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I. INTRODUCTION

The first decade of the twenty-first century has been a "lost decade" for American labor. According to a recent report, "[t]here has been zero net job creation since December 1999. No previous decade going back to the 1940s had job growth of less than twenty percent. Economic output rose at its slowest rate of any decade since the 1930s as well."[1] When adjusted for inflation, middle-class households earned less in 2008 than a decade earlier, and the years 2000–2010 represented "the first decade of falling median incomes since figures were first compiled in the 1960s."[2] Certainly, these employment figures are unprecedented in recent decades, both in terms of their scope and severity upon American workers. Other related developments, such as double-digit unemployment rates[3] and a spike in home foreclosures,[4] are often attributed exclusively to the global financial crisis of the past year.[5] Nonetheless, what the previous decade's stagnant employment figures evince is that the nation had been suffering an ailing employment and labor market for years preceding the present economic crisis.

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1. Neil Irwin, *Aughts were a lost decade for U.S. economy, workers*, WASH. POST, Jan. 2, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101196.html.

2. *Id.*

3. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT SITUATION SUMMARY (2010), *available at* http://www.bls.gov/news.release/empsit.nr0.htm.

4. Steve Kerch, *2009 Foreclosures Hit Record High*, MARKET WATCH, Jan. 14, 2010, *available at* http://www.marketwatch.com/story/foreclosures-top-record-in-2009-no-end-in-sight-2010-01-14?reflink=MW_news_stmp ("The number of U.S. residential properties receiving at least one foreclosure filing jumped 21% in 2009 to a record 2.82 million, RealtyTrac, an online foreclosure marketplace, reported Thursday. The report also showed that 2.21% of all U.S. housing units (1 in 45) received at least one foreclosure filing during the year, up from 1.84% in 2008, 1.03% in 2007 and 0.58% in 2006.").

5. *See, e.g.*, Associated Press, *U.S. Jobless Claims Drop Unexpectedly*, N.Y. TIMES, Dec. 31, 2009, *available at* http://www.nytimes.com/2010/01/01/business/economy/01econ.html ("The crisis led to widespread mass layoffs, which sent jobless claims to as high as 674,000 last spring.").

To be sure, the tenuous global economy and the precarious state of affairs regarding hiring have severely affected both employers and employees to a significant degree and have prevented both large-scale, institutional firms and small businesses alike from investing in new workers and expanding upon current operations. However, these issues are further compounded by a near-record docket of employment-related litigation, both on the federal and state level.[6] This litigation most frequently relates to an employer's grounds for termination, and typically, is very expensive and time-consuming for both parties. Yet oftentimes, these suits are theoretically avoidable since they are directly resultant from the uncertainty and instability derived from the very nature of vertical employment relationships in the contemporary American labor market.[7] With this fact in mind, a more efficient employment relationship may serve to reduce these costs.

The employment-at-will doctrine, which provides the default rule regarding non-contractual employment in all but one jurisdiction in the United States, inheres substantial levels of uncertainty for employers and employees alike.[8] Under this scheme, a firm's ability to freely terminate its employees at common law is virtually unrestricted. In essence, this rule permits workers not under express employment contracts to be terminated at any point during the course of employment, with or without cause.[9] At one point in its development, the employment-at-will doctrine included a customary presumption that vertical employment relationships took the form of contracts one year in duration. For the most part,

6. A January 2010 press release by the Equal Employment Opportunity Commission, the governmental body responsible for investigating employment discrimination claims, "announced that near record numbers of workplace discrimination charges were filed with the agency in the fiscal year ending September 30, 2009. As reflected in the agency's statistical presentation, there were 93,277 charges filed in FY 2009, which is the second-highest number the agency has recorded." Kevin M. LaCroix, *EEOC Discrimination Complaints Near Record Highs in 2009*, THE D&O DIARY, Jan. 10, 2010, http://www.dandodiary.com/2010/01/articles/d-o-insurance/eeoc-discrimination-complaints-near-record-highs-in-2009/; Press Release, Equal Employment Opportunity Commission, Job Bias Charges Approach Record High in Fiscal Year 2009, Jan. 6, 2010, *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-6-10.cfm.

7. Throughout the course of this Article, the term "vertical" employment relationship will be used to signify the employer-employee relationship, as compared to "horizontal" relationships between and amongst colleagues and coworkers. The verticality of an employment relationship can take several forms, including hirer-hiree, supervisor-subordinate, and firer-firee. Ultimately, the distinguishing feature between a vertical relationship and a horizontal one is a modicum of control over the other's employment status—the more control that exists, the more "vertical" that relationship is—conversely, the less control, the more "horizontal" it becomes. For example, the relationship between a store manager of a retail outlet and an entry-level employee would be less vertical than that of a regional manager and that employee, since the regional manager would presumably possess superior managerial and supervisory abilities to that of the local store manager.

8. FUNDAMENTALS OF EMPLOYMENT LAW (Karen E. Ford et al. eds., 2000). The only US jurisdiction that does not recognize the employment-at-will doctrine as the default rule is Montana. MCA §§ 32-9-903–915

9. FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

however, this custom no longer exists in common law employment jurisprudence.

While the past decade has indeed been perilous for the American workforce, the United States has dealt with different, and occasionally more severe, employment problems in years past. The U.S. Congress has responded by enacting a bevy of wrongful discharge statutes, which comprise an entire regime of federal wrongful discharge jurisprudence upon themselves. These legislative reforms have often centered on prohibiting workplace discrimination on the basis of race, color or national origin,[10] age,[11] disability,[12] gender,[13] genetic information,[14] sickness or medical condition,[15] and financial status.[16] State legislatures have also implemented similar reforms, which include prohibitions against discrimination based on sexual orientation,[17] and family status.[18] Together these reforms comprise a distinct and oft-complicated body of wrongful discharge jurisprudence with causes of actions and remedies not present under the common law.[19] That the legislative antidiscrimination protections mentioned above and the employment-at-will doctrine pose fundamentally competing, and often incongruous, objectives has been well documented by legal scholars and commentators as far back as immediately following the passage of these reforms.[20]

The common law has also developed several wrongful discharge doctrines independent of the above-referenced statutory wrongful discharge provisions: the implied contract, the covenant of good faith

10. Civil Rights Act of 1964, 42 U.S.C. § 21 (2008).

11. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2008).

12. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (2008).

13. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2008).

14. Genetic Information Nondiscrimination Act of 2008, 29 U.S.C. §§ 216(e), 1132 (2008).

15. The Family and Medical Leave Act, 29 U.S.C. § 2613 (2008).

16. Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (2008).

17. *E.g.*, CAL. GOV'T CODE § 12926(q) (West 2005); CONN. GEN. STAT. Ann. § 46a-81a (West 2009); MD. CODE ANN., Discrimination in Employment art. 49B, § 15(j) (2009); MASS. GEN. LAWS ANN. ch. 151B, § 3 (West 2003); MINN. STAT. § 363.01 subd. 44 (West 2004); N.H. REV. STAT. ANN. 354-A:2(XIV-a) (West 1992); NEV. REV. STAT. ANN. § 613.310(6) (West 2001); N.J. STAT. ANN. § 10:5-5(hh) (West 2000); R.I. GEN. LAWS § 28-5-6(15) (West 1996); VT. STAT. ANN. tit. 1 § 143 (West 1991); and WIS. STAT. ANN. § 111.32(13m) (West 2002).

18. *E.g.*, The California Family Rights Act, CAL. GOV'T CODE §§ 12945.1 & 12945.2 (West 1993); The New Jersey Family Leave Act, N.J. STAT. ANN. 34:11B-1 *et seq.* (West 2000).

19. By its language Title VII makes it clear that it does not impinge upon states' ability to enact their own employment antidiscrimination legislation. 42 U.S.C. 2000e-7 states that "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

20. Julie Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

and fair dealing, and the public policy doctrine. The application of these doctrines varies widely throughout the United States, with some jurisdictions recognizing them all, while others recognize none of them. Further, even amongst the jurisdictions that recognize a particular common law wrongful discharge doctrine, no consensus exists regarding what the appropriate scope of each doctrine should be. This variability and instability between the common law wrongful discharge doctrines has injected a considerable measure of ambiguity and inefficiency into the American labor market, both for employers and employees. This uncertainty however, has been compounded by the increased levels of termination, unemployment, and underemployment of recent months. For this reason, when employers ultimately begin renewing hiring efforts, a significant opportunity may arise to reestablish a more prominent role for contract law in employment relationships.

