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Good Cause: California's New Exception to the At-Will Employment Doctrine

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I. Introduction

California Labor Code section 2922 provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." This absolute power of both the employer and the employee to terminate the at-will employment relationship at any time and for whatever reason is founded on the contractual concept of mutuality of obligation. This concept was first applied in employment relationships by the United States Supreme Court in Adair v. United States. It was argued in Adair that an employee could not be forced to stay in someone's employ against his will as that would be an unconstitutional act of slavery; the employee therefore had the right to terminate his employment at will. Just as the employee could not be treated as a "slave," neither could the employer; thus the Court held that the right to terminate the employment relationship at-will should be mutual and extend to the employer as well.

In the absence of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employee [sic] in his personal service any more than an employee [sic] can be compelled to remain in the personal service of another.

This concept of mutuality has been embodied in California Labor Code section 2922. Soon after the enactment of sec-

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4. U.S. Const. amend. XIII, § 1, provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . . ."
5. 208 U.S. at 175-76.
tion 2922, however, it became apparent to both the California courts and legislature that the at-will doctrine, applied in its purest form, could lead to inequitable results. Consequently, three limitations on the at-will relationship have been created through judicial and legislative action; the mere fact that a contract is terminable at-will no longer confers upon the employer the absolute right to terminate his employees. Under the first limitation, an employment relationship will not be terminable at-will if the employment contract contains an express or implied condition to the contrary. The second and third limitations forbid an employer from discharging an employee for reasons which are contrary to a specific statutory provision or to public policy.

Prior to 1980 and three California appellate court decisions, there existed in this state only these three exceptions to the at-will doctrine. Through the use of an implied covenant of good faith and fair dealing in contractual relationships, however, the courts have recently fashioned a sweeping new exception to the doctrine, and have attempted to impose a “good cause” requirement for termination in at-will employment situations. The first of these three important decisions, Tameny v. Atlantic Richfield Co., only hinted at the possibility of this fourth exception. In the later case of Cleary v. American Airlines, Inc., however, the court relied upon the “good cause” requirement, in its judgment against the employer's at-will termination of the employee. In the most recent case, Pugh v. See’s Candies, Inc., the court of appeal again recognized the possible existence of the new “good

6. Such inequitable results could arise, for example, through employer coercion. If the employer could fire the employee for any reason, then the employer could force the employee to do anything he pleased, even to commit a crime, by using the threat of discharge. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1408 (1967).
cause" exception which had been formally announced by the Cleary court, but nevertheless declined to apply it, having found its decision against the employer already supported by the existing contractual exception.

Never before have the California courts limited an employer's power to terminate at-will employees without some compelling public policy or statutory or contractual consideration. While these three recent cases do not conclusively hold that this "good cause" exception exists such that an employer would not be able to terminate any employment relationship without good cause, the courts' language clearly suggests that future judicial decisions may in fact so hold. If accepted by the California Supreme Court as precedent in California, this new exception will effectively repeal Labor Code section 2922 and impose a "good cause" standard on the employer's traditional freedom of contract. This recently manifested court concern for the employee is unnecessary. The courts have seemingly ignored, if not abandoned, the rights of the employer to not only freely contract but also to employ whomever he chooses.

This comment will begin by tracing the development and application of the at-will employment relationship and the three well-established exceptions to that relationship. It will then discuss the new "good cause" exception, announced by the California appellate courts, this exception's application, and its potential impact. In particular, the comment will examine the employer's rights in at-will employment relationships as affected by the new "good cause" exception and will argue that the exception violates the employer's due process rights. Lastly, the comment will conclude that the courts have improperly usurped the legislature's function by fashioning new law in the guise of an "exception" to existing law.

II. THE AT-WILL EMPLOYMENT DOCTRINE

A. The Nature of the At-Will Doctrine

The concept of "mutuality of obligation" is the basis for the at-will employment doctrine established by the United States Supreme Court in Adair v. United States.\(^\text{13}\) Under this concept an employee is never presumed to engage his services

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\(^{13}\) 208 U.S. 161 (1908).
permanently. It would be against public policy to presume an employee would cut himself off from all chances of improving his condition. If the employment contract does not permanently bind the employee then it cannot bind the employer; there would be lack of "mutuality." The California courts have concurred with this view which has been codified in California Labor Code section 2922. Employment at-will enables either party, the employer or the employee, to terminate with or without cause even in the presence of ill will or an improper motive. The employer, unlike the employee, however, has certain well-defined limitations, not explicit in the statute itself, placed on his right to discharge which have provided the employee with considerable protection against termination.

