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EMPLOYMENT-AT-WILL AND WRONGFUL DISCHARGE IN OKLAHOMA

I. INTRODUCTION

Twenty years ago, a terminated employee did not have a cause of action for wrongful discharge, because the American principle of employment-at-will was generally accepted without question. Under this principle, either party to an employment contract of indefinite duration could terminate that contract at any time for any reason, or for no reason. Recently, however, judicial decisions and legislative enactments have eroded the employment-at-will doctrine; this erosion has led to confusion and increased litigation regarding wrongful discharge. Since 1980, courts in almost every state have faced wrongful discharge questions, and approximately thirty jurisdictions now recognize a cause of action for wrongful discharge. In the words of one commentator, it is “the labor law issue of the 80s.”

Labor law is changing in Oklahoma, as well. Recent cases have left the wrongful discharge causes of action in a state of confusion. The Oklahoma Supreme Court has recognized that this area of the law must be clarified and has begun to construct a framework for the analysis of employment-at-will and wrongful discharge in Oklahoma.


II. NATIONAL JURISPRUDENCE ON EMPLOYMENT-AT-WILL

A. Evolution of the Employment-at-Will Doctrine

The principle of employment-at-will did not exist at English common law.5 As early as the sixteenth century, English and American courts presumed that a general hiring for an indefinite period was a renewable contract for employment for one year,6 and the employer could be liable if he discharged the employee without "reasonable cause" at any time other than the end of that year.7 This approach reflected the social structure of the times: the master-servant relationship was personal, with almost familial obligations.8

American courts followed the English approach until the late nineteenth century. During the Industrial Revolution, the personal master-servant relationship evolved into the more impersonal employer-employee relationship.9 Influenced by the writings of Horace G. Wood,10 American courts in almost every state reversed precedent and gradually accepted the employment-at-will principle.11

Courts used several theories and policies to justify this departure from the precedent of annually renewable employment contracts.12 Courts applied the contract law rationale of "mutuality of obligation" as applied to an employment relationship.13 In other cases they focused on

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5. For a comprehensive overview of the evolution of the employment-at-will doctrine and its foundations, see Tepker, supra note 2, at 378-92.


7. Id.

If the hiring be general, without any particular time limited [sic], the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master shall maintain him, throughout the revolutions of the respective seasons, as well as when there is work to be done as when there is not.

Tepker, supra note 2, at 379 (quoting 1 W. BLACKSTONE, COMMENTARIES *425).


10. H. WOOD, MASTER AND SERVANT § 134, at 271 (1877). "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." Id. at 272. Critics note that none of the four cases which Wood cited actually support the rule of employment at will. Lopatka, supra note 3, at 4 (citing Toussaint v. Blue Cross & Blue Shield, 408 Mich. 379, 602 & nn.13-14, 292 N.W.2d 880, 886-87 & nn.13-14 (1980)).

11. Tepker, supra note 2, at 380.

12. Id.

13. "[A]n employee's freedom to quit his job at any time and for any or no reason supported the employer's corresponding freedom to terminate the employee at any time and for any or no reason." Brief of Amicus Curiae, American Airlines, Inc. at 3, Burk v. K-Mart Corp., No. 67,785 (submitted to the Oklahoma Supreme Court) [hereinafter American Airlines Brief] (citing Freeman
the parties’ “probable expectations.”\textsuperscript{14} In addition, judges preferred to defer to the reasonableness of an employer’s discretion and sound business judgment, because the employer could more competently assess the productivity of its personnel.\textsuperscript{15} Once courts accepted the doctrine of employment-at-will, they adhered strictly to the presumption that an employment contract was at-will.\textsuperscript{16} unless parties agreed otherwise, an employment contract of indefinite duration could be terminated by either party at any time for any reason.\textsuperscript{17}

B. Exceptions to Employment-at-Will

The at-will presumption has steadily declined in most states.\textsuperscript{18} Today, most jurisdictions have abandoned the rigid employment-at-will rule and recognize some form of wrongful discharge.\textsuperscript{19} Courts have eroded the at-will doctrine by carving out three general exceptions: public policy, breach of implied contract, and breach of the implied covenant of good faith and fair dealing.\textsuperscript{20}