Accordingly, this Article will review the various legislative and common law wrongful discharge doctrines that have developed in the United States with an eye towards examining the role these doctrines play upon vertical employment relationships. Correspondingly, it will also explore whether an expansion of express employment contracts in the American workplace, as was once the case at common law, would ultimately work to the benefit of both parties to vertical employment relationships. In this vein, this Article will proceed in three Sections. Section I will survey the present condition of the American employment market as it currently stands, taking into consideration recent employment figures and those that have developed over the course of the past century and decade. Section II will survey the various wrongful discharge statutes currently governing the nation's labor market, and it will review the wrongful discharge doctrines that have been developed in the common law. This Section will also discuss the features of vertical employment relationships pursuant to express contract as they relate to the common law employment-at-will doctrine. Section III will explore the relative features of contract and the abovementioned wrongful discharge doctrines, as well as those based upon federal statute, specifically Title VII of the Civil Rights Act of 1964.

This Article will conclude that when the American employment market ultimately does rebound following the current recessionary period, and firms begin taking on new workers, a significant number of new employment relationships will be formed. Therefore, it is currently an opportune time for a rethinking of the current conception of vertical employment relationships, and both employer and employee would greatly benefit by striving to re-infuse greater elements of contract law in the formation of these new employment relationships.

II. OVERVIEW OF THE AMERICAN EMPLOYMENT MARKET

A. The Current State

2009 has proved to be a very difficult period for American workers and employers alike. In October 2009, the unemployment rate in the United States reached a thirty-year high of 10.2%.[21] Alongside this unfortunate statistic, during the course of the past year the American workforce also endured record-level rates of underemployment[22] and extensive firings and layoffs across sectors.[23] This period has also been marked by decreasing profit margins, plummeting sales and outputs, the failure of domestic and international financial institutions, a plummeting stock market, and a widespread freezing of commercial credit markets.[24] In turn, governmental bodies and agencies have experienced fiscal deficits, on the state and federal level,[25] and increased demand in important public services, like food stamps, welfare payments, and unemployment insurance disbursements.[26] As of January 2010, "[o]ne in eight Americans, and one in four children, are on food stamps. Some six million Americans . . . have said that food stamps were their only income."[27]

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21. In January 2009, American workers lost 598,000 jobs and the unemployment rate hit 7.6%. In October 2009, the unemployment rate rose to a record 10.2%. Jeannine Aversa & Christopher S. Rugaber, *Unexpected Drop in Jobless Rate Sparks Optimism*, YAHOO NEWS, Feb. 5, 2009, http://news.yahoo.com/s/ap/20100205/ap_on_bi_go_ec_fi/us_economy; Neil Irwin & Annys Shin, *598,000 Jobs Shed in Brutal January*, WASH. POST, Feb. 7, 2009, at A01.

22. The "underemployment rate" is comprised of "[t]otal unemployed, plus all marginally attached workers, plus total employed part time for economic reasons, as a percent of the civilian labor force plus all marginally attached workers." BLOOMBERG, http://www.bloomberg.com/apps/quote?ticker=USUDMAER%3AIND.

23. Culminating one year ago, the American employment situation was one of the most stark job markets facing employees in decades. "The number of cuts by employers [in January 2009] is the biggest for any single month since 1974." Maura Reynolds & Walter Hamilton, *U.S. unemployment rate at 7.6%; jobs disappearing at faster pace*, L.A. TIMES, Feb. 7, 2009, *available at* http://articles.latimes.com/2009/feb/07/business/fi-jobs7.

24. *See* Vikas Bajaj & Jack Healy, *Stocks Drop Sharply and Credit Markets Seize Up*, N.Y. TIMES, Nov. 19, 2008, *available at* http://www.nytimes.com/2008/11/21/business/21markets.html?pagewanted=all.

25. During the 2009 fiscal year, forty-six states were confronted with budget shortfalls, which are expected to continue into the 2010 and 2011 fiscal years. These budget gaps are "estimated to total more than $350 billion," Elizabeth McNichol & Iris J. Law, *Recession Continues to Batter State Budgets; State Responses Could Slow Recovery*, CENTER ON BUDGET AND POLICY PRIORITIES, *available at* http://www.cbpp.org/9-8-08sfp.pdf.

26. *See, e.g.*, Jay Fitzgerald, *Bankrupt Jobless Insurance Fund Borrows From Feds*, BOSTON HERALD, Feb. 27, 2010, *available at* http://www.bostonherald.com/business/general/view.bg?articleid=1235816; Allison Sherry, *Long Delays in Colorado Food Aid May Spur Another Lawsuit*, DENVER POST, Feb. 1, 2010, *available at* http://www.denverpost.com/keefe/ci_14307816.

27. Bob Herbert, *An Uneasy Feeling*, N.Y. TIMES, Jan. 4, 2010, *available at* http://www.nytimes.com/2010/01/05/opinion/05herbert.html.

These figures stand in stark contrast to those of the late 1990s and early 2000s. This period saw a marked decrease in the disbursement of welfare filings,[28] and the national unemployment rate generally hovered around between four- and five-percent.[29] Further, the 1990s were marked by periods of governmental surplus, as well as other markers of fiscal health and financial prosperity, such as significant expansion in the housing market and robust economic growth across sectors.[30] Nonetheless, by the end of 2010, "the net worth of American households—the value of their houses, retirement funds and other assets minus debts—has [declined] when adjusted for inflation, compared with sharp gains in every previous decade since data were initially collected in the 1950s."[31]

On the positive side, there is some indication that the American employment market is starting to improve, and that the worst of the economic crisis may be behind us.[32] Labor economists have posited that the worst effects of the recession upon the labor market are in the past. The most recent job figures released by the Department of Labor ("DOL") seem to support this claim. These figures indicate that hiring may already have resumed on the fringes of the economy, and while jobs are still being shed at the rate of 80,000 per month, the unemployment rate has begun to stabilize and the number of jobs lost on a monthly basis has begun to level off.[33] Firms in the United States have also begun

28. *See, e.g.*, Phillip M. Dearborn, *Welfare Rolls No Longer in Rapid Decline*, Brookings Institution, May 2002, available at http://www.brookings.edu/~/media/Files/rc/reports/2002/05washington_dearborn/welfarerolls.pdf (noting that in the District of Columbia, "Area caseloads dropped dramatically after the enactment of the Temporary Assistance for Needy Families (TANF) program in 1996, from 47,730 to 22,994 in 2000"); Robert E. Thompson, *Heeding the Cry; As Welfare Rolls Decline, Church Charities Are Answering More Pleas From Area's Poor*, WASH. POST, Aug. 23, 1997, at B6 ("Although welfare rolls have been declining nationally, church officials say the crackdown on receiving certain benefits, particularly food stamps, has put many people here in dire straits.").

29. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Labor Force Statistics from the Current Population Survey*, *available at* http://www.bls.gov/news.release/union2.toc.htm (last visited Feb. 6, 2010).

30. *Clinton Predicts Bigger Budget Surplus*, CHI. TRIB., Jan. 7, 1999; *Rise in Key Interest Rate Shouldn't Slow Housing Market, Experts Say Economists Had Already Forecast Higher Mortgage Rates. The Fed Only Accelerated the Rise, They Say*, PHILA. INQUIRER, Feb. 11, 1994; Penny Singer, *A Cool Housing Market Heats Up*, N.Y. TIMES, Sep. 6, 1992, *available at* http://www.nytimes.com/1992/09/06/nyregion/a-cool-housing-market-heats-up.html?pagewanted=1.

31. Irwin, *supra* note 1.

32. *See, e.g.*, Luca Di Leo, *US Economy Still Recovering Slowly*, WALL ST. J., Jan. 13, 2010; *Richmond Fed President Sees Economy Improving*, RICHMOND TIMES-DISPATCH, Jan. 15, 2010.