B. Limitations on the At-Will Doctrine: Protecting the Employee

1. The Contract Exception

If a contract for permanent employment contains a condition, express or implied, that contradicts the at-will nature of the agreement, then the employment cannot be terminated at the will of the employer. The employee, on the other hand, is still free to quit his employment at any time as it still qualifies as an at-will relationship. In California there are two such contract conditions which will cause an employment contract to be terminable only for good cause. The first such condition is the existence of "independent consideration;" the

17. Marin v. Jacuzzi, 224 Cal. App. 549, 553-54, 36 Cal. Rptr. 880, 883 (1964) (presence of ill will or improper motive will not destroy an employer's right to discharge at-will employee).
18. "[P]ermanent employment ... is interpreted as a contract for an indefinite period terminable at the will of either party, unless it is based on some consideration other than the services rendered." Ruinello v. Murray, 36 Cal. 2d 687, 689-90, 227 P.2d 251, 253 (1959).
second is an express or implied agreement by the parties that the employee may be terminated only for good cause.  

a. "Independent Consideration." Under the first contract condition, in order for an employment relationship not to be terminable at the employer’s will, the contract must be supported by some consideration independent of and in addition to the services to be rendered by the employee. This independent consideration is considered sufficient to eliminate the employer’s right to discharge the employee at his will. As an example, if the employer has said, "in consideration of [your] purchasing [a certain automobile,] we are offering you employment. . . . This employment is to be steady so long as your services are satisfactory."  

The purchase of the car by the employee is the independent consideration and is sufficient to bind the employer to his promise to terminate only if the employee’s services prove unsatisfactory. If, on the other hand, the same promise not to terminate except if services prove unsatisfactory had been made by the employer but the employee had not purchased the car, there would be no independent consideration and the employment would be considered terminable at-will.

The courts have recently held that it is not their function to question the adequacy of the consideration given by the employee. Therefore, if a contract expressly limits the employer’s power to terminate his employees, the employee’s services alone will be consideration enough to support the employee’s claim to wages, and also to supply the required “independent consideration” necessary to bind the employer to the contract’s termination terms. In the previous example then, even if the employee had not purchased the automobile, his services alone would now be viewed as sufficient consideration to bind the employer to his promise to terminate only for unsatisfactory work. It is important to note, however, that in order for this exception to apply, there must be an express contractual agreement as to the conditions which would just-
tify termination. Consequently, referring again to the above example, if the employer had not expressly promised that he would terminate only for "unsatisfactory work," all of the independent consideration in the world would not have diminished the employer's right to discharge at-will. Only a few California courts have applied "independent consideration" as justification for holding the employer liable for wrongful discharge, and the courts were usually reluctant to do so "despite unusually persuasive factual situations."  

b. Express or Implied Agreement Between the Parties. The second condition in California which causes an employment contract to be terminable by the employer only for good cause, is an express or implied agreement between the parties to that effect regardless of the existence of "independent consideration." If an employment contract has no specified term as to its duration, it is presumed to be an at-will contract.  

If a term or terms of the contract expressly or impliedly contradict this at-will presumption, then the employment will no longer be considered terminable at-will. For example, if the employment contract provides that employment will continue only as long as the employee properly conducts the business, the courts have readily found that a "good cause" provision has been placed into the contract. The employer is consequently precluded from terminating except for good cause. In another case the employer assured the employee that she would only be terminated for good cause, specifically, if she failed to perform her functions and assignments. The court held that even if the employer was in good faith dissatisfied with the employee's work, he could not discharge her, as the contract specifically entitled him to discharge the employee only if she "failed to perform her function and assignments." In the above examples, the contract itself made the employment terminable only for good cause. In other words,


27. Id.
even though a contract technically may be "at-will," if specific terms of the contract indicate otherwise, the courts will ignore the at-will status and enforce those terms.

Moreover, in making its determination of the nature and scope of the contractual agreement, the court will not only look to the contract's express language but will also look for implied contractual terms. For instance, if a management policy provides that the employer shall rehire from those employees previously laid off, or it provides specific procedures for adjudicating employee disputes, and the policy is intended to benefit the employees and is not "mere management guidelines," that policy will become a part of the contract. Likewise, any positive inducement that may be given by an employer to obtain his employee's employment acceptance or continuance will also be considered as part of the employment contract.

2. The Statutory Exception

Under this exception to the at-will doctrine, an employer is forbidden from discharging an employee for reasons which are contrary to statutory law. Through this exception, an employee's legal rights are protected. The California Legislature, by statute, has expressly limited the employer's right to discharge an employee for a variety of reasons including race, sex, religion, age, and political affiliation. Additionally, an employer has no right to discharge an employee when that
employee does any of the following: asserts his civil rights, including participation in elections and service as a juror or witness at a trial; seeks protection of the minimum wage laws; or refuses to perform work under unsafe conditions. The above examples illustrate how the legislature, by express statute, has curtailed an employer's right to discharge at-will.

3. The Public Policy Exception

The third exception to the at-will doctrine prohibits an employer from discharging an employee for reasons which are contrary to public policy. It is based on a "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 . . . ." The first major case in California which dealt with this exception was Petermann v. International Brotherhood of Teamsters. There, an employee was discharged when he refused to commit perjury on his employer's behalf. The court imposed liability on the employer, finding it to be against public policy to discharge an employee for that employee's failure to commit a crime. Later, in furtherance of this exception, the California courts held that discharging an employee "solely because of his membership or activity in a

33. CAL. LAB. CODE § 98.6(a) (West Supp. 1983) provides that no person shall discharge or discriminate against any employee because such employee filed any bona fide complaint or caused to be instituted any proceeding relating to his rights, or has testified or will testify in any such proceeding on behalf of himself or others of any rights afforded him.

34. CAL. ELEC. CODE § 1655 (West 1977 & Supp. 1983) provides that no person shall be suspended or discharged from any service or employment because of absence while serving as an election officer on election day.

