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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,¹ and approximately thirty jurisdictions now recognize a cause of action for wrongful discharge.² In the words of one commentator, it is "the labor law issue of the 80s."³

Labor law is changing in Oklahoma, as well. Recent cases have left the wrongful discharge causes of action in a state of confusion.⁴ 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.

1. Springer, *The Wrongful Discharge Case: Establishing and Avoiding Employer Liability*, TRIAL, June 1985, at 38 (citing Employment-at-Will Subcommittee, Employment and Labor Relations Law Committee, ABA Litigation Section, 1984 Report (Aug. 4, 1984)).

2. Tepker, *Oklahoma's At-Will Rule: Heeding The Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 378 (1986) (citing *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985)).

3. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1 (1984). The recent proliferation of commentary on the subject underscores the importance of this labor issue. See Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware!*, 5 J. L. & COM. 207 (1985); Driscoll, *Employment-At-Will: A Practical Guide for Employers*, WOMEN LAW. J., Summer 1983, at 7; Gilberg and Voluck, *Employee Termination Without Litigation*, PERSONNEL, May 1987, at 17; McCoy, *A Primer on the Oklahoma Retaliatory Discharge Act*, 57 OKLA. B.J. 715 (1986); Springer, *supra* note 1; Tepker, *supra* note 2; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

4. *Grayson v. American Airlines, Inc.*, 803 F.2d 1097 (10th Cir. 1986); *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987); *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Okla. 1985).

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

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.

6. *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, ___, 710 P.2d 1025, 1030 (1985) (citing Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332 (1982)).

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).

8. Tepker, *supra* note 2, at 379. See also Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

9. Tepker, *supra* note 2, at 379-80.

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. 579, 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."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.¹⁵ Once courts accepted the doctrine of employment-at-will, they adhered strictly to the presumption that an employment contract was at-will:¹⁶ unless parties agreed otherwise, an employment contract of indefinite duration could be terminated by either party at any time for any reason.¹⁷

B. *Exceptions to Employment-at-Will*

The at-will presumption has steadily declined in most states.¹⁸ Today, most jurisdictions have abandoned the rigid employment-at-will rule and recognize some form of wrongful discharge.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.²⁰

1. Public Policy

An employer may be held liable for wrongfully terminating an employee if the discharge violates public policy.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

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.

14. 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)).

15. *Id.* at 385-87. See also Carley, *At-Will Employees Still Vulnerable*, A.B.A. J., Oct. 1987, at 66, 70.

16. Gilberg and Voluck, *supra* note 3, at 17.

17. *Id.*

18. See Lopatka, *supra* note 3, at 1-6.

19. *Id.* at 1.

20. 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.

21. 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).

act;²² (2) discharge for exercising a legal right or privilege;²³ (3) discharge for performing a public obligation;²⁴ and (4) discharge for motives which violate other "clear mandates" of public policy.²⁵ The public policy exception is the most widely received exception to the employment-at-will doctrine;²⁶ in some jurisdictions, it is the sole exception.²⁷

2. Implied Contract

Several courts have found an implied-in-fact agreement or contract not to discharge an employee except for "just cause."²⁸ Certain employer representations may form an implied contractual basis for changing an at-will agreement into an agreement to terminate only for just

22. See *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (refusal to violate antitrust laws); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in price-fixing); *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee refused to perjure himself); *Trombetta v. Detroit, T. & I. R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to alter pollution reports); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978) (refusal to perform unlawful medical procedure); *Delaney v. Taco Time Int'l Inc.*, 297 Or. 10, 681 P.2d 114 (1984) (refusal to sign false, tortious statement); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (refusal to illegally pump bilges into the water).

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 *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983)).

24. See *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983) (employee subpoenaed to testify); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (employee insisted employer comply with state food labeling law); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (1982) (employee adhered to state pharmacy regulations and professional ethics); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee absence due to jury duty). This exception includes "whistleblowing" (complaining of or reporting employer's or another employee's wrongdoing). The discharge is generally retaliatory in nature. See *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (complained about embezzlement of corporate funds), *aff'd*, 143 Ill. App. 3d 1, 493 N.E.2d 616 (1986); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (supplied information to authorities regarding co-worker's illegal activity); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (complained because employer failed to comply with state and federal law).

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

26. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936 (1983).

27. See *id.* For a contrary view, see *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.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.²⁹ 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.”³⁰ For example, courts have given contractual status to oral employer assurances of job security at the time of hiring.³¹ Courts have also treated policy statements in a personnel manual as an agreement that an employee could only be discharged for just cause.³² 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 dealing³³ 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.³⁴ In the past, courts used this implied covenant primarily in insurance cases,³⁵ but it has been applied recently in the employment context, as well.³⁶ 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.”³⁷ In Montana, an employee handbook bound the employer to the handbook policies “as a matter of the covenant of good faith and fair dealing.”³⁸ 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,

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)).

32. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 598-99, 292 N.W.2d 880, 884-85 (1980).

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.