33. Jane M. Von Bergen, *New Unemployment Claims Continue to Fall*, PHILA. INQUIRER, Jan. 8, 2010. *But see* Bob Willis & Courtney Schlisserman, *Shrinking U.S. Labor Force Keeps Unemployment Rate from Rising*, BLOOMBERG BUS. WEEK, Jan. 9, 2010, *available at* http://www.businessweek.com/news/2010-01-09/shrinking-u-s-labor-force-keeps-unemployment-rate-from-rising.html (noting that decrease in national unemployment rate is on account of the number of discouraged workers no longer actively seeking employment).

making increased numbers of temporary hires, which in the aftermath of previous economic crises, has signaled employers' willingness to begin making permanent hires once again.[34] Furthermore, since the beginning of the current year, unemployment insurance filings have begun to decrease slightly, and economists have predicted that the current elevated unemployment figures will begin to decline in late 2010 or early 2011.[35]

B. Historical Considerations

An examination of the contours of the American employment market over a longer term, from roughly 1950 on, shows a recent weakening in quality of life measures. Over the past few decades, American salaries have not kept pace with inflation, and workers have been required to cover previously employer-subsidized expenses out of their own pockets, such as healthcare and retirement expenses.[36] This period has also been marked by other troubling indicators, such as a rising Gini coefficient, which measures a nation's domestic income disparities, and in the American context, signifies an ever-shrinking middle class.[37]

Another important factor in the development of the American labor market over the past half-century has been the role of organized labor. In the years since the American labor market first became an industrialized economy, the nation's job market has become increasingly globalized and interconnected, which has in turn resulted in an exponentially more complex employment landscape domestically. In turn, these events have resulted in significant changes in the size and structure of American labor. At the start of the twentieth century, the nation's workforce was primarily comprised of rural, unskilled workers in a "commodity-based" economy revolving around manufacturing and agriculture; whereas in the twenty-first century, the nation's workers have predominantly tended towards greater urbanization and education, with a focus on "service-

34. *Unemployment Hovers at 10%; 85K Jobs Lost*, CBS NEWS: BUS., Jan. 8, 2010, *available at* http://www.cbsnews.com/stories/2010/01/08/business/main6071140.shtml?tag=cbsnewsLeadStoriesAreaMain;cbsnewsLeadStoriesHeadlines ("Firms are still being very cautious, so the first thing they are turning to aren't full-time employees, but temps. . . . Companies have added about 166,000 temp workers since July.").

35. Shobhana Chandra & Alex Tanzi, *U.S. Unemployment Rate to Reach 9.4%, Survey Shows*, BLOOMBERG, March 10, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid= aWHdSE69tNtk; Krishna Guha, *US Data Hit Hopes of Early Rebound*, FIN. TIMES, Jan. 9, 2010.

36. *See, e.g.*, Patrice Hill, *In U.S., The Rich Get Richer While the Poor Tread Water*, WASH. TIMES, July 31, 2005, *available at* http://www.walkersands.com/Washington-Times-July-31-2005.htm.

37. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES – INCOME EQUALITY, *available at* http://www.census.gov/hhes/www/income/histinc/ie6.html.

based" labor.[38]

Perhaps one of the most fundamental differences between the contemporary American labor market and that of fifty years ago is that the degree of union activity in the workplace has dramatically decreased. In the 1950s, over a third of the nation's private-sector workers were unionized. [39] This figure fell to under a quarter of workers in the 1980s and in the year 2009, totaled a mere 7.6%.[40] It is difficult, and ultimately, beyond the scope of this Article's thesis, to evaluate the true effect this development has played in the development of the American labor market—but without question, its impact has been significant.

C. Contemporary Developments

In recent months, the U.S. Congress has passed further anti-discrimination workplace protections and that body is expected to enact more such legislation in the immediate future. Among these reforms are, the Employment Non-Discrimination Act ("ENDA"),[41] which would expand the protections of Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation; the Lilly Ledbetter Fair Pay Act,[42] which expanded claim eligibility under the ADEA; and expansions of COBRA health care coverage for the unemployed.[43] In addition, Congress and the Obama administration have unrolled several more direct relief measures for affected workers in response to the current recession, including extending the term for unemployment insurance claims, job creation measures through the stimulus spending of the American Recovery and Reinvestment Act of 2009 ("ARRA"),[44] a renewed emphasis on investment in infrastructure and construction projects, and grants and tax credits for businesses taking on new workers that focus on clean energy initiatives.[45]

Accordingly, the present American employment market appears to be in a state of flux. At present, the job market in the United States sits at the crossroads between the current financial crisis and an increasingly

38. Paul Kantor, *The Dependent City*, 22 URB. AFF. REV. 493 (1987).

39. Peter Kirsanow, *Employee No Choice Act*, NAT'L REV., March 23, 2009, at 25.

40. *Id.*

41. Employment Non-Discrimination Act, H.R. 2015 (2009).

42. Lilly Ledbetter Fair Pay Act of 2009, § 706(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(e)(3)) (2009).

43. COBRA benefits were expanded pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

44. *Id.*

45. *Obama on jobs: The road to recovery is never straight*, USA TODAY, Jan. 8, 2010, *available at* http://content.usatoday.com/communities/theoval/post/2010/01/obama-on-jobs-the-road-to-recovery-is-never-straight/1.

complex and far-reaching federal regulatory and wrongful discharge regime. Nonetheless, despite all of these recent developments, the American employment market is still, to a great degree, the product of the common law doctrines that have followed the American legal system from the British common law. As will be outlined in Section II below, the American common law has also developed several wrongful discharge doctrines, which were created in response to historical changes in the American common law employment-at-will rule—a system that presently operates in a very different context than it was originally conceived.

III. WRONGFUL DISCHARGE

All wrongful discharge doctrines, whether arising under common law or statute, have been developed within the specific context of the American employment-at-will scheme, which governs normal, non-contract vertical employment relationships in the United States.[46] In effect, the employment-at-will rule states that either party may terminate an employer-employee relationship at any point during the employment relationship. An at-will employee is not obligated to maintain his employment for any specific duration of time, and likewise, his firm is not required to retain an individual worker for a set period of time.[47] Accordingly, pursuant to this employment-at-will scheme, any statute or common law rule that creates an action for wrongful discharge doctrine operates as an exception to this rule, since an employer's ability to terminate employees is constrained by these various restrictions.

A. The Employment-At-Will Rule

First, a brief word about the history of the employment-at-will doctrine will better explain its role in American employment law jurisprudence. Initially, the employment-at-will scheme developed in the context of the master-servant relationship of feudal England.[48] In juxtaposition to modern vertical employment relationships, this doctrine

46. To clarify, it is widely held that an at-will employment relationship *is* actually a form of employment contract—one that is, with very fluid, short-term length component. *See, e.g.*, Richard Epstein, *In Defense of Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Richard Harrison Winters, *Note: Employee Handbooks and Employment-at-Will Contracts*, 1985 DUKE L.J. 196 (1985). While it is not the objective of this Article to argue for or against this proposition, for the sake of clarity and readability this discussion will not reference employment-at-will relationships as contracts, so as not to conflate discussions of "traditional" employment contracts and at-will employment contracts.

47. *See generally* FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

48. Joseph DeGiuseppe, Jr., *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981).

was "primarily based on status rather than contract," particularly a serf's subordinate socio-political position relative to his lord.[49] As the feudal model began to erode, concepts of contract law eventually started creeping into employment relationships, including a contract-based presumption that the default employment practice involved a contract with a one-year duration. Related to this customary presumption, other customs developed, including the practice of providing notice prior to termination, along with an exception for immediate termination on grounds of just cause.[50] This employment scheme was imported into the United States during the Colonial period, and throughout the ensuing centuries, the employment-at-will scheme has been implemented in fifty American jurisdictions, including the District of Columbia.[51] Notably, however, while some remnants of these early customs remain to this day—such as the practice of providing employees with two weeks notice prior to termination—the contractual presumption of one-year employment has, for the most part, evaporated.[52]

Considering this history, the underlying rationale traditionally cited for the perpetuation of the employment-at-will scheme is somewhat surprising: freedom of contract. Because the at-will system does not require the continuance of the employment for any set duration, its proponents argue that both employer and employee are placed on the same footing, since either may terminate the employment relationship for almost any reason at any time.[53] This notion has been heavily criticized by scholars, the courts, and legislatures alike;[54] however, the fact remains that the employment-at-will doctrine governs nearly all employment relationships in the United States, and despite the myriad and wide-ranging historical developments in the realm of employment law, the employment-at-will doctrine has remained largely unscathed. Nonetheless, several wrongful discharge doctrines have evolved through the common law, which mitigate the often blunt impact of the at-will scheme upon American workers in certain situations.