35. CAL. LAB. CODE § 230 (West 1971 & Supp. 1983) provides that no employer shall discharge or discriminate against an employee for taking time off to appear in court as a witness or to serve on an inquest or trial jury, if reasonable notice is given to the employer that he is required to appear in court.

36. CAL. LAB. CODE § 1197 (West 1971 & Supp. 1983) provides that "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful." See also Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970).

37. CAL. LAB. CODE § 6311 (West Supp. 1982) provides in part: [n]o employee shall be . . . discharged for refusing to work in the performance of which this code . . . ., any occupational safety or health standard or any safety order of the division or standards board will be violated, where such violation would create a real and apparent hazard to the employee or his fellow employees.


labor union" was against public policy. Tameny v. Atlantic Richfield Co. contains the most recent expression of the public policy exception; an employee's termination for his failure to participate in a price fixing scheme, a clear violation of public policy, constituted wrongful discharge.

Through the contract, statutory, and public policy exceptions to Labor Code section 2922, the California Legislature and the courts, have considerably diminished the employer's discretion to determine those individuals whom he would employ. At least one commentator has pointed out abuses from which the employee should be protected: termination because of race or religion, for refusing to commit a criminal act, for exercising one's civil rights, and for the exercise of political free choice. The employee has been amply protected by the three exceptions to at-will employment discussed above. As a result, the employer's discretion has been sharply curtailed.

This protection afforded to employees today is admittedly very important and it should be maintained. The problem does not lie in what the courts and the legislature have done to provide such protection, but rather, it lies in what the courts have introduced to further limit the employer's rights. Just as the employee has certain basic rights, so does the employer, namely, the right to freely contract for services, including the right not to have contractual obligations thrust upon him, and the right to use his best business judgment to hire and fire whomever he chooses. As will be discussed below, it appears very likely that in an over-zealous campaign to champion the employee's cause, the courts have gone too far and as a result employers have been left virtually unprotected.

40. Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 798, 13 Cal. Rptr. 769, 772 (1961) (discharge of an employee for membership in a union against public policy, and creates basis for civil liability against the employer). The California Legislature codified this exception in Labor Code sections 922 and 923, which provide that there is a basis for civil liability where an employee at-will is terminated for union activity. CAL. LAB. CODE §§ 922, 923 (West 1971).

41. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

42. The court in Tameney held that a cause of action for wrongful discharge sounded both in tort and contract law, thus making it possible to collect punitive damages in tort where before this had not been allowed under a contract action. Id.


44. Id. at 1433.
III. THE NEW "GOOD CAUSE" TERMINATION EXCEPTION

In 1980 the California Supreme Court held in Tameny v. Atlantic Richfield Co. that a cause of action for wrongful discharge was stated for an employee's termination based on his refusal to participate in a price fixing scheme. The court based its decision on the public policy exception discussed above; in order to implement the fundamental public policies embodied in the state's penal statutes all employers have a law-imposed duty not to discharge employees who refuse to commit a criminal act. Although the court did not at this time so hold, it did allude to a possible contract cause of action against the employer for breach of an implied covenant of good faith and fair dealing. The court stated in a footnote that it was unnecessary to determine whether recovery would sound in contract on the theory of breach of the covenant. It noted that other jurisdictions had so found, and that past California cases had held that breach of the covenant of good faith and fair dealing could sound in contract as well as in tort.

Later in 1980, in Cleary v. American Airlines, Inc., this potential cause of action was given more attention by the court when it specifically held that the combination of the employee's eighteen years of service and the employer's express policy of providing specific procedures for adjudicating employee disputes, precluded the employer from discharging that specific employee without good cause. In the court's opinion, after such a long period of employment the termination of an employee without good cause offended the implied-in-law covenant of good faith and fair dealing inherent in all
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contracts.  

Pugh v. See’s Candies, Inc. is the most recent in the line of cases which have dealt with the implied covenant of good faith and fair dealing. The appellate court acknowledged that if, as the Cleary court found, the implied-in-law covenant of good faith and fair dealing is found in all employment contracts and the covenant also requires “good cause” for termination, then the plaintiff employee would be afforded such protection; his employment was nearly twice the duration of the plaintiff’s in Cleary. The Pugh court, however, declared that it “need not go that far.” The court instead explained the Cleary decision and its own decision in traditional contract terms: the employer’s conduct constituted an implied promise not to act arbitrarily in discharging its employees, and the promise, by application of the contract exception to the at-will doctrine, therefore became a part of the employment contract.