1. Public Policy

An employer may be held liable for wrongfully terminating an employee if the discharge violates public policy.\textsuperscript{21} Cases in which the discharge violates public policy fall into three major categories, with a fourth catch-all category: (1) discharge for refusing to commit an illegal

\begin{itemize}
  \item v. Chicago, Rock Island & Pac. R.R., 239 F. Supp. 661 (W.D. Okla. 1965)). This turn-of-the-century doctrine has gradually eroded, and if the requirement of consideration is met, there is no additional requirement of mutuality of obligation. American Airlines Brief at 3 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981)). See also Tepker, supra note 2, at 387-92.
  \item See Tepker, supra note 2, at 382-85. "The at-will contract ... allows both sides to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information ..." Id. at 384 (quoting Epstein, In Defense of the Contract At Will, 51 U. Chi. L. Rev. 947, 969 (1984)).
  \item Id. at 385-87. See also Carley, At-Will Employees Still Vulnerable, A.B.A. J., Oct. 1987, at 66, 70.
  \item Gilberg and Voluck, supra note 3, at 17.
  \item Id.
  \item See Lopatka, supra note 3, at 1-6.
  \item Id. at 1.
  \item Oklahoma courts have been reluctant to adopt all of the exceptions to the employment-at-will doctrine, but the Oklahoma legislature has imposed certain limited public policy exceptions. See infra note 21.
  \item That which violates “public policy” varies greatly from jurisdiction to jurisdiction and from case to case. In Oklahoma, for example, an employer may not discharge an employee for being absent due to jury service, OKLA. STAT. tit. 38, §§ 34, 35 (1981 & Supp. 1987); for filing a worker’s compensation claim, OKLA. STAT. tit. 85, § 5 (1981); or for opposing discriminatory practices, OKLA. STAT. tit. 25, § 1601 (1981).
\end{itemize}
act;\(^\text{22}\) (2) discharge for exercising a legal right or privilege;\(^\text{23}\) (3) discharge for performing a public obligation;\(^\text{24}\) and (4) discharge for motives which violate other “clear mandates” of public policy.\(^\text{25}\) The public policy exception is the most widely received exception to the employment-at-will doctrine;\(^\text{26}\) in some jurisdictions, it is the sole exception.\(^\text{27}\)

2. Implied Contract

Several courts have found an implied-in-fact agreement or contract not to discharge an employee except for “just cause.”\(^\text{28}\) Certain employer representations may form an implied contractual basis for changing an at-will agreement into an agreement to terminate only for just

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23. See Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (filing worker’s compensation claim); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (filing worker’s compensation claim); Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983) (filing worker’s compensation claim); Krystad v. Lau, 65 Wash. 2d 827, 400 P.2d 72 (1965) (joining labor union). This exception may also be expanding to create employer liability based on the employee’s constitutional rights. Lopatka, supra note 3, at 11-13 (discussing Novosei v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983)).


25. See Tepker, supra note 2, at 397 nn.165-66 and accompanying text.


27. See id. For a contrary view, see Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.Y.2d 86, 461 N.Y.S.2d 232 (1983) (a change in the established at-will doctrine should be made by the legislature and not the courts).

28. See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). For a comprehensive discussion of the breach of implied contract exception to the employment-at-will doctrine, see Lopatka, supra note 3, at 17-22; Decker, supra note 3.
cause. A contract may be inferred from any communication by the employer that could lead the employee to develop a reasonable expectation that a discharge must be only for "good cause." For example, courts have given contractual status to oral employer assurances of job security at the time of hiring. Courts have also treated policy statements in a personnel manual as an agreement that an employee could only be discharged for just cause. As these examples indicate, an implied contract to terminate for good cause is based in fact, and there must be a factual basis for the employee's belief that such an agreement exists.

3. Implied Covenant of Good Faith and Fair Dealing

Generally, a covenant of good faith and fair dealing is a duty imposed by law that neither party to a contract will do anything to inhibit the other from receiving the benefits of the agreement. In the past, courts used this implied covenant primarily in insurance cases but it has been applied recently in the employment context, as well. In a 1980 California decision, an employee's length of service gave rise to an obligation of the employer to terminate the employee only for "good cause." In Montana, an employee handbook bound the employer to the handbook policies "as a matter of the covenant of good faith and fair dealing." The more accepted interpretation is the Massachusetts view: if an employer terminates an at-will employee for the purpose of or with the effect of depriving the employee of previously earned compensation,