B. Common Law Wrongful Discharge Doctrines

Three relevant wrongful discharge doctrines have developed under the common law: the implied contract doctrine, the public policy

49. *Id.* at 4.

50. *Id.*

51. Charles J. Muhl, *The Employment-at-will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3-11.

52. DeGiuseppe, *supra* note 48.

53. Muhl, *supra* note 51, at 3.

54. *See* Tara J. Radin & Patricia H. Werhane, *Employment-at-Will, Employee Rights, and Future Directions for Employment*, 13 BUS. ETHICS Q. 113, 113–30 (2003).

doctrine, and the covenant of good faith and fair dealing.

1. Implied contract doctrine

The implied contract doctrine, which provides that the representations and assurances employers make to employees such as those found in employee handbooks, can form the basis for employment contracts, is the first common law wrongful discharge doctrine this Article will consider. As indicated in Chart 1 below, this doctrine is recognized in thirty-eight jurisdictions. Its scope, however, varies by jurisdiction, with regard to whether a firm's oral assurances may form the basis of an implied contract or whether its application is confined exclusively to written representations.

CHART 1[55]

Jurisdictions Recognizing the Implied Contract Doctrine

Alabama	●	Kentucky	●	North Dakota	●
Alaska	●	Louisiana		Ohio	●
Arizona	●	Maine	●	Oklahoma	●
Arkansas	●	Maryland	●	Oregon	●
California	●	Massachusetts		Pennsylvania	
Colorado	●	Michigan	●	Rhode Island	
Connecticut	●	Minnesota	●	South Carolina	●
Delaware		Mississippi	●	South Dakota	●
District of Columbia	●	Missouri		Tennessee	●
Florida		Montana		Texas	
Georgia		Nebraska	●	Utah	●
Hawaii	●	Nevada	●	Vermont	●
Idaho	●	New Hampshire	●	Virginia	
Illinois	●	New Jersey	●	Washington	●
Indiana		New Mexico	●	West Virginia	●
Iowa	●	New York	●	Wisconsin	●
Kansas	●	North Carolina		Wyoming	●

TOTAL	38

The implied contract doctrine is most often utilized to enforce provisions of workplace handbooks and policy statements, as it makes employers' assurance to employees enforceable and contractually binding.[56] Frequently, these representations are found in statements from employee handbooks, providing that an employee is only subject to termination for just cause. Other common provisions that have been found to form the bases for implied contracts are those that provide workplace disciplinary procedures,[57] an employer's positive evaluation of an employee's performance,[58] or even when circumstantially, an employee reasonably concludes that he will remain in his position on the grounds of his "longevity of service, regular raises, promotions, oral

55. *Id.* at 5; David J Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Update, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (1996).

56. Muhl, *supra* note 51, at 7–10; FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8, at 174.

57. FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8, at 174.

58. *Id.*

assurances of continued employment or lack of meaningful criticism" by the firm.[59]

2. Public policy doctrine

Next, many American jurisdictions recognize a common law public policy wrongful discharge doctrine which prohibits employers from terminating workers on grounds that would violate well-settled policies of the state.[60] This doctrine typically applies to cases where an employee is terminated for refusing to commit illegal acts or where an employer terminates a worker for exercising a legally-protected right.[61] As indicated in Chart 2 below, the public policy wrongful discharge doctrine is recognized in the vast majority of American jurisdictions—forty-three in total.

CHART 2[62]

Jurisdictions Recognizing the Public Policy Doctrine

Alabama		Kentucky	●	North Dakota	●
Alaska	●	Louisiana		Ohio	●
Arizona	●	Maine		Oklahoma	●
Arkansas	●	Maryland	●	Oregon	●
California	●	Massachusetts	●	Pennsylvania	●
Colorado	●	Michigan	●	Rhode Island	
Connecticut	●	Minnesota	●	South Carolina	●
Delaware	●	Mississippi	●	South Dakota	●
District of Columbia	●	Missouri	●	Tennessee	●
Florida		Montana	●	Texas	●
Georgia		Nebraska		Utah	●
Hawaii	●	Nevada	●	Vermont	●
Idaho	●	New Hampshire	●	Virginia	●
Illinois	●	New Jersey	●	Washington	●
Indiana	●	New Mexico	●	West Virginia	●
Iowa	●	New York		Wisconsin	●
Kansas	●	North Carolina	●	Wyoming	●

TOTAL	43

59. *Id*. at 138 (California).
60. Muhl, *supra* note 51, at 4.
61. *Id.*
62. *Id.* at 5; Walsh & Schwartz, *supra* note 55.

While this doctrine is recognized in all but eight states, its scope varies by jurisdiction—some jurisdictions limit the application of the public policy wrongful discharge doctrine exclusively to cases relating to policies based upon constitutional, statutory, or administrative grounds—while others, in addition to recognizing the policies found in these traditional sources, also look to aims of public policy more broadly.[63] This jurisdictional split owes to the fact that each state develops its statutory and constitutional policies independently.

3. Implied covenant of good faith and fair dealing

Finally, as laid out in Chart 3 below, the doctrine of implied covenant of good faith and fair dealing ("implied covenant") is recognized in eleven U.S. jurisdictions. Under the implied covenant, "the parties are required to conduct themselves in an honest manner and not to take unconscionable advantage of the other party in executing and entering into" a vertical employment relationship.[64]

63. Muhl, *supra* note 51; FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

64. STELLA VETTORI, THE EMPLOYMENT CONTRACT AND THE CHANGED WORLD OF WORK, 151 (2007).

CHART 3[65]

Jurisdictions Recognizing the Covenant of Good Faith Doctrine

Alabama	●	Kentucky		North Dakota	
Alaska	●	Louisiana		Ohio	
Arizona	●	Maine		Oklahoma	
Arkansas		Maryland		Oregon	
California	●	Massachusetts	●	Pennsylvania	
Colorado		Michigan		Rhode Island	
Connecticut		Minnesota		South Carolina	
Delaware		Mississippi		South Dakota	
District of Columbia	●	Missouri		Tennessee	
Florida		Montana	●	Texas	
Georgia		Nebraska		Utah	●
Hawaii		Nevada	●	Vermont	
Idaho		New Hampshire		Virginia	
Illinois	●	New Jersey		Washington	
Indiana		New Mexico		West Virginia	
Iowa		New York		Wisconsin	
Kansas		North Carolina		Wyoming	●

TOTAL	11

The application of the implied covenant doctrine varies from state to state, with roughly half of the relevant jurisdictions recognizing a manifestation of the doctrine that requires "just cause" to terminate employees, with the other half requiring that terminations may not be made maliciously or otherwise with bad-faith.[66] This variability is compounded by the fact that amongst the remaining forty states that do not recognize the implied covenant doctrine, the vast majority of courts in these jurisdictions have explicitly rejected the adoption of this doctrine.[67]

65. Muhl, *supra* note 51, at 5; Walsh & Schwartz, *supra* note 55.
66. Muhl, *supra* note 51, at 10.
67. *Id*.

C. Statutory Wrongful Discharge Doctrines

Over the course of the past 100 years, particularly during the second half of the century, a wide raft of federally-enacted legislative wrongful discharge schemes have been put in place, which are fundamentally at odds with the common law conception of employment-at-will and serve to limit a firm's ability to otherwise freely terminate employees. In this regard, Congress has proscribed workplace discrimination based on various protected grounds including *inter alia*, race, color, national origin, sex, or religion,[68] age,[69] disability,[70] gender,[71] genetic information,[72] sickness or medical condition,[73] and financial status.[74] Other federal statutes have also been enacted which prevent termination based on retaliation or on other protected grounds, such as the Employee Retirement Income Security Act of 1974 ("ERISA"),[75] the Fair Labor Standards Act ("FLSA"),[76] and various other federal Whistleblower Protection statutes.[77] As a group, this statutory wrongful discharge regime operates on much the same theoretical basis as the common law public policy doctrine, in that it provides employees with a legal remedy when termination or other adverse workplace actions produce outcomes that are inconsistent with important public policy aims or that are otherwise deemed inappropriate in contemporary society.