Each of these three cases can be read to fall within the existing exceptions to the at-will doctrine: Tameny relied upon the recognized public policy exception, while both Cleary and Pugh encompass the contract exceptions. In the latter two cases, it is conceivable that the appropriate result could have been arrived at based simply on the existence of the grievance procedures and acknowledged employer policies which were not followed. These procedures could have been seen as a benefit to the employee, something the employee may have relied upon in deciding to accept or continue employment, and not mere management guidelines. Under the contract exception, when an employer’s policies are intended

50. Id. at 445, 168 Cal. Rptr. at 723.
51. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In Pugh, a vice president in charge of production (also a member of the corporation’s board of directors), who had been employed for 32 years by See’s, brought an action alleging that he had been fired for reasons against public policy and breach of contract. The trial court granted defendant’s motions for nonsuit. The court of appeal reversed. The court found the plaintiff’s evidence lacking in establishing the violation of public policy but did find evidence sufficient for a jury to find an implied promise only to terminate for good cause. This evidence included the duration of plaintiff’s employment, the commendations, and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given of continued employment, and the employer’s acknowledged policies. Id.
52. Pugh had worked for See’s Candies for 32 years before his discharge. Id.
53. Id. at 329, 171 Cal. Rptr. at 927.
54. Id.
to benefit the employees and not to act as guidelines for management, the policies become a part of the employment contract. The grievance procedures, therefore, would have become a term of the employment contract itself. By not following those procedures the employer had breached the contract. The potential impact, however, of the actual disposition of the cases extends far beyond a mere reiteration of the existing exceptions to the at-will doctrine. While the existence of a covenant of good faith and fair dealing in employment contracts has never been the sole basis for a court's decision against an employer, the court considered it a major factor in Cleary.

The precise implications of the Cleary holding are as yet unclear. One commentator has already interpreted the case as suggesting that "after an unspecified period of time a 'just cause' standard will be implied in all at-will employment contracts." If this standard is accepted, only termination for "good cause" will satisfy the covenant of good faith and fair dealing. The courts will have virtually repealed Labor Code section 2922 and the at-will doctrine. This is the direction in which the courts are headed, using the covenant of good faith and fair dealing to impose a "good cause" requirement for termination. The rights of the employer not only have been ignored, but the wise and thoughtful judgment of the California Legislature has been overruled.

A. The Covenant of Good Faith and Fair Dealing in General

There is an implied covenant of good faith and fair dealing in every contract which provides that neither party to the contract will do any act or acts which will injure the other party's right to receive the benefits of the agreement. The duty imposed by the covenant, that of dealing fairly and in good faith with the other party, is a duty imposed by law rather than one arising from the terms of the contract itself.

55. See supra note 28 and accompanying text.
Accordingly, this duty exists whether or not the parties have consented thereto.

The covenant of good faith and fair dealing was initially developed in California in the context of insurance contracts. The typical case involved an insured who had suffered a loss which was covered by his insurance policy, but for which the insurance company had failed, without proper cause, to compensate him. The California courts have traditionally viewed this type of situation, where the insurance company knows that it owes the insured under the policy but nevertheless refuses to pay, as outrageous and unconscionable conduct bordering on fraud. This particular conduct has specifically been held to breach the covenant of good faith and fair dealing implicit within the insurance contract by injuring the insured's right to receive his benefits under the policy.

It is important to note that in the insurance cases, the covenant of good faith and fair dealing is applied only to the existing terms of the contract as agreed to by the parties. If a duty exists under the contract terms to, for example, pay out proceeds to the insured, then any action by the insurance company which is contrary to those terms constitutes bad faith and necessarily breaches the covenant. The parties themselves are free to define their respective obligations and duties by specific terms of the contract; however, no matter what those duties may be, the performance of them must be in good faith.

On the other hand, if there are no existing contract terms

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62. Id. at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488.
which create a duty, there would be nothing to which the covenant could be applied. As will be more fully developed below, in an at-will employment contract there are no contract terms which create any duty regarding the act of termination by either party. Consequently, the covenant would not be applicable to acts of termination.

B. The Covenant of Good Faith and Fair Dealing as Applied to the At-Will Doctrine

The Court of Appeal in Cleary v. American Airlines, Inc. applied the covenant of good faith and fair dealing to at-will employment contracts. The court found that the employer had wrongfully terminated the employee, based on two factors: The length of the employee's service, and a company policy requiring it to follow a specific grievance procedure in handling employee disputes. The court stated that after such a long period of service, termination without good cause would breach the covenant of good faith and fair dealing. Further, the court felt that the existence of the grievance procedures evidenced the employer's recognition of its responsibility not to act arbitrarily with respect to its employees. It has been suggested that the result of this finding was the creation of an implied duty of good faith and fair dealing in employment contracts, requiring that all employees be terminated only for good cause.

1. The Covenant Must Be Applied to Existing Terms of the Employment Contract

In applying the covenant of good faith and fair dealing to employment contracts it is important to look at the benefits each party derives from the agreement, because under the covenant each party must refrain from injuring those benefits. In an employment contract terminable at-will, one of the primary benefits to both parties—employer or employee—is the ability to terminate the relationship at any time for whatever reason, and not to be "locked in" to the

64. Id. at 455, 168 Cal. Rptr. at 729.
66. 50 Cal. 2d at 658, 328 P.2d at 200.
employment relationship. If, however, it is only the employer who is not allowed to discharge the employee for good cause as the covenant requires, then he is being denied one of the most important benefits of his agreement. The employee, who is not reciprocally hampered by this "good cause" requirement, is provided with greater benefits than those to which he is entitled.

In Cleary, the court considered the employee's longevity of service and the internal grievance system that the employer did not follow, as evidence of the employer's bad faith in discharging the employee. This employer conduct, however, is a far cry from the outrageous, unconscionable conduct found in the insurance company cases where the covenant of good faith and fair dealing originated.

