P.2d 483 (Utah 1989).

192. Justice Stewart dissented.

193. *Id.* at 485 (citing *Berube*, 771 P.2d at 1050-51).

194. *Howcroft*, 712 F. Supp. at 1522; *Loose*, 785 P.2d at 1097 (Durham, J.); *Caldwell*, 777 P.2d at 485.

been applied broadly and has in practical effect probably emasculated the employment-at-will presumption. In *Gilmore v. Salt Lake Area Community Action Program*,¹⁹⁵ subsequent to an admittedly at-will hiring, the employer issued a manual that set forth termination procedures.¹⁹⁶ When those procedures were not correctly followed, the employee sued and ultimately prevailed on the employer's motion for summary judgment since, under *Berube*, an employee can rebut the at-will presumption with evidence contained in employment manuals.¹⁹⁷ In *Caldwell*, the court affirmed the employer's motion for summary judgment.¹⁹⁸ It did so, however, on the basis that in terminating the employee, the employer complied with all requirements that would have been implied by the terms of a bulletin issued after an employment-at-will hiring.¹⁹⁹

This broad application of the implied-in-fact contract exception has turned the at-will doctrine on its head, except for the analytical framework that the doctrine provides. Utah employers must now be sure that neither formal nor informal policies or practices create reasonable expectations in employees that they will be terminated for cause only. To be sure, employers must avoid giving assurances, such as "keep up the good work and you will be with this company for a long time" and "don't worry, when it comes to your job, you have nothing to worry about." Conceivably, such assurances, even if informally made, could give rise to a rebuttal of the at-will presumption.

Other popular employer practices might also give rise to implied-in-fact contracts of termination "for cause" only. Initial probationary periods, manuals listing certain grounds for termination, prior warnings (formal or informal), annual employee reviews, and progressive disciplinary steps all offer ammunition to employees wishing to rebut the at-will presumption.

Some options which an employer might use to avoid being a "for cause" employer would be to issue periodical memorandums renouncing any previous assurances or promises from supervisors and stating that the employment relationship remains "at-will" absent a written contract signed by the employer stating otherwise. Employers may also use express written contracts precluding inconsistent implied terms. Employment manuals might contain disclaimers of "for cause" employ-

195. 775 P.2d 940 (Utah App. 1989).

196. *Id.* at 941.

197. *Id.* at 942.

198. 777 P.2d 483 (Utah 1989).

199. *Id.* at 486; *see also* *Lowe v. Sorenson Research Co.*, 779 P.2d 668 (Utah 1989) (holding that the employee was entitled to a jury trial since termination procedures set forth in an employment manual could rebut the at-will presumption).

ment language so long as they are unqualified, prominently displayed, and expressly state that the manual is a complete integration of all terms of employment. The well-advised employer would also maintain thorough records of employee misconduct or poor performance in the event that he or she may need to formulate a cause for termination.

The timing for communicating terms of employment is also of great importance. As previously stated, an employer must take careful steps to renounce any indications of "for cause" employment given after an at-will relationship has been established. Likewise, the prudent employer should take careful steps early in employment contract negotiations to affirm that it is an "at-will" employer. Such steps might include displaying prominently and conspicuously on the employment application a disclaimer of "for cause" employment and stating that no subsequent representations by supervisors, personnel directors, or others, and no industry practices or any prior course of dealing will alter the status of the relationship.²⁰⁰

VI. CONCLUSION

Since the late 1950s, state courts have begun recognizing exceptions to the long-standing presumption that indefinite hirings are "at-will." Some courts, including the Utah Supreme Court, have begun to construe one or several of the recognized exceptions so broadly and apply the exceptions so liberally that the traditional employment-at-will presumption has been emasculated and now serves merely to provide a theoretical framework for analysis. Because of the broadly applied exceptions, employers wishing to maintain their "employment-at-will" status must now take affirmative steps to rebut facts that would implicate "termination for cause only" employment.

Justin R. Olsen

200. The author does not advocate that these steps would always make the most business sense. Such a determination must be left to the individual employers. The precautions suggested here are offered only as combative measures to rebuttal of the at-will presumption.