Merely inventorying the myriad federal and state wrongful discharge regimes that have been enacted over the past fifty-odd years would not serve the objectives of this Article, and would require a protracted, banal, and ultimately futile cataloguing of all the relevant legislative developments. Accordingly, this Article's treatment of this topic will examine a representative wrongful discharge statute, Title VII of the Civil Rights Act of 1964, to discuss the features of statutory wrongful discharge doctrines more generally. Title VII provides an appropriate proxy for this class of legislation not only because it provides the basis for the most commonly-litigated claims related to employment, but also because Title VII provides the most wide-ranging workplace anti-

68. Civil Rights Act of 1964, 42 U.S.C. § 21 (2008).

69. Age Discrimination Employment Act of 1967, 29 U.S.C. §§ 621–34 (2008).

70. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2008).

71. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

72. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 112 Stat. 881 (2008).

73. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

74. Consumer Credit Protection Act, 115 U.S.C. § 1674(a) (2006).

75. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 105 (2006).

76. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2006).

77. *See, e.g.*, Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(c) (2006); Major Fraud Act of 1988, 18 U.S.C. § 1031 (2006) (amended 1989); False Claims Act, 31 U.S.C. § 3729 \ (2006).

discrimination regulation on the bases of race, color, national origin, sex, or religion.[78]

Under Title VII, an employee that allegedly faces workplace discrimination may bring several types of claims under a number of different theories, provided that certain guideline requirements are met, such as filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and abiding by timing and filing periods.[79] If the EEOC chooses not to initiate an investigation of its own, a prospective plaintiff is issued a "Right to Sue" letter, which enables that individual to bring suit against the employer or firm that allegedly subjected him or her to illegal discrimination.[80] In certain cases, even if a plaintiff can state a valid prima facie claim of discrimination in violation of Title VII, a firm may be able to avoid liability by demonstrating an affirmative defense.[81] However, if a plaintiff is able to state a claim for a violation of Title VII by a preponderance of the evidence,[82] and the defendant employer is unable to shelter itself under any relevant affirmative defense, a successful plaintiff is entitled to a wide array of remedies, such as front pay, back pay, hiring, promotion or reinstatement, attorneys' fees and court costs, pain and suffering, mental anguish, injunctive relief, and punitive damages.[83]

78. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

79. 42 U.S.C. § 2000(e) (2006).

80. *Id.* The courts have recognized a wide range of different employment discrimination claims pursuant to Title VII, including those for hostile work environment, tangible employment action (*e.g.*, termination or failure to promote), s*ee, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); retaliation, *see, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); quid pro quo harassment, *see, e.g.*, Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988); disparate impact (where one protected group is subject to different workplace conditions or terms than another), *see, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 338 (1977); disparate treatment (where an employer's actions are pretext for discrimination), *see, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); and mixed motive cases (where an employer's workplace actions are motivated in part by discriminatory animus), Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989).

81. One of the most commonly asserted defenses is the *Faragher/Ellerth* defense in the case of hostile work environment claims, which focuses on the employer's exercise of due care and reasonableness in preventing discrimination, by implementing, for example, anti-harassment policies and effective reporting measures. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

82. Section IV, *infra*, will also discuss the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, which governs pretext-based adverse employment action discrimination claims. 411 U.S. 792, 804 (1973).

83. 42 U.S.C. § 2000(e) (2006); The Civil Rights Act of 1991, 42 U.S.C. § 1981(b) (2006) (expanding the types of remedies available to victims of discrimination under Title VII).

D. Contract-Based Employment

Despite the fact that the employment-at-will doctrine governs employment relationships in forty-nine American states and the District of Columbia, employers and employees in every jurisdiction are nonetheless capable of bypassing this common law scheme by entering into employment through express contract. By entering into contractual employment relationships, the parties are able to specify key terms of the arrangement, such as the provision of workplace conditions, the term of employment, non-competition provisions, notice provisions, and proper grounds for termination.[84] Additionally, when compared to the wide array of damages that parties may seek pursuant to statutory wrongful discharge doctrines, like Title VII, damages sought pursuant to a breach of contract claim are traditionally limited to compensatory, incidental and consequential damages.[85] Express contracts also commonly contain another feature which limits significantly the scope and costs of litigation: mediation or arbitration clauses. These clauses serve as private alternative dispute resolution mechanisms to the parties, and their existence in employment contracts may help keep work-related disputes out of the public court system.[86]

In the contemporary American employment market, employees working under individual work contracts are by far the exception to the norm, and contract-employees have traditionally been thought of as belonging to a relatively confined number of positions—highly-compensated executives, short-term laborers, and specialty workers. As noted above, this was not always the case.[87] Under the English common law, an employment contract was presumed, as Blackstone noted, "[i]f the hiring be general, without any particular time limited, the law

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84. Again, as mentioned *supra* note 46, employment-at-will is technically a "contractual" relationship as well. However, for the reasons related to clarity of terminology outlined in that note, "contractual employment relationships" in this Article refer to those governed by discrete, written, and pre-negotiated contracts, rather than those arising under the at-will rule.

85. As Thorpe and Bailey have commented:

> The object of awarding damages to the wronged party is to put him in the position he would have been in if the contract had been performed. The purpose is therefore to compensate the wronged party and not in any sense to punish the party in breach. It follows that a party can break a contract without fear of being taken to court if he compensates the other party for the loss or damage he suffers as a result. Such breaches are in fact common-place.

CHRIS P. THORPE & JOHN C. L. BAILEY, COMMERCIAL CONTRACTS: A PRACTICAL GUIDE TO DEALS, CONTRACTS, AGREEMENTS, AND PROMISES, 165 (1999).

86. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2003).

87. *See supra* Section III.A.

construes it to be a hiring for a year."[88] Although this presumption was exported from the British to the American common law, over time, it was eventually reduced in duration, depending on trade custom and payment practices, to month-long or quarter-year terms, and ultimately yielded the present term-less and condition-less employment-at-will scheme.[89]

On a theoretical level, "[e]xperience suggests—and most Western economists believe—that decentralized economic authority such as that found in market economies encourages innovation and promotes efficient resource use."[90] In other words, express individual employment contracts are able to provide a more effective allocation of workplace resources than blanket, legislative or common law doctrines because contracts provide private, decentralized, and ultimately customizable arrangements that can be uniquely tailored to each employment situation. Wrongful discharge doctrines on the other hand, are in essence, judicially (and congressionally) developed and administered—the terms of which are confined to the dictates of precedent or statutory language. In addition, contract law provides a more efficient means of allocating employment-related resources than the common law and statutory doctrines because pursuant to contract, the parties are able to better communicate with regard to their objectives during the course of their vertical employment relationship. This communicative advantage has important certainty-based implications for the parties to employment relationships—employment pursuant to an express employment contract is far less likely to implicate violations or alleged violations of an implied contract, certain public policies (such as equity or fairness), an implied covenant of good faith and fair dealing, and in some cases, antidiscrimination statutes.

88. 1 WILLIAM BLACKSTONE, COMMENTARIES, *425.

89. Gary E. Murg & Clifford Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 334 (1982); *see also* J. CHITTY, LAW OF CONTRACTS 533; Clyde W. Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082 (1983). Some scholars argue that the deterioration of the one-year contractual presumption is rooted in a fundamental misinterpretation of the English common law rule. *See Summers*, *supra* note 89, at 1083 n.7.

90. Paul R. Milgrom, *Employment Contracts, Influence Activities, and Efficient Organization Design*, 96 J. POL. ECON. 42, 42 (1988).

IV. INTERPLAY OF CONTRACT AND EMPLOYMENT-AT-WILL

In practice, express employment contracts serve to infuse certainty into an otherwise relatively ambiguous and indeterminable employment-at-will scheme, particularly in light of the statutory and common law wrongful discharge doctrines outlined above. Common sense dictates that written, pre-arranged terms inevitably provide greater reliability, security, and stability between the parties than any post-termination resort to common law or statute. But what is the exact nature of contract's enhanced level of efficiency as compared to that of the common law scheme?