Moreover, in an at-will employment relationship there is no contract term imposing a duty on the employer regarding discharge. As was seen earlier in the insurance cases, there is no term to the contract to which the covenant does not apply. By definition, pure at-will employment contracts place no duty on the employer or the employee to terminate the employment for any specific reason. The only duty, if it can be called such, is for either party to exercise his will, the employee's will to leave and the employer's will to discharge.

If the employer or the employee had a duty to terminate the contract only for a specific reason or reasons, then the covenant of good faith and fair dealing would apply to those contractual terms of dismissal; employer good faith would have to be exercised with respect to those terms. An example of this can be seen where dissatisfaction by the employer with the employee's job performance is the express or implied contractual grounds for dismissal. Dissatisfaction with the employee's services is a contract term agreed upon by both parties. As such, in order to rightfully terminate the employee, the employer must in good faith be dissatisfied with the employee's services. If the employer is not in good faith dissat-

68. Id.
69. See supra notes 59-62 and accompanying text.
70. Notice of termination to the other party, is the only requirement under Labor Code section 2922. CAL. LAB. CODE § 2922 (West Supp. 1982).
isfied with the employee's job performance, but nevertheless discharges him, the covenant is breached.

Good faith, however, cannot be said to apply to something which is not a contract "duty." The Cleary court may indeed have been correct in finding an employer duty not to arbitrarily discharge his employees; a duty based upon established grievance procedures. Nevertheless, by applying this covenant to all at-will employment situations, regardless of the specific contractual provisions, the court has not only created a duty never contemplated by the parties but has also imposed the exercise of good faith with respect to that "duty."

2. The Covenant's Requirement of "Good Cause"

The Cleary court did not stop at merely applying the covenant of good faith and fair dealing to at-will employment contracts, it further required "good cause" in order to satisfy the covenant. This requirement of "good cause," however, does not follow from prior application of the covenant. First, "good faith" is not the equivalent of "good cause"; where good cause for termination was required by contract terms, dismissal of an employee without "good cause" has nevertheless been upheld in situations where there was good faith. When the employer exercised good faith, "good cause" was apparently not needed. Second, good faith only applies to the contract terms and "good cause" is not a term of an at-will employment contract. If "good cause" was an actual contract term, then the covenant of good faith and fair dealing would not be necessary to enforce that term. Under the contract exception to the at-will employment doctrine such terms will be

hold otherwise would prevent an employer from firing a employee except for good cause shown in every situation. We are not here dealing with the hiring to the satisfaction of the employer, where good faith is a proper test." Marin v. Jacuzzi, 224 Cal. App. 2d 549, 554, 36 Cal. Rptr. 880, 883 (1964) (citing Coats v. General Motors Corp., 3 Cal. App. 2d 340, 348, 39 P.2d 838, 841 (1934)).

72. The court stated that "[t]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts." 111 Cal. App. 3d at 465, 168 Cal. Rptr. at 729 (emphasis added).

enforced, and the contract will no longer be considered "terminable at-will." The Pugh court recognized that the contract exception provided sufficient support for its own decision, as well as support for the Cleary court's decision, to impose liability on the employer for wrongful discharge. The Cleary court, by not adhering to existing law, apparently tried to impose a "good cause" requirement in at-will employment situations through the guise of the covenant of good faith and fair dealing. The "good cause" requirement, however, does not naturally flow from the covenant itself. The court in essence imposed a new term on an existing contract. As will be discussed below, this is unconstitutional; it not only interferes with an existing contractual relationship between the employer and the employee, but it also infringes on the employer's right to due process.

IV. UNCONSTITUTIONALITY OF THE "GOOD CAUSE" REQUIREMENT: THE EMPLOYER'S RIGHTS

A. The "Good Cause" Exception: An Interference With Contract

The Contract Clause of the United States Constitution provides that the states shall not interfere with private contracts or impose new terms on any party to an existing contract if those parties have not contemplated or agreed to such terms. What the courts have apparently overlooked, however, is that by imposing a "good cause" requirement on the employer's right to discharge an at-will employee, they have written a new contract term not contemplated by the parties, and thus have interfered with the at-will employment contract. It might also be argued that the contract, statutory, and public policy exceptions constitute interferences with contract, and thus also are unconstitutional. On the contrary, unlike the "good cause" exception, these three exceptions do not interfere with the contractual relationship and are not violations of the Contract Clause.

74. "[A] contract for permanent employment . . . cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary." Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169, 174 (1972). See also supra text accompanying notes 22-27.

75. U.S. CONST. art. I, § 10, cl. 1 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."
The contract exception to the at-will doctrine does not impose new contractual terms, it merely enforces express or implied obligations already created under the contract by the parties themselves. Further, both the statutory exception and the public policy exception have actually been provided for by the United States Supreme Court through its interpretation of the Contract Clause. In interpreting the Constitution the Court has established that:

[N]either the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. 76

Furthermore, it has been said that the major purpose of the Contract Clause is to restrain states from creating laws affecting private contracts, not to be an inflexible barrier to public regulation. 77 The statutory exception to the at-will doctrine limits an employer's right to discharge employees. This exception is consistent with existing statutes enacted to safeguard the general public welfare by protecting employees. 78 Similarly, the public policy exception is derived from the principle of law which makes it unlawful for any citizen to do any act which tends to injure the public, or which is against public policy. 79 Both of these exceptions fall in line with the recognized limitation to the Contract Clause, that of necessary public regulation.