36. See *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

37. Lopatka, *supra* note 3, at 24 (citing *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980)).

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.³⁹ 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.⁴⁰

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.⁴¹ This is still the general rule today.⁴² Thus, both the employer and the employee have the right to terminate the at-will relationship without liability.⁴³ Recent cases, however, illustrate the debate over the continuing viability of the doctrine.⁴⁴ 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*,⁴⁵ 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.⁴⁶ Both parties enjoyed a mutually profitable and satisfactory relationship for many years.⁴⁷ However, in 1978, Hall and the Farmers district manager had several disagreements which eventually resulted in the termination of Hall's agency arrangement.⁴⁸ At the time of the notice of

39. *Id.* at 23 (citing *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21 (Mass. 1981)).

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.

41. See *Singh v. Cities Serv. Oil Co.*, 554 P.2d 1367 (Okla. 1976); *Foster v. Atlas Life Ins. Co.*, 154 Okla. 30, 6 P.2d 805 (1931); *Rogers v. White Sewing Mach. Co.*, 59 Okla. 40, 157 P. 1044 (1916); *Arkansas Valley Town & Land Co. v. Atchison, T. & S.F. Ry. Co.*, 49 Okla. 282, 151 P. 1028 (1915); *Willock v. Downtown Airpark, Inc.*, 130 F. Supp. 704 (W.D. Okla. 1955).

42. *Pierce v. Franklin Elec. Co.*, 737 P.2d 921, 923 n.4 (Okla. 1987).

43. *Freeman v. Chicago, Rock Island & Pac. R.R.*, 239 F. Supp. 661 (W.D. Okla. 1965). The court in *Freeman* discussed the principle of mutuality of obligation as a basis for employment-at-will. *Id.* at 662. See *Sooner Broadcasting Co. v. Grotkop*, 280 P.2d 457 (Okla. 1955).

44. *Grayson v. American Airlines, Inc.*, 803 F.2d 1097 (10th Cir. 1986); *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987); *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Okla. 1985).

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.⁴⁹ 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.⁵⁰ The trial court rendered a verdict in Hall's favor and the court of appeals reversed.⁵¹ The Oklahoma Supreme Court vacated the judgment of the court of appeals and affirmed the trial court's decision regarding the wrongful discharge.⁵²

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."⁵³ 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.⁵⁴ The court extended this implied covenant of good faith to "a covenant not to wrongfully resort to the termination-at-will clause."⁵⁵ Because Farmers terminated Hall with an intent to wrongfully deprive him of his earned commission, Farmers breached the implied covenant of good faith.⁵⁶

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.⁵⁷ One view is that *Hall* signified the end of the employment-at-will rule in Oklahoma:⁵⁸ the Oklahoma Supreme Court meant *Hall* to "sound the death knell on the laissez-faire era of unbridled employer discretion."⁵⁹ 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. The

49. *Id.* at 1029.

50. *Id.*

51. *Hall v. Farmers Ins. Exch.* 55 OKLA. B.J. 1297 (Okla. Ct. App. 1984).

52. *Hall v. Farmers Ins. Exch.* 713 P.2d 1027, 1032 (Okla. 1985).

53. *Id.* at 1029.

54. *Id.* (quoting *Wright v. Fidelity & Deposit Co.*, 176 Okla. 274, 277, 54 P.2d 1084, 1087 (1935)).

55. *Id.* at 1030 (citing *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974)). The *Monge* rationale has since been rejected in New Hampshire. *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, ___, 710 P.2d 1025, 1032 n.3 (1985).

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.

58. *E.g.*, *Grayson v. American Airlines, Inc.*, 803 F.2d 1097, 1099 (10th Cir. 1986); *Hinson v. Cameron*, 57 OKLA. B.J. 1229 (Okla. Ct. App. 1986).

59. Brief of Amicus Curiae, Oklahoma State Lodge Fraternal Order of Police, Professional Fire Fighters of Oklahoma, *Burk v. K-Mart Corp.*, No. 67,785 (submitted to the Oklahoma Supreme Court).

latter view is clearly the correct position in Oklahoma today.⁶⁰

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.⁶¹ The plaintiff in *Hall* requested damages based solely upon future premiums from policies already sold.⁶² The court awarded the damages that *Hall* requested,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 *Hall* decision, the Tenth Circuit incorrectly interpreted *Hall* in another at-will case, *Grayson v. American Airlines*.⁶⁴ Keith Grayson worked for American in Tulsa, Oklahoma.⁶⁵ When he was hired, Grayson signed an employment application⁶⁶ which stated (1) that he was an at-will employee, and (2) that his employment would be in accord with company rules and regulations.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."⁶⁸ After fifteen years of employment, American notified Grayson that his position was to be eliminated due to a reduction in force.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.⁷⁰ On January 4, 1982, American terminated Grayson and paid him thirty-two weeks' severance pay.⁷¹

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

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

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).

62. *Hall*, 713 P.2d at 1031.

63. *Id.*

64. 803 F.2d 1097 (10th Cir. 1986).

65. *Id.* at 1098.