In an effort to delineate the answer to this inquiry, this Article will proceed by comparing a contractual approach to employment to each of the wrongful discharge doctrines outlined above—both based on statute and common law. In so doing, this discussion will explore the manifestation each wrongful discharge doctrine assumes, and it will highlight these doctrines' impact in relation to those vertical employment relationships based solely upon contract. After comparing the individual wrongful discharge doctrines with contractual employment, this section will examine the superiority of employment contracts relative to the employment-at-will doctrine in general.

A. Common Law Wrongful Discharge Versus Contract

1. Implied contract

Fundamentally, when employees reasonably rely on employer assurances, the implied contract doctrine operates as a restriction upon a firm's ability under the common law employment-at-will rule to freely terminate its employees. The implied contract doctrine, when compared to the employment-at-will scheme generically, provides workers with somewhat greater certainty during the course of their employment, in that they may be able to rely on an employer's workplace assurances, at least to the extent that this assurance is provable and recognizable in that jurisdiction. These implied terms allow employees to rely upon representations made by employers regarding, for instance, the rate of compensation, grounds for termination, and conditions and expectations of employment. For these same reasons—and to an even greater degree—a written employment contract with express, pre-determined and pre-defined terms provides clarity between employer and employee.

The fundamental, if not sole, aim of contract law is to provide objective legal certainty and predictability between counterparties, by means of specificity and particularity regarding the parties' duties and obligations to one another.[91] Express, bargained-for, and tangible employment contracts necessarily provide a greater quantum of certainty. By their very nature, implied contracts may only be found to exist retroactively, after one of their purported terms has been allegedly breached and suit is subsequently brought to determine liability. Because these contracts are *implied*, the parties cannot preemptively agree to its terms or even its existence—to do so would signify the existence of an *actual* express contract. Prior to a judicial determination that an implied contract arose, an employer's assurances cannot rightly be characterized as giving rise to a contract, implied or otherwise. Accordingly, vertical employment relationships governed by actual memorialized contracts present a greater degree of specificity and particularity than those resulting from a subsequent determination of implied contract, because express employment contracts allow parties to bargain for and rely upon the previously agreed-upon terms in pursuing the employment relationship. In the case of implied contract, however, an employee typically resorts to this doctrine after she has been terminated, or subject to some other alleged breach by her employer.[92] Thus, negotiated, tangible, and written employment contracts promote greater certainty for both parties because in order to more adequately construct and interpret the provisions of any contract or purported contract, the parties must be aware of the ultimate scope of the arrangement prior to the point of alleged breach.[93]

Moreover, whereas the implied contract doctrine only provides unilateral protection for employees, express employment contracts can

91. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000) (Contracts are typically interpreted pursuant to the objective theory of contract interpretation, wherein "the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions").

92. Express contracts likewise must be subsequently determined to be supported by legal considerations, such as, *inter alia*, competency and lack of ambiguity. However, if a well-drafted, particular employment contract has been implemented, in the bulk of cases, these threshold conditions should not require the parties to expend any significant amount of resources.

93. What is more, litigation revolving around claims of implied contracts necessarily requires a greater inquiry into whether a contract can be implied in the first place. Although, during any contract litigation proceedings, trial courts must first look into the existence of a binding contract as well, this inquiry within the context of implied contracts would be far more involved, expensive, and inefficient than that involved for an actual, written contract. In the course of litigation pursuant to a claim of implied contract, courts do not examine the merits of a tangible, signed and fixed document, but instead are forced to look to distributed documents, such as manuals and guidebooks to determine the basis of any such contract.

provide bilateral protection for both employees and employers.[94] To illustrate the unilateral nature of the implied contract, an example is instructive:

> *Assume that an Employee X represents to Firm Y that he intends to remain in his position for a minimum of six months. Under the implied contract doctrine, Y would effectively have no recourse if X decides to leave his post prior to the expiration of that six month term. If however, the roles were reversed, and Firm Y makes a representation with regard to length of employment duration to Employee X, X may have grounds to bring a wrongful discharge claim on the grounds of implied contract.*

Pursuant to a written employment contract however, particularly one containing a duration provision, either party could be sued for breach if it unilaterally terminates the employment relationship prior to the duration specified. The implied contract doctrine, at least as it is currently conceived, is a one-way street. Express contracts, on the other hand, are capable of providing protective provisions for the benefit of both employer and employee.

Whether an employer's oral assurances may form the basis of an implied contract depends to a great extent upon the jurisdiction in which the employment relationship is governed.[95] While a majority of American jurisdictions—roughly seventy-five percent—recognize the implied contract doctrine, approximately half of these jurisdictions limit the doctrine's applicability exclusively to those cases involving written, rather than oral employer representations.[96] Accordingly, the implied contract doctrine has no uniform application across the United States, and even amongst jurisdictions that have adopted the doctrine, no consensus exists regarding its appropriate scope. Contract law, on the other hand, provides a highly uniform, stable, and consistent field of law. Certainly, variations across jurisdictions exist—for example, regarding competency and capacity, statutes of fraud, and merger provisions.[97] Nevertheless, contract law is a basic tenet of American legal jurisprudence, which unlike the implied contract doctrine of wrongful discharge, is recognized consistently across every jurisdiction in the

94. *See generally,* FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

95. To be clear, oral statements may form the basis for express (non-implied) contracts in most jurisdictions—dependent, of course, upon that jurisdiction's statute of frauds. An express contract, however, is not subject to the one-year limit the statute of frauds imposes.

96. Muhl, *supra* note 51.

97. *See generally* MARTIN A. FREY & PHYLLIS HURLEY FREY, ESSENTIALS OF CONTRACT LAW (2001).

United States.

Further, while express employment contracts provide greater levels of security and certainty for both parties, even if an employer and employee enter into a predetermined oral contract, barring any statute of frauds considerations, this oral contract would still ostensibly be recognized in all jurisdictions—whereas, a fair number of jurisdictions would not find an oral implied contract under any condition.[98]

Finally, express employment contracts possess a far broader scope than that belonging to most implied contracts. The implied contract doctrine applies primarily to cases involving policies found in employee handbooks and manuals.[99] This relatively narrow focus may ensure that certain workplace policies and standards are adhered to, but when compared to the potential coverage an actual employment contract is capable of providing, the implied contract offers a much more limited solution.

Pursuant to a traditional, written employment contract, parties can agree to bind themselves to virtually any contractual provision, rather than those related to general company policies, with several exceptions, such as illegality and unconscionability. Specifically, in the employment arena, express employment contracts more frequently cover other, more significant employment issues such as employment duration, compensation structure, non-competition arrangements, waivers of liability, arbitration and mediation clauses, merger clauses, and damages provisions, including liquidated, consequential and incidental damages, amongst others, both on behalf of the employer and employee.[100] While nothing in the common law explicitly precludes such a wide range of issues to be encompassed in an implied contract, their traditional application to handbooks and manuals, along with the implausibility that an employer would warrant some of these terms during the course of employment, serve to effectively limit the role that the implied contract wrongful discharge doctrine plays in ensuring fundamentally greater levels of certainty for both parties in the workplace.

2. Public policy doctrine

Unlike the implied contract doctrine discussed immediately above and the implied covenant of good faith and fair dealing discussed below, the public policy doctrine does not stand in such direct tension with contractual employment. The public policy doctrine is the most popular

98. Muhl, *supra* note 51; FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

99. FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 8.

100. *Id.*

common law wrongful discharge doctrine and is applied in all but eight U.S. jurisdictions. Two forms of the public policy doctrine exist: one implements the policy aims of state statutes, constitutions, and administrative rules; the other, applies these aims along with broader notions of public good and fairness. The reason for this difference is that public policy considerations apply as a matter of law to every vertical employment relationship, even in the event that contractual provisions exist to the contrary.[101] In this regard, employment relationships founded upon contract, like employment-at-will relationships, are similarly limited by public policy considerations.

Moreover, several features of contract law, including unconscionability, legality, and competency, complement and overlap with the public policy doctrine regardless of whether a jurisdiction pursues a broad or narrow interpretation of the public policy doctrine. This overlap can also be seen with regard to the statutory wrongful discharge regimes discussed above,[102] since the public policy doctrine works to enforce and implement the aims of statutes, constitutions, and public good alike—workplace anti-discrimination legislation would plainly fall under such a description as well. In other words, regardless of whether an employment relationship is governed by the at-will doctrine or by contract, the public policy doctrine applies to the same extent. An extended discussion, therefore, regarding the relative efficiency of the public policy wrongful discharge doctrine as compared to contractual employment relationships would be both beyond the scope, and collateral to, the objective of this Article.