All three of the established exceptions complement the Contract Clause rather than contradict it. The "good cause" exception, however, is an unwarranted regulation and an unconstitutional interference with the employer-employee relationship. "Good cause" for termination is now being imposed

76. Atlantic Coast Line R. Co., v. Goldsboro, 232 U.S. 548 (1914). As the Court stated in Manigault v. Springs 199 U.S. 473 (1905), "parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." Id. at 480.


78. See supra notes 30-37 and accompanying text.

on the employer in at-will employment contracts without such a requirement ever having been contemplated or agreed upon by the parties. This constitutes a violation of the Contract Clause. This exception to the at-will doctrine is not embodied in any of the other three exceptions, which do not violate the Contract Clause. If it had been, it seems reasonable to conclude that the courts would not have found it necessary to separately articulate the exception. Instead, the courts would merely have held that "good cause" is required for termination by virtue of the already existing contract or public policy exceptions. Further, the legislature has not enacted any statute which sets forth a "good cause" exception, so that such limitation could be enforced through the use of the statutory exception. On the contrary, the legislature has apparently reaffirmed the at-will doctrine, as evidenced by its failure to amend that portion of Labor Code section 2922.80

In both the Cleary and Pugh cases the courts did interfere with the contract by imposing a new and uncontemplated term on the employer, longevity of service, which affected his freedom to discharge. Both courts held that because the employee had worked a certain length of time for the employer, the employer was precluded from discharging the employee except for "good cause."81 The particular contracts involved in these cases, however, did not themselves expressly or impliedly provide that if the employee remained in service for a long enough period of time, the employer would not discharge him except for "good cause." The courts, by requiring "good cause" termination based on the employee's longevity of service, imposed a new term on the contracting parties, and in so doing violated the Contract Clause and both the employer's and employee's constitutional right to be free from interference with their contract.

Labor Code section 1155.2(a),82 which is contained within the California Agricultural Labor Relations Act (ALRA), lends further support to the basic policy discussed above that contract terms may not be imposed upon the employer or the employee if those parties have not contemplated or agreed to

81. See supra notes 48-54 and accompanying text.
such terms. The ALRA\textsuperscript{83} governs collective bargaining and agricultural labor relations unions in California. It imposes upon the employer and the union the obligation to bargain collectively in good faith. As specifically provided by section 1155.2(a), however, such obligation does not "compel either party to agree to a proposal or require the making of a concession."\textsuperscript{84} Therefore, while California has committed itself to the collective bargaining principles as a matter of public policy,\textsuperscript{85} it has also clearly set forth as a matter of public policy, that contract terms may not be imposed upon the employer or the employee, at least within the context of collective bargaining relationships under the ALRA. This can be viewed as further support for the argument set forth above: The parties to an at-will employment relationship should be free from the imposition of new and uncontemplated terms to their at-will employment contract. If the courts were allowed to impose a "good cause" requirement for termination on all employment contracts, including at-will contracts, not only would they be interfering with the at-will employment contract and the employer’s constitutional rights therein, but they would be acting in direct opposition to California’s public policy against imposing contract terms on an employer.

B. The "Good Cause" Exception: A Violation of Due Process

The Supreme Court of the United States has recognized

\textsuperscript{83} The ALRA was modeled in large part after the National Labor Relations Act (NLRA) of 1935, which specifically excluded agricultural labor from its coverage.

\textsuperscript{84} \textit{Cal. Lab. Code} \textsection 1155.2(a) (West Supp. 1983). Section 1155.2(a) provides: \"[T]o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder; and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.\" (emphasis added).

\textsuperscript{85} It has been announced by the legislature, through the enactment of Labor Code sections 920-23 that it is the public policy of this state to advance the freedom of employees to organize into unions and enter into collective bargaining agreements for their own protection. Glenn v. Clearman’s Golden Cock Inn, 192 Cal. App. 2d 793, 798, 13 Cal. Rptr. 769, 772 (1961).
an employer's interest in entering into employment contracts which are terminable at-will as a constitutionally protected right. In *Adair v. United States* the Court specifically stated that as the employee had the right to quit the service of his employer for whatever reason, so too had the employer the same right to dispense with the employee's services for whatever reason. The Court further declared that any federal legislation which altered this equality between the employer and the employee by compelling the employer to retain the employee's personal services constituted "an invasion of the personal liberty, [of the employer] as well as the right of property, guaranteed by [the fifth] Amendment." Through the development of the contract, statutory, and public policy exceptions to the at-will employment relationship, restrictions have already been placed upon the employer's right to choose those personal services he will or will not retain. This has limited the employer's right to liberty and property. The *Adair* Court itself recognized the appropriateness of these limitations. The basic principle underlying at-will employment relationships, that of the employee's freedom to quit and the employer's freedom to fire, however, has remained unchanged. It is important to note that these limitations do not completely abrogate the employer's rights in at-

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87. 208 U.S. 161 (1908).
88. *Id.* at 175.
89. *Id.* at 172. The Court in *Adair* went on to say, it is not within the function of government at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.
90. The *Adair* Court stated that Due Process:

Embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds forbids as inconsistent with the public interest or as hurtful to the public order or as detrimental to the common good.