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29. "Just cause" or "good cause" are terms that seem to defy definition; they may mean documented unsatisfactory performance or misconduct, lack of work, or anything other than a "bad" or "unjust" cause.
30. Springer, supra note 1, at 41-42.
31. Lopatka, supra note 3, at 19 (citing Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983)).
33. For an overview of the breach of covenant of good faith and fair dealing exception to the employment-at-will doctrine, see Lopatka, supra note 3, at 23-26; Tepker, supra note 2, at 392-95.
34. Lopatka, supra note 3, at 23 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).
35. Lopatka, supra note 3, at 23.
38. Id. (citing Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1067 (Mont. 1982)). The handbook was distributed two years after hiring and was not part of an employment contract. Id.
the employer has breached the covenant of good faith and fair dealing.  
This exception to the employment-at-will doctrine has enjoyed less acceptance than the other two exceptions, possibly because of the difficulty of defining the covenant.

III. EMPLOYMENT-AT-WILL IN OKLAHOMA

Oklahoma has recognized the employment-at-will doctrine for many years: an employment contract of indefinite duration may be terminated at any time for any reason or for no reason. This is still the general rule today. Thus, both the employer and the employee have the right to terminate the at-will relationship without liability. Recent cases, however, illustrate the debate over the continuing viability of the doctrine. These decisions have created considerable confusion and controversy with respect to employment law in Oklahoma.

A. Hall v. Farmers Insurance Exchange

In Hall v. Farmers Insurance Exchange, the Oklahoma Supreme Court deviated from a rigid employment-at-will approach. The plaintiff, Ned Hall, was an at-will insurance agent for Farmers Insurance Group. Both parties enjoyed a mutually profitable and satisfactory relationship for many years. However, in 1978, Hall and the Farmers district manager had several disagreements which eventually resulted in the termination of Hall’s agency arrangement. At the time of the notice of


40. Although Oklahoma recognizes the Restatement view that a covenant of good faith and fair dealing is implicit in every contract, past courts have declined to impose a broad legal duty upon the employer not to terminate an at-will employee in “bad faith.” E.g., Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987). See infra notes 102-04 and accompanying text.


45. 713 P.2d 1027 (Okla. 1985).

46. Id. at 1028.

47. Id.

48. Id. at 1028-29. These disagreements primarily concerned methods of sales and the termination of another agent. Id.
termination, Farmers attempted to pay Hall $38,000 for the contract value of his agency. Hall refused the offer, claiming that he was wrongfully terminated and that he was entitled to future income of over $305,000 from renewal premiums. The trial court rendered a verdict in Hall’s favor and the court of appeals reversed. The Oklahoma Supreme Court vacated the judgment of the court of appeals and affirmed the trial court’s decision regarding the wrongful discharge.

The main issue in Hall was whether a party to a terminable-at-will contract may be held liable for damages if the employer terminates the contract in “bad faith.” The court stated that every contract contains implied covenants that neither party will do anything to injure the other party’s rights to enjoy the benefits of the contract. The court extended this implied covenant of good faith to “a covenant not to wrongfully resort to the termination-at-will clause.” Because Farmers terminated Hall with an intent to wrongfully deprive him of his earned commission, Farmers breached the implied covenant of good faith.

The Hall decision sparked controversy because it is unclear whether the Oklahoma Supreme Court intended to overrule precedent which found no employer liability in termination of at-will employees. One view is that Hall signified the end of the employment-at-will rule in Oklahoma: the Oklahoma Supreme Court meant Hall to “sound the death knell on the laissez-faire era of unbridled employer discretion.” The opposite view limits Hall exclusively to cases in which an employee seeks to recover future compensation for past services: Hall does not apply to an employee who seeks compensation for future services.

49. Id. at 1029.
50. Id.
53. Id. at 1029.
54. Id. (quoting Wright v. Fidelity & Deposit Co., 176 Okla. 274, 277, 54 P.2d 1084, 1087 (1935)).
56. Hall, 713 P.2d at 1030-31. Relying upon the law of agency, the court stated that the applicable rule prevents a principal from wrongfully resorting to a termination-at-will clause in the employment contract in order to deprive the agent of the fruits of the agent’s labor. Id.
57. See supra notes 41-44 and accompanying text.
latter view is clearly the correct position in Oklahoma today.\textsuperscript{60}

\textit{Hall} also left open the question whether in Oklahoma breach of the implied covenant of good faith and fair dealing sounds in tort or contract.\textsuperscript{61} The plaintiff in \textit{Hall} requested damages based solely upon future premiums from policies already sold.\textsuperscript{62} The court awarded the damages that Hall requested,\textsuperscript{63} but the decision did not address whether other remedies, such as punitive damages, might be available to the wrongfully discharged plaintiff.