3. Implied covenant of good faith and fair dealing

Amongst the three common law wrongful discharge doctrines discussed in this Article, the implied covenant of good faith and fair dealing represents the greatest departure from the employment-at-will scheme. Depending upon the jurisdiction, this doctrine may impose a *de facto* termination "for cause" system, or it may restrict a firm's termination decisions made in bad faith.[103] Indeed, because this doctrine represents such a significant divergence from the default at-will scheme, the implied covenant is only recognized in eleven American jurisdictions.[104] Despite this relatively limited coverage, a trend towards

101. Muhl, *supra* note 51, at 5.

102. *See supra* Section III.C.

103. Muhl, *supra* note 51, at 9-11; *"Employment-at-Will" - What Employers Should Know*, LABOR AND EMPLOYMENT LAW BLOG, Feb. 21, 2008, http://www.laborandemploymentlawblog.com/2008/02/employment-at-w.html (last visited Apr. 28, 2009).

104. Muhl, *supra* note 51, at 9–11.

contractual, rather than at-will employment, would better serve the interests of both employers and employees. While approximately eighty-percent of U.S. jurisdictions have rejected the notion of reading an implied covenant into at-will relationships,[105] under § 1-203 of the Uniform Commercial Code ("UCC"),[106] § 205 of the Restatement (Second) of Contracts,[107] and the law of nearly all American jurisdictions, an implied covenant of good faith is read into almost all contracts.[108]

Therefore, parties to employment contracts, regardless of whether a jurisdiction recognizes the common law implied covenant of good faith and fair dealing, are subject to a requirement of good faith in dealing with one another as contractual counterparties. On the other hand, whether good faith is required of parties in a normal at-will employment relationship depends solely upon which jurisdiction's laws apply. For example, the California Supreme Court, in discussing this same issue, commented that the covenant of good faith is a necessary and important principle because "predictability about the cost of contractual relationships plays an important role in our commercial system."[109] In further underscoring the quintessentially contractual nature of the implied covenant, the court noted: "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. . . . The covenant prevents a party from acting in bad faith to frustrate the contract's *actual* benefits."[110] A significant expansion of contract law into the American employment arena would by necessity provide greater coverage for the application of the implied covenant. In turn, the more universal application of the implied covenant of good faith would bring positive aspects of contract law to the American employment market, which would in turn, enhance certainty and predictability between the parties.

The implied covenant also ensures that parties deal with one another in good faith and that at least a modicum of honesty exists when initially entering into a vertical employment relationship. At-will employers and employees are under no overriding obligation to deal with one another in a straightforward, candid fashion absent any common law requirement of

105. Muhl, *supra* note 51.

106. U.C.C. § 1-203 (2009).

107. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

108. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559 (2006); *see also* ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 654A, at 88 (Supp. 1992).

109. Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

110. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1112, n.18 (Cal. 2000). A few jurisdictions, such as Nevada, have, however, permitted recovery for breach of the implied covenant of good faith and fair dealing in tort. *See, e.g.*, K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987).

good faith. Because of this fact, firms may freely exaggerate or misrepresent workplace conditions or terms, and employees are enabled to make other misrepresentations with regard to their qualifications, employment history, and the intended length of time they will commit to a prospective position. Good faith and honesty are necessary prerequisites to any successful agreement because, upon determining whether to enter into such a relationship, counterparties should be able to make an accurate assessment of what is being exchanged to achieve the full benefit of the agreement.

The commentary to § 205 of the Restatement (Second) of Contracts supplies an authoritative explanation for the good faith requirement in contractual interpretation and execution:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[111]

Indeed, while this section of the Second Restatement did not contemplate employment contracts specifically,[112] the above language applies just as forcefully, if not more so, to the employment context as to contracts in general. Bad faith or dishonesty by counterparties to an agreement have much the same effects on employment relationships as contracts—specifically, that the non-offending party does not receive the full benefit of the bargain made.

On a related note, even assuming no bad faith exists at the outset of a vertical employment relationship, the increased contractualization of American employment would also help avoid other certainty- and predictability-related issues—contractual incompleteness and resultant bad faith opportunism. Contractual incompleteness is an inevitable and inescapable component of every contractual transaction because "[e]ven the simplest of economic transactions can be so complex that it is practically impossible to list the entire range of outcomes and contingencies that might affect contractual performance."[113] In other

111. RESTATEMENT (SECOND) OF CONTRACTS § 205(d) (1981).

112. HENRY H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE, 6–101, (2006).

113. *See* Babil I. Al-Najjar, *Theory of Contracts: Incomplete Contracts and the Governance of*

words, even in cases where neither party enters into an employment relationship bearing the intent to mislead or deceive the other party, a contract's scope cannot cover every potential ambiguity that arise in any contract:

> The problem with contractual incompleteness is that it can lead to opportunistic behaviour. This idea of opportunism is now frequently mentioned in law and economics literature. However, like good faith, it is hard to find a universal definition of contractual opportunism. It has been described as an attempted redistribution of benefits which have already been contractually allocated.[114]

An expanded application of contract-based implied covenant of good faith would, therefore, ensure that parties do not unfairly take advantage of ambiguities in the terms of employment, such as shirking and hold-out behavior, to their benefit and the detriment of the non-offending party. A greater infusion of good faith into employment relationships would increase efficiency and certainty —

> The concept of the duty of good faith . . . is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute. The parties want to minimize the costs of performance. To the extent that a doctrine of good faith is designed to do this by reducing defensive expenditures is a reasonable measure to this end, interpolating it into the contract advances the parties' joint goal.
>
> . . . The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of such a rule.[115]

Accordingly, by imposing the affirmative duty of good faith upon both employer and employee, both parties are better able to predict the expected costs of performance and rely upon the other party's representations in making this valuation.

By entering into an employment contract on the front-end of a vertical employment relationship, the parties are therefore better able to

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Complex Contractual Relationships, Papers and Proceedings of the Hundredth and Seventh Annual Meeting of the American Economic Association Washington, DC, January 6–8, 1995, 85 THE AM. ECON. REV. 432 (May 1995).

114. J. Edward Bayley, *Good Faith in Contract: A Law and Economics Perspective*, Canterbury Economics Seminar, July 29, 2009, *available at* http://www.econ.canterbury.ac.nz/research/pdf/Paper_Bayley.pdf.

115. Market St. Assoc. Ltd. P'ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (internal citations and quotations omitted).

bargain individually for the appropriate levels of rights and obligation pursuant to the agreement. Because a covenant of good faith is read into all contracts, not just those relating to employment, the parties should be able to place more confidence in the representations and assurances the other party makes in the course of these preliminary discussions. Furthermore, the employment-based implied covenant of good faith and fair dealing is recognized as a common law doctrine in only a handful of U.S. jurisdictions, leaving the vast majority of American employers and employees without legal recourse if their counterparty misrepresents or omits material information in bad faith regarding the employment relationship.

B. Statutory Wrongful Discharge Versus Contract

1. The federal wrongful discharge regime

As noted above, federal statutes provide many important wrongful discharge regimes, such as Title VII,[116] 42 U.S.C. §§ 1981 & 1983,[117] the ADEA,[118] the ADA,[119] the Equal Pay Act,[120] GINA,[121] FMLA,[122] ERISA,[123] the FLSA,[124] and the CCPA.[125]. These statute-based doctrines apply equally to workers, regardless of whether their employment is pursuant to contract or the common law at-will scheme.[126] In other words, the existence of an employment contract typically will have a rather minor impact upon these doctrines which are imposed by statute.[127] In this regard, considering that the objective of this Article is

116. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

117. 42 U.S.C. §§ 1981 & 1983 (2006).

118. Age Discrimination Employment Act of 1967, 29 U.S.C. §§ 621–34 (2006).

119. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

120. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

121. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 112 Stat. 881 (2008).

122. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

123. Employee Retirement Income Security Act, 29 U.S.C. § 105 (2006).

124. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2006).

125. Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (2006).