66. This application contained the terms of Grayson's employment with American.

67. *Grayson*, 803 F.2d at 1098.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Grayson also filed suit for promissory fraud based on a prior temporary assignment to Toronto. *Id.*

without good cause limited American's power to terminate.⁷³ The district court granted American's motion for summary judgment.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.⁷⁵

The Tenth Circuit in *Grayson* interpreted *Hall* as indicating that good faith is mandated in all contracts.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.⁷⁷ Although the plaintiff in *Hall* sought to recover future commissions from renewal premiums on insurance policies already sold, the *Hall* court recognized that "each contract carries an implicit and mutual covenant by the parties to act toward each other in good faith."⁷⁸ The Tenth Circuit apparently believed that the Oklahoma Supreme Court in *Hall* did not intend a narrow application of the good faith requirement,⁷⁹ because the court in *Hall* indicated that "the implied covenant of good faith . . . exists in all contracts."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."⁸¹ According to the *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.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.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.⁸⁴

73. *Id.*

74. *Id.* at 1099.

75. *Id.* at 1101. The court affirmed the summary judgment on the promissory fraud claim. *Id.* at 1102.

76. *Id.* at 1099.

77. *Id.*

78. *Id.* (quoting *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027, 1029 (1985)).

79. *Id.*

80. *Hall*, 713 P.2d at 1031.

81. *Grayson*, 803 F.2d at 1099.

82. *See id.*

83. *Id.*

84. *Id.* American argued on remand that *Hall* was limited "to principal/agent relationships and to claims for the unconscionable denial of earned benefits." *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 *Hall* in *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987). *See infra* notes 86-97 and accompanying text. The

C. Hinson v. Cameron

After the Tenth Circuit remanded *Grayson*, the Oklahoma Supreme Court again addressed wrongful discharge in *Hinson v. Cameron*.⁸⁵ 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.⁸⁶ Nita Hinson worked as a nurse's assistant at Comanche County Hospital Authority for approximately five years.⁸⁷ The hospital discharged Hinson because she failed to follow an order on her daily assignment sheet.⁸⁸ 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.⁸⁹ In addition, Hinson argued that the hospital's employee manual, "which constitute[d] a part of her employment contract with the Hospital, protect[ed]

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:

[U]nder 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.*

her from discharge absent good cause.”⁹⁰

Hinson brought an action for wrongful discharge from employment, or in the alternative, for breach of employment contract.⁹¹ 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.⁹²

In *Hinson*, the Oklahoma Supreme Court first clarified its holding in *Hall*.⁹³ 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.’”⁹⁴ 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.”⁹⁵ Both the facts and the legal relationships in *Hinson* and *Hall* were “clearly distinguishable.”⁹⁶

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.⁹⁷ 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.”⁹⁸ 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.⁹⁹ 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.*

...¹⁰⁰ Even in light of the public policy exception, however, Hinson's claim was not actionable.¹⁰¹

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.¹⁰² The court refused "to impose upon the employer a legal duty not to terminate an at-will employee in bad faith."¹⁰³ The court reasoned that its "adoption of a contrary view would 'subject each discharge to judicial incursions into the amorphous concept of bad faith.'" ¹⁰⁴

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.¹⁰⁵ The court named five critical factors to determine whether such an implied-in-fact contract exists:¹⁰⁶ (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."¹⁰⁷ 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*.¹⁰⁸

D. *Burk v. K-Mart*

In late 1986, federal district Judge Brett¹⁰⁹ certified six questions regarding wrongful discharge to the Oklahoma Supreme Court in *Burk v. K-Mart Corp.*¹¹⁰ The subsequent *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 *Hinson* decision and its interpretation of *Hall* probably answered this certified question in the affirmative.¹¹¹ However, this covenant is not so extensive as to prohibit an employer from terminating an employee. In the employment context, the *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.¹¹² Therefore, termination itself is not prohibited; the law merely prohibits failure to pay earned benefits.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.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 *Hall*¹¹⁵ indicate that such a breach may sound only in contract. On the other hand, certain language in *Hinson* implies that a breach of the implied covenant

also cited an Oklahoma public employee case in which the Tenth Circuit held that a written employee handbook specifying that permanent employees would not be dismissed except for cause created a property interest in continued employment, *Vinyard v. King*, 728 F.2d 428, 432 (10th Cir. 1984). *Hinson*, 742 P.2d at 555 (citations omitted).

108. *Hinson*, 742 P.2d at 555-57.

109. Hon. Thomas R. Brett, United States District Judge, Northern District of Oklahoma.

110. No. 86-C-440-B (N.D. Okla. filed Nov. 28, 1986).

111. RESTATEMENT (SECOND) OF CONTRACTS §§ 205-08 (1981).

112. *Hinson*, at 742 P.2d 552.

113. *Id.*

114. *See supra* note 13.

115. *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Okla. 1985).

of good faith and fair dealing sounds in tort.¹¹⁶ 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.¹¹⁷ Because *Hall* only requested compensation already earned,¹¹⁸ 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"¹¹⁹

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.¹²⁰ The failure by the employee to attempt to reduce damages constitutes a willful loss of earnings and relieves the employer of liability.¹²¹

Although *Hinson* provided a framework for the law of wrongful discharge, many details are missing.¹²² 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.

119. OKLA. STAT. tit. 23, § 9 (1981 & Supp. 1986).

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 *McGehee 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