B. Grayson v. American Airlines

One year after the \textit{Hall} decision, the Tenth Circuit incorrectly interpreted \textit{Hall} in another at-will case, \textit{Grayson v. American Airlines}.\textsuperscript{64} Keith Grayson worked for American in Tulsa, Oklahoma.\textsuperscript{65} When he was hired, Grayson signed an employment application\textsuperscript{66} which stated (1) that he was an at-will employee, and (2) that his employment would be in accord with company rules and regulations.\textsuperscript{67} Approximately two years later, American gave Grayson an employee handbook which included a company rule that no one would be discharged without "good cause."\textsuperscript{68} After fifteen years of employment, American notified Grayson that his position was to be eliminated due to a reduction in force.\textsuperscript{69} Grayson attempted to obtain another job within the company, but American determined that there was not another position available for which Grayson was most qualified.\textsuperscript{70} On January 4, 1982, American terminated Grayson and paid him thirty-two weeks' severance pay.\textsuperscript{71}

Grayson filed suit for breach of employment contract,\textsuperscript{72} claiming that the company rule which stated that no one would be discharged

\textsuperscript{60} The Oklahoma Supreme Court adopted this interpretation in Hinson v. Cameron, 742 P.2d 549 (Okla. 1987).

\textsuperscript{61} This issue is significant because of the types of damages which are available under each theory: "exemplary damages" may be awarded in a tort action, OKLA. STAT. tit. 23, § 9 (1981 & Supp. 1987), but "[n]o damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin." OKLA. STAT. tit. 23, § 21 (1981).

\textsuperscript{62} \textit{Hall}, 713 P.2d at 1031.

\textsuperscript{63} \textit{Id}.

\textsuperscript{64} 803 F.2d 1097 (10th Cir. 1986).

\textsuperscript{65} \textit{Id}. at 1098.

\textsuperscript{66} This application contained the terms of Grayson's employment with American.

\textsuperscript{67} \textit{Grayson}, 803 F.2d at 1098.

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{Id}.

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} \textit{Id}. Grayson also filed suit for promissory fraud based on a prior temporary assignment to Toronto. \textit{Id}.
without good cause limited American’s power to terminate.\textsuperscript{73} The district court granted American’s motion for summary judgment.\textsuperscript{74} The Tenth Circuit held that a genuine issue of material fact existed as to whether American breached an implied covenant of good faith, and, therefore, summary judgment was precluded.\textsuperscript{75}

The Tenth Circuit in \textit{Grayson} interpreted \textit{Hall} as indicating that good faith is mandated in all contracts.\textsuperscript{76} The court rejected American’s argument that the covenant of good faith and fair dealing is operable only if the employee has been denied previously earned benefits to be paid in the future.\textsuperscript{77} Although the plaintiff in \textit{Hall} sought to recover future commissions from renewal premiums on insurance policies already sold, the \textit{Hall} court recognized that “each contract carries an implicit and mutual covenant by the parties to act toward each other in good faith.”\textsuperscript{78} The Tenth Circuit apparently believed that the Oklahoma Supreme Court in \textit{Hall} did not intend a narrow application of the good faith requirement,\textsuperscript{79} because the court in \textit{Hall} indicated that “the implied covenant of good faith . . . exists in all contracts.”\textsuperscript{80} The Tenth Circuit viewed this language as “a clear indication that the Oklahoma courts have recognized an implied covenant of good faith in contractual dealings.”\textsuperscript{81} According to the \textit{Grayson} court, in Oklahoma, whether or not an employer has good cause to terminate is not dispositive of the issue; the employer must also act in good faith.\textsuperscript{82} Although American did show that good cause to terminate Grayson existed, such a finding did not preclude a separate inquiry into whether American breached the covenant of good faith dealing.\textsuperscript{83} The appellate court found that there was enough information to preclude summary judgment on this issue and remanded the case to the district court.\textsuperscript{84}