126. These federal statutes are also accompanied by a similar, and often more expansive, regime of state legislation, which likewise proscribes employers from making employment decisions based upon various protected grounds. *See, e.g.*, *Lazar v. Superior Court*, 909 P.2d 981 (Cal. 1996) (holding that California Labor Code § 970 created cause of action in tort for fraudulent inducement, specifically false statements inducing an employee's relocation); Bratcher v. Sky Chefs, Inc., 783 P.2d 4 (Or. 1989) (recognizing claims for wrongful constructive discharge).

127. Still, some greater levels of protection may be afforded to workers in small businesses (those employing fewer than fifteen employees) under the public policy doctrine as compared to federal legislation, because the common law public policy doctrine is not required to have a jurisdictional commerce clause hook. Nonetheless, state statutory wrongful discharge and anti-discrimination regimes are not subject to such limitations, so even workers that are not eligible to

to explore the ways in which contractual employment would help serve the contemporary American labor market, it would be inaccurate to compare the attributes of federal wrongful discharge statutes with those belonging to contractual employment as if these two doctrines provide competing alternatives to one another.

2. Playing defense through contract in title VII claims

Nonetheless, in certain significant ways, a well-drafted employment contract may help discourage, prevent, or at a minimum, refocus litigation related to alleged acts of discrimination in violation of Title VII. Again, for the reasons outlined *above*,[128] this limiting effect can be illustrated by means of a hypothetical claim alleging a discriminatory adverse employment action in violation of Title VII. In the absence of direct evidence of discrimination, a plaintiff may pursue a "pretext theory" of discrimination by using a burden-shifting framework initially set forth by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.[129] A "pretext claim" proceeds where a plaintiff, "after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination."[130] Pretext claims are some of the most common types of discrimination-based wrongful discharge actions pursued by terminated employees, particularly because discrimination can be shown in these cases without presenting any direct evidence of discrimination. Instead, plaintiffs may state their case through the *McDonnell Douglas* burden-shifting framework, which provides that:

> To demonstrate the prima facie case of sex or age discrimination under the pretext framework, the plaintiff must show that (1) she is a member of a protected class; (2) she suffered adverse employment action; (3) she was performing her job duties at a level that met her employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class. . . . If a prima facie case is presented, the burden shifts to the employer to articulate a legitimate,

pursue federal wrongful discharge causes of action may still find protection in similar doctrines under state law.

128. *See supra* Section III.C.

129. 411 U.S. 792, 802 (1973).

130. Hill v. Lockheed Martin Logistic Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (citing Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 252–53(1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807, (1973)).

> nondiscriminatory reason for the adverse employment action. Assuming the employer meets this burden of production, 'the *McDonnell Douglas* framework—with its presumptions and burdens—disappears, and the sole remaining issue [is] discrimination *vel non.*'[131]

Under this pretext framework, however, the burden shifts back to the plaintiff one last time to demonstrate "by a preponderance of the evidence that the employer's stated reasons were not its true reasons, but were a pretext for discrimination."[132] Thereafter, the plaintiff's "burden to demonstrate pretext merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination."[133]

Accordingly, in the case where a contract employee is terminated for violating the terms of the parties agreement, should that individual pursue a discrimination claim under the pretext theory a firm would have compelling, documented, and irrefutably authentic evidence at various stages of this burden-shifting framework. First, such a plaintiff would have great difficulty in stating a prima facie case of discrimination because he would likely be unable to show that he met the employer's legitimate expectation, apart from his breach of the employment contract.[134] Second, should a breaching employee manage nonetheless to establish a prima facie case of discrimination, once the burden has shifted to the employer, it should be relatively straightforward showing that the defendant employer had a legitimate, nondiscriminatory reason for the termination; namely, breach of contract, and further, that this breach provided a non-pretextual basis for termination.[135]

To be clear, despite the robust evidentiary position in which a defendant employer would find itself in the above scenario, the mere implementation of an employment contract may not always prevent discrimination litigation in all cases. Discrimination claims may be unavoidable in certain instances; however, even when such claims are brought, if the plaintiff employee's termination resulted from the breach of a valid employment contract, the ultimate focus of any related legal proceedings would not revolve around murky and time-intensive considerations regarding the employer's expectations or whether subsequent workers in that position were similarly qualified to the

131. *Id.*

132. *Id.* (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000)).

133. *Id.* (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (internal quotations omitted)).

134. *See, e.g.*, Nader v. ABC Television, Inc., 150 Fed. Appx. 54 (2d Cir. 2005) (no prima facie ADA claim).

135. *See, e.g.*, Pomroy v. Conopco, Inc., 2007 U.S. Dist. LEXIS 11323, at *4 (S.D.N.Y. Feb. 12, 2007); Hollimon v. Potter, 2009 U.S. Dist. LEXIS 57430, at *13 (S.D. Miss. July 7, 2009).

plaintiff. Instead, any litigation must concentrate on an alleged breach of contract claim because, as illustrated above, the issue of breach would be a decisive consideration under the *McDonnell Douglas* burden-shifting framework. And while contract litigation, like any litigation, is ultimately an inefficient and costly means of dispute resolution, it provides a less fact- and resource-intensive undertaking than full-scale employment discrimination litigation under Title VII.[136] This is especially true if such contracts contain arbitration or mediation clauses, which require the parties to attempt a non-judicial resolution of their claims.[137] In this way, while the broader contractualization of vertical employment relationships would not necessarily provide a bona fide alternative to statutory wrongful discharge doctrines, like Title VII, since these statutes apply to all employees regardless of contract, the wider implementation of employment contracts would nevertheless provide greater certainty and more efficiency in employment relationships. Employment contracts would accomplish the objective of keeping employment disputes out of the courts; where litigation cannot be avoided outright, the considerations and deliberations involved in such proceedings would be narrowed significantly.

V. CONCLUSION

As laid out in the preceding discussion, vertical contractual employment relationships, when compared to wrongful discharge doctrines arising both under common law and statute, provide superior certainty, predictability, and clarity than their common law at-will counterparts. Whereas the common law employment-at-will scheme has signified high levels of instability and turmoil in the American workplace, on account of its marginal protections for employers and employees alike, an increased reliance upon employment contracts, as was once the case under the common law of employment, would serve to

136. Cherly L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1482 n.27 (2002) (discussing changing corporate practices, so as to avoid "the expensive and time-consuming litigation" related to workplace discrimination). Another key indicator of the growing expense of discrimination litigation has been the "explosion of employment discrimination class action lawsuits that have been resolved through record breaking settlements. The best known of these cases [are] the $176 million settlement involving Texaco, . . . substantial settlements involving Coca-Cola ($192 million), Home Depot ($104 million), Shoney's ($105 million), Publix Markets ($81 million), and State Farm Insurance Co. ($157 million)." Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1249 (2003).

137. *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549 (2003). *See generally*, Knapp, *supra* note 86.

provide workers with greater levels of certainty and security and employers with more contained risk-coverage and binding, bilateral commitments. Certainly, while the more widespread introduction of employment contracts into the contemporary American labor market would be a positive development, it would not be a panacea for the dismal global economy and the nation's flagging employment market.

Nonetheless, in the wake of American labor's lost decade, it has become evident that significant changes must be implemented in order to better stabilize and prepare the employment market once firms once again resume hiring new employees. When these new employment relationships are formed, both parties would be wise to insist upon undertaking employment pursuant to an express contract rather than leaving their collective fates in the hands of the common law. Employment pursuant to express contract has been shown to be superior not merely because it serves as an alternative to the employment-at-will scheme, but also on the grounds that it complements common law wrongful discharge rules, like the public policy doctrine, and on account of its ability to hedge and constrain employment-related discrimination litigation. Presently, these benefits are underutilized in the American employment arena, which has worked to the detriment of both employer and employee. Nonetheless, merely increasing the incidence of employment contracts or a consequent reduction in reliance on common law employment doctrines would not ensure that the nation will never again face future periods of recession, high unemployment, or financial instability—nor for that matter, would any measure—legal, financial, or otherwise. What is certain, however, is that a substantial infusion of contract law into a greater number of American employment relationships would ensure that in the event of such tumult, as well as during times of financial prosperity, employers and employees would be better positioned to deal with these events. Thus, when American firms begin rehiring workers once again in the wake of the current recession, a greater infusion of contract law into American employment relationships would work to the benefit of employers and employees alike.