208 U.S. at 172.
will employment contracts, they only modify them. If the state were to deprive the employer of the at-will employment bargain completely, by imposition of the "good cause" requirement, it would deprive the employer of his fourteenth amendment due process rights to liberty and property.91

The employer's personal liberty to decide whom he shall employ, to whom he will trust the running of his business, and the right to expend his property (money) as he sees fit are rights which are protected under the Due Process Clause of the United States Constitution. These basic rights, as well as the entire at-will doctrine, would be eliminated if the "good cause" exception is ever formally accepted. A state is free to increase a citizen's constitutional rights, but it may not decrease those rights.92 The California courts have, however, reduced the employee's constitutional rights of freedom to contract and due process. Moreover, as will be set forth more fully below, in so doing the courts have improperly usurped the legislature's lawmaking function.

V. THE COURT'S USURPATION OF THE LEGISLATIVE FUNCTION

In our legal system, it is well-settled that the court's role is to consistently interpret and administer the law as it is set forth by the legislature. The California Legislature, through the enactment of Labor Code section 2922, granted employers authority to hire and terminate employees. Any restrictions or redefinitions of that authority should likewise emanate, explicitly or implicitly, from the legislature. The legislature has in fact exercised its power by prohibiting various forms of employer conduct through the enactment of statutes which specifically limit an employer's right to discharge employees.93 As was discussed above, such action by the legislature has given rise to the statutory exception to the at-will doctrine.94 The California Legislature, however, has not seen fit to delete or

91. The fourteenth amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1.

92. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (the state is not limited in its right to adopt in its own constitution individual liberties more expansive than those in federal constitution).


94. See supra notes 30-37 and accompanying text.
even amend the at-will provision of Labor Code section 2922, despite the fact that other provisions of that statute were amended as late as 1971.95

In carrying out their function as interpreters of the law, the courts have thus far consistently applied the three established exceptions to Labor Code section 2922 by looking at other legislative enactments where possible to glean the legislative intent behind this labor code section. For instance, through the penal system the legislature has enacted a statute declaring the act of perjury to be a crime.96 Consistent with this expressed legislative will, the courts have created the public policy exception to at-will employment which prohibits an employer from discharging an employee because the employee refused to commit perjury on the employer's behalf.97

Now, however, through the introduction of a possible "good cause" exception to the at-will doctrine the courts have ventured into the legislative realm of lawmaking, rather than adhering to their interpretive role as they did with respect to the other three exceptions. As one court itself has declared "[i]t is not the function of the courts in the absence of contractual, statutory, or public policy considerations to compel a person to accept or retain another in his employ nor to compel a person against his will to remain in the employ of another."98 Through the enactment of Labor Code section 2922, the California Legislature has made it quite clear that the employer is to have the broadest discretion in discharging at-will employees and that this discretion is to be limited only if its exercise conflicts with an expressed public policy of greater value.99 As has been noted, in both Cleary v. American Airlines, Inc.,100 and Pugh v. See's Candies, Inc.,101 the courts, by

advancing the “good cause” exception, have indefensibly usurped legislative authority by intruding into an area which the legislature has expressly reserved to the employer’s sound discretion.102

It has often been urged that in the past the California courts have taken a creative role in the administration of the law rather than a wholly interpretive role and should continue to do so in the future.103 Circumstances may warrant such interference with the legislature, but as will be more fully developed below, no such judicial legislation is called for in at-will employment relationships. It is the legislature who should make any necessary changes in this area if and when the circumstances so dictate.

In one very important case involving products liability,104 the California Supreme Court openly acknowledged the court’s creative role when it decided to hold strictly liable in tort a manufacturer who marketed a defective product.105 The court reasoned that as the manufacturer was better situated economically to bear the financial burden of injury than was any single consumer, the manufacturer should be held strictly liable for product defects.106

In the products liability area as opposed to at-will employment, “judicial legislation” was justified; the court was sufficiently capable of weighing and balancing the few wholly economic factors involved. The employment situation, on the other hand, involves much more than an economic analysis in that financial burdens are not the only factors to be considered. Employment does involve the payment and receipt of compensation for employee services, but it also involves per-

105. J. HENDERSON AND B. PEARSON, THE Torts Process 607 (1975). The traditional view in products liability was that unless negligence or a breach of warranty could be proven against the product manufacturer, the consumer would bear the cost of injury attributable to any product defect.
sonal working relationships, including the interaction between the employee and the employer, and between an employee and his fellow employees.\textsuperscript{107} The evaluation of any change to be made in at-will employment relationships involves much more than an evaluation in terms of dollars and cents. In its recent committee report on At-Will Employment and the Problems of Unjust Dismissal,\textsuperscript{108} the Committee on Labor and Employment Law of the Association of the Bar of the City of New York expressed its view that if all employees were to enjoy general protection against discharge without good cause the change would be accomplished most appropriately by the legislature.\textsuperscript{109} The California Legislature, not the courts, is better qualified to evaluate and make any necessary changes to the at-will employment doctrine.