\begin{thebibliography}{9}
\bibitem{id} \textit{Id.} at 1099.
\bibitem{id} \textit{Id.} at 1099.
\bibitem{id} \textit{Id.} at 1101. The court affirmed the summary judgment on the promissory fraud claim. \textit{Id.} at 1102.
\bibitem{id} \textit{Id.} at 1099.
\bibitem{id} \textit{Id.}
\bibitem{id} \textit{Id.} (quoting \textit{Hall v. Farmers Ins. Exch.}, 713 P.2d 1027, 1029 (1985)).
\bibitem{id} \textit{Id.}
\bibitem{hall} \textit{Hall}, 713 P.2d at 1031.
\bibitem{grayson} \textit{Grayson}, 803 F.2d at 1099.
\bibitem{see} See \textit{id.}
\bibitem{id} \textit{Id.}
\bibitem{id} American argued on remand that \textit{Hall} was limited “to principal/agent relationships and to claims for the unconscionable denial of earned benefits.” \textit{Grayson v. American Airlines, Inc.}, No. 83-C-298-C (N.D. Okla. Sept. 15, 1987) (order granting defendant’s motion for summary judgment). This argument was based on the Oklahoma Supreme Court’s later interpretation of \textit{Hall} in \textit{Hinson v. Cameron}, 742 P.2d 549 (Okla. 1987). See infra notes 86-97 and accompanying text. The
\end{thebibliography}
C. Hinson v. Cameron

After the Tenth Circuit remanded Grayson, the Oklahoma Supreme Court again addressed wrongful discharge in Hinson v. Cameron. As illustrated by the previous cases, the law was uncertain in Oklahoma regarding wrongful discharge, but the Hinson opinion established a cohesive framework for analyzing cases in this area.

Comanche County Hospital discharged one of its employees for failure to carry out an order. Nita Hinson worked as a nurse's assistant at Comanche County Hospital Authority for approximately five years. The hospital discharged Hinson because she failed to follow an order on her daily assignment sheet. Hinson claimed that she was not given the order during her shift and that her supervisor, Patricia Cameron, falsely altered the assignment sheet to show that the order was given. In addition, Hinson argued that the hospital's employee manual, "which constitutes[d] a part of her employment contract with the Hospital, protect[ed]

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federal district court relied on remand on the Oklahoma Supreme Court's narrowing of Hall in Hinson v. Cameron. In its order granting summary judgment in favor of American, the district court quoted "[t]he central passage in Hinson . . .:"

The appellate court's reversal of summary judgment against Hinson rests on Hall v. Farmers Ins. Exchange. Hall came to be perceived as creating a new cause of action in favor of an at-will employee discharged in "bad faith." As we view Hall it stands for the rule that an agent may recover from the principal when the latter has, in bad faith, deprived him of the fruit of his own labor. The relationship between the Hospital and Hinson as [sic] that of master and servant, not principal and agent. Hinson is not claiming the Hospital deprived her of any earned income. In short, the facts and the legal relations dealt with in Hall are clearly distinguishable from those in the present case.

Grayson v. American Airlines, Inc., No. 83-C-298-C (N.D. Okla. Sept. 15, 1987) (order granting defendant's motion for summary judgment) (quoting Hinson v. Cameron, 742 P.2d 549, 552 (Okla. 1987)). The district court distinguished Grayson from Hall by noting that Grayson was American's employee but that Hall was Farmers' agent. In addition, the court awarded Hall earned benefits, whereas Grayson made no claim for earned benefits. During the trial, Grayson apparently acquiesced in American's reasoning and focused only on the Hinson "implied employment contract" cause of action. However, even if an implied contract to terminate only for good cause existed, uncontroverted facts showed that American had good cause to terminate Grayson because of a reduction in work force. Therefore, the district court granted summary judgment in favor of American. The court concluded:

[Under the law of the case doctrine the only issue remanded to the District Court for trial relates to the cause of action for breach of the implied covenant of good faith and fair dealing under Hall v. Farmers Insurance Exchange. With Hinson v. Cameron, that issue has been decided in AMERICAN's favor and the case is now over.

Id. (quoting Defendant's Response to Plaintiff's July 10, 1987 Motion for Relief at 6 n.5) (emphasis by the court).

85. 742 P.2d 549 (Okla. 1987).
86. Id. at 551. Hinson's supervisor claimed that she left orders for Hinson to give a patient an enema. Id. at n.1.
87. Id. at 551.
88. Id.
89. Id.
Hinson brought an action for wrongful discharge from employment, or in the alternative, for breach of employment contract. The trial court granted summary judgment in favor of the hospital. The Oklahoma Supreme Court vacated the decision of the court of appeals and affirmed the trial court’s summary judgment.

In Hinson, the Oklahoma Supreme Court first clarified its holding in Hall. The court recognized that Hall had been “perceived as creating a new cause of action in favor of an at-will employee discharged in ‘bad faith.’” To correct this misperception, the court stated that Hall “stands for the rule that an agent may recover from the principal when the latter has, in bad faith, deprived him of the fruit of his own labor.” Both the facts and the legal relationships in Hinson and Hall were “clearly distinguishable.”

The court in Hinson summarized the national body of law governing employment-at-will and the exceptions upon which a wrongful discharge claim may be based. The court discussed in detail the three separate theories upon which exceptions are founded: (1) “public policy tort,” (2) “tortious breach of an implied covenant of good faith and fair dealing,” and (3) “implied contract that restricts the employer’s power to discharge.” Although the court did not specifically adopt each theory, there is a strong implication that in the future it may do so.

1. Public Policy

Because Hinson’s termination did not violate public policy, the court found no need to rule on this exception. In dicta, however, the court adopted a wrongful discharge cause of action based on the public policy exception to employment-at-will. The Court discussed the facts surrounding Hinson’s claim as if “Oklahoma would apply the public policy exception and would recognize an action for tortious discharge

90. Id.
91. Id.
92. Id. at 558.
93. Id. at 552.
94. Id. (emphasis added).
95. Id. (citations omitted).
96. Id.
97. Id.
98. Id.
99. Id. at 553. The facts surrounding Hinson’s dismissal did not lead to a wrongful discharge claim based on the public policy exception, because the hospital did not order Hinson to act illegally, deny her any legal rights, or prevent her from performing a public obligation. Id.
Even in light of the public policy exception, however, Hinson’s claim was not actionable.

2. Implied Covenant of Good Faith and Fair Dealing

While the Oklahoma Supreme Court in Hinson acknowledged that a covenant of good faith and fair dealing was implicit in every contract, it refused to imply a duty to terminate only for good cause in an at-will employment relationship. The court refused “to impose upon the employer a legal duty not to terminate an at-will employee in bad faith.” The court reasoned that its “adoption of a contrary view would ‘subject each discharge to judicial incursions into the amorphous concept of bad faith.’”

3. Implied Contract

The Court in Hinson recognized that particular facts may imply a contract restricting or limiting an employer’s discretion to discharge an at-will employee. The court named five critical factors to determine whether such an implied-in-fact contract exists: (1) evidence of “separate consideration,” other than the employee’s continued services, to support the implied contract; (2) longevity of the employment relationship; (3) employer handbooks and company policy manuals; (4) detrimental reliance by the employee on oral assurances, pre-employment interviews, company policy, or past practices; and (5) “promotions and commendations.” The hospital’s employment manual did not contain an exclusive list of all grounds for termination; therefore, it did not create an

100. Id. at 557.
101. Id.
102. Id. at 554.
103. Id. (citations omitted). Even if there is an implied covenant of good faith and fair dealing in every at-will employment relationship, “that covenant does not operate to forbid employment severance except for good cause.” Id.
104. Id. (quoting Parnar v. Americana Hotels, Inc., 65 Haw. 370, __, 652 P.2d 625, 629 (1982)). The court cited Wagenseller v. Scottsdale Mem. Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985), and Tepker, supra note 2, at 442. The court’s use of language from Wagenseller implied that the court believed that such a radical departure from precedent was the province of the legislature, not the judiciary. Hinson, 742 P.2d at 554.
105. Hinson, 742 P.2d at 554.
106. Id.
107. Id. at 554-55. (citations omitted). The court discussed a lower court decision, Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976), in which a personnel manual created the contractual basis for claim to benefits, but the court in Hinson did not directly address this issue. The court
implied contract limiting the hospital's authority to terminate Hinson.\textsuperscript{108}

D. Burk v. K-Mart

In late 1986, federal district Judge Brett\textsuperscript{109} certified six questions regarding wrongful discharge to the Oklahoma Supreme Court in \textit{Burk v. K-Mart Corp.}\textsuperscript{110} The subsequent \textit{Hinson} decision addressed some of these questions, but a few of them remain unanswered.