The legislative process enjoys an advantage over the judicial process in that it can make exceptions and establish classifications that accommodate conflicting interests which at the same time generally serve the purposes of justice.\textsuperscript{110} The legislature has the resources and the opportunity to consider all of the possible circumstances, problems, and conflicting interests in a particular area enabling it to arrive at an all encompassing equitable solution. The court, on the other hand, is limited by the binding power of precedent and while its impact extends to the community at large, its focus remains with a certain set of facts affecting a single plaintiff and a single defendant standing before it.

An illustration of the inadequacy of court-made law as opposed to legislative enactment, specifically in the area of at-will employment, is the task of defining "good cause." A definition of "good cause" should be such that it enables the "good cause" exception to be consistently applied to all at-will employment terminations. If it is left to the courts to define in an ad hoc fashion, it would necessarily be the jury as factfinder who would determine whether the particular facts

\begin{itemize}
  \item \textsuperscript{107} "[E]ven a competent person may be of no use to his employer if he cannot work effectively with his fellow employees." Prigpank & Mooney, Wrongful Discharge: A New Danger for Employers, PERSONNEL AD., March 1981, at 33.
  \item \textsuperscript{108} Committee on Labor and Employment Law of the Association of the Bar of the City of New York, Committee Reports - At-will Employment and the Problem of Unjust Dismissal, 36 THE RECORD (1981).
  \item \textsuperscript{109} Id. at '97.
  \item \textsuperscript{110} Peck, supra note 103, at 48-49.
\end{itemize}
constituted "good cause" or not. There is substantial danger, however, that the jury will identify and sympathize with the employee and favor him over the employer even though such a finding may not be warranted by the case's facts. This could give rise to inconsistent verdicts due to jury bias; one set of facts may at one time establish liability against the employer for wrongful discharge and at another time those very same facts may absolve the employer.

An example of how juries interpret the facts in "good cause" for discharge can be seen in a recent at-will employment case in which the employee was discharged for ordering falsification of company records in an effort to enhance his career. The jury found in that case that despite compelling evidence of the employee's dishonesty in falsifying company records, and notwithstanding the at-will nature of the employment, the employer did not have good cause for terminating the employee. Fraudulent conduct on the part of the employee was simply not considered sufficient justification for his discharge. It appears clear that this is further evidence of the difficulty facing the courts in dealing equitably with a "good cause" exception to the at-will doctrine.

Another potential problem to which jury sympathy for the employee could give rise includes harassing lawsuits by discontented employees fabricating tales of employer coercion. If this potential is too great, employers will be discouraged from exercising their best judgment regarding those employees who should or should not be retained. Even though as a matter of constitutional law the employer's right to discharge at-will employees is no longer absolute, the "employer's prerogative to make independent, good faith judgments about employees is [nevertheless] important to our free enterprise system." The legislature has the wherewithal to define and limit, if it so chooses, the "good cause" require-

111. The court in Cleary stated that when there was evidence showing that the discharge was for reasons other than valid ones the question as to whether the employer acted appropriately is one for the jury. 111 Cal. App. 3d at 453, 168 Cal. Rptr. at 728.
114. Id.
ment to make its consistent and equitable application possible. If left to the legislature everyone’s rights, including the employer’s, would be considered.

VI. Conclusion

The at-will doctrine has undergone considerable change. Through the placement of limitations on the doctrine by use of contract law, statutory enactments, and public policy considerations the California Legislature and the courts have retracted from the explicit meaning of Labor Code section 2922 and the at-will employment doctrine. In so doing, they have effectively diminished the employer’s right to discharge employees. The courts, however, have not stopped with these necessary modifications; with the introduction of the “good cause” requirement for termination, they have gone one step further in limiting the at-will doctrine. Through this new exception to the at-will employment doctrine, the courts effectively prohibit any employer from firing an employee except for “good cause,” regardless of the contractual relationship existing between them. If accepted as precedent by the California Supreme Court, the at-will employment relationship will not only be modified by the provisions of Labor Code section 2922 but will be destroyed as well.

In their continued concern for the rights of the employee the courts have not only overlooked the adequacy of the existing limitations on the employer’s discretion in terminating an at-will employee, but they have also ignored the employer’s rights. Constitutionally, this new exception should not be upheld. It interferes with the employment contract by imposing a “good cause” termination term on the parties without their consent. It also strips the employer of his due process rights. The appellate courts, in fashioning this “good cause” exception, did not have the capacity to weigh and balance all the alternatives necessary to arrive at a well-reasoned conclusion.

The entire concept behind the at-will employment doctrine is “mutuality of obligation.” This contractual principle is based on both parties giving up something in return for receiving something. With the “good cause” exception, however, the employer is forced to completely give up his right to discharge at-will, yet the at-will employee is asked to give up nothing; he is still free to stop rendering his services to the employer whenever and for whatever reason he chooses. If the
result were otherwise, the employee's constitutional right not to be forced against his will into the service of another would be violated. What the courts have apparently failed to recognize is that this "good cause" exception will result in the employer's "enslavement" by forcing him to retain, against his will, the employee's services. The right to life, liberty, and property provided for by the Due Process Clause of the fourteenth amendment, however, was not intended to protect some people and not others; it was intended to protect everyone, including employers.

Wendy J. Hannum