The first question is whether in Oklahoma there is an implied obligation of good faith and fair dealing in reference to termination in every employment-at-will contract. By voicing the Restatement view that the implied covenant of good faith and fair dealing is implicit in all contracts, the \textit{Hinson} decision and its interpretation of \textit{Hall} probably answered this certified question in the affirmative.\textsuperscript{111} However, this covenant is not so extensive as to prohibit an employer from terminating an employee. In the employment context, the \textit{Hinson} decision limited breaches of the implied covenant of good faith and fair dealing to situations in which the employer has terminated the employee for the unconscionable purpose of depriving an employee of future compensation earned for past services.\textsuperscript{112} Therefore, termination itself is not prohibited; the law merely prohibits failure to pay earned benefits.\textsuperscript{113}

The second question is whether the implied obligation of good faith is mutual between the employer and the employee. If there is an implied covenant of good faith and fair dealing in all contracts, the covenant should apply to all parties. Both the employer and the employee have a mutual obligation of good faith in the performance of their agreement.\textsuperscript{114}

The third question is whether the breach of this implied obligation sounds in contract and/or in tort. Prior Oklahoma decisions have not clearly addressed this question. The damages awarded in \textit{Hall}\textsuperscript{115} indicate that such a breach may sound only in contract. On the other hand, certain language in \textit{Hinson} implies that a breach of the implied covenant

\begin{itemize}
\item \textit{Hinson}, 742 P.2d at 555 (citations omitted).
\item \textit{Hinson}, 742 P.2d at 555-57.
\item Hon. Thomas R. Brett, United States District Judge, Northern District of Oklahoma.
\item No. 86-C-440-B (N.D. Okla. filed Nov. 28, 1986).
\item \textsc{Restatement (Second) of Contracts} §§ 205-08 (1981).
\item \textit{Hinson}, at 742 P.2d 552.
\item \textit{Id.}
\item See supra note 13.
\end{itemize}
of good faith and fair dealing sounds in tort. However, because the Oklahoma Supreme Court in Hall stated that the terminated employee may only recover benefits previously earned, this question may now be moot.

The fourth question addresses the recoverable damages if the breach sounds in contract. The Hall court only awarded compensation for services already performed. Because Hall only requested compensation already earned, it is not clear how the court would have ruled had Hall asked for an amount that would compensate him for the amount which he would have earned had he not been terminated.

The fifth question addresses the character of the defendant’s conduct that would permit recovery of punitive damages if the breach sounds in tort. If this breach sounds in tort, Oklahoma law would permit the recovery of punitive damages if the employer’s conduct evidences a “wanton or reckless disregard for the rights of another, oppression, fraud or malice . . . .”

The sixth question asks what duty either party has to mitigate damages. According to the United States Supreme Court, a dismissed employee has a duty to make a reasonable and diligent effort to find new employment. The failure by the employee to attempt to reduce damages constitutes a willful loss of earnings and relieves the employer of liability.

Although Hinson provided a framework for the law of wrongful discharge, many details are missing. By answering the Burk questions, the Oklahoma Supreme Court will be able to expand and clarify its holding in Hinson, as well as indicate exactly what exceptions to the employment-at-will doctrine are valid in Oklahoma. In addition, the Oklahoma court may specifically address the remedies that are available with these exceptions.

116. Hinson, 742 P.2d at 552.
117. Hall, 713 P.2d at 1031. The services previously performed in Hall were the sales of insurance policies; the compensation was for the commissions from the future premiums on those policies.
118. Id. at 1029.
120. See Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-98 (1941)).
121. Id.
122. A recent appellate court decision underscored the inconsistencies in Oklahoma’s past wrongful discharge decisions. On September 8, 1987 (after Hinson’s and Grayson’s remand), in McGee v. Florafax Int’l, Inc., 58 Okla. B.J. (Okla. Ct. App. 1987), the court ignored the Oklahoma Supreme Court’s decision in Hinson and relied upon its own interpretation of Hall. The appellate court’s failure to follow an Oklahoma Supreme Court decision further frustrates attempts to find order or predictability in Oklahoma employment law.
IV. CONCLUSION

Although employment-at-will is still the presumption in Oklahoma, recent decisions have created uncertainty and confusion in the field of labor law. The Oklahoma Supreme Court made a strong attempt to confront these problems in *Hinson v. Cameron*. The court in *Hinson* limited the implied covenant of good faith and fair dealing in the employment context to narrow circumstances and laid the groundwork for analyzing future wrongful discharge issues. The Oklahoma Supreme Court has established a basic approach to employment-at-will issues; however, it must continue to clarify this area of the law. The certified questions now before the court will provide the court the opportunity to provide certainty and predictability in the area of wrongful discharge law.

*J.C. Pletcher*