Employment Contracts Terminable at Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges

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EMPLOYMENT CONTRACTS TERMINABLE AT WILL: MONGE v. BEEBE RUBBER CO.
AND BAD FAITH DISCHARGES

Introduction

Approximately ninety percent of the labor force in the United States can be classified as wage or salary earners.¹ With declining opportunities for self-employment,² America has become a "nation of employees."³ "[The] dependence of the mass of the people upon others for all their income is something new in the world. For our generation, the substance of life is in another man's hands."⁴

For most American workers this dependency is absolute because of the rule that in employment contracts of indefinite duration the employer has an absolute right of discharge;⁵ a right that may be exercised by an employer for a good cause, a bad cause,⁶ "or even for a cause morally wrong."⁷ Such a rule vests in an employer an enormous power subject to abuse. It was partially in response to "abusive" discharges that Congress enacted the National Labor Relations Act⁸ which prohibited employers from exercising the right of discharge as a means of intimidation and coercion against union organizing activity.⁹ This limitation on the employer's ordinary prerogative was deemed justified because the "employee is sensitive and responsive to even the most subtle expression on the part of the

¹ See REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA 20-23 (1972).
² Id. "In the middle of the 19th century, less than half of all employed people were wage and salary workers. By 1950 it was 80%, and by 1970, 90%.” Id.
³ F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).
⁴ Id.
⁵ Notes 16 and 17 infra and accompanying text.
⁷ Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).
⁹ See NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 47-48 (1937).
employer, whose good will is so necessary.”

There has, however, been no extension of the principles of the N.L.R.A. to other types of abusive discharges, although a number of writers have called for such action. Consequently, the majority of American workers serve at the whim of their employers, and are subject to abusive discharges without legal recourse.

Against the background of this almost universally accepted common law right of absolute discharge stands the recent case of Monge v. Beebe Rubber Company. Therein, the New Hampshire Supreme Court, boldly disregarding established precedent, held that malicious, bad faith, or retaliatory discharges are against public policy and constitute breaches of at-will employment contracts. As will be seen, this decision is not without substantial legal foundation and may well serve as the catalyst for a further judicial re-evaluation of this area of the law.

The Origins of the Terminable-at-Will Doctrine

An employment contract may be either expressly or impliedly for a definite term, in which case the courts will enforce the intentions of the parties. However, when the duration of employment is neither expressed nor implied, the employ-

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12 316 A.2d 549 (N.H. 1974).


14 Although courts were formerly usually unwilling to look beyond the express terms of a contract to determine whether a fixed term was implied under the circumstances, during the past thirty years they have been more inclined to do so. See Blumrosen, Employer Discipline: U.S. Report, 18 RUTGERS L. REV. 428, 431-33 (1964)
ment is understood to be for an indefinite period and is terminable at will by either the employer or the employee.\textsuperscript{15} Until recently, this rule was universal\textsuperscript{16} and without exception.\textsuperscript{17}

The "terminable-at-will" doctrine in employment contracts is peculiar to America. The English rule is that a general hiring (roughly equivalent to an indefinite hiring) is for one year.\textsuperscript{18} Thus, the contract is for a specific period and the intentions of the parties are enforced. The American rule originated with a late nineteenth century treatise which was quickly cited and followed by American courts, often with no justification or analysis.\textsuperscript{19} The author of the treatise, H. G. Wood, in stating the employment-at-will rule, said:

With us the rule is inflexible that a general or indefinite hiring is \textit{prima facie} a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to

\cite{Blumrosen}

[hereinafter cited as Blumrosen]. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Mayerson v. Washington Mfg. Co., 58 F.R.D. 377 (E.D. Pa. 1972); Wilson v. Haughton, 266 S.W.2d 115 (Ky. 1954); Still v. Lance, 182 S.E.2d 403 (N.C. 1971); School Comm. of Providence v. Bd. of Regents for Educ., 308 A.2d 788 (R.I. 1973). See generally 1 WILLISTON § 39 at 117. A minority of courts have been willing to find, where no duration is expressed, an implied term of employment in contracts where a periodic pay rate is specified. In such cases the courts have found an implied term of employment equal to the pay period. Where the pay period specification is taken to imply a contract for that period, an employee has a cause of action if terminated without cause. However, the majority of courts have concluded that pay period specifications relate only to pay rates and imply nothing about the duration of employment. The logical conclusion of the majority opinion is that since no term is specified the employment is at will. See generally Annot., 161 A.L.R. 706, 707 (1946); Annot., 100 A.L.R. 834 (1936); Annot., 11 A.L.R. 469 (1921).

\textsuperscript{15} See 9 WILLISTON § 1017 at 129.


\textsuperscript{16} Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) represents the sole exception.

\textsuperscript{17} See Annot., 161 A.L.R. 706, 707 (1946).

\textsuperscript{18} See Annot., 11 A.L.R. 469, 476 (1921).
establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. 20

Wood cited only four American cases, 21 none of which supported his thesis. 22 His statement of the employment-at-will rule, in spite of its dubious accuracy, spread widely and quickly and is today the "standard text statement of the common law." 23

Several writers attribute judicial receptivity to the doctrine to the sociological, political and economic ideologies that prevailed toward the end of the nineteenth century (i.e., laissez-faire, 24 free enterprise, 25 and individualism 26). A thor-

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20 H. Wood, Master and Servant § 134 (1877).
21 Wilder v. United States, 5 Ct. Cl. 462 (1869), rev'd on other grounds, 80 U.S. 254 (1871); DeBriar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871).
22 For a discussion of these cases see Annot., 11 A.L.R. 469, 476 (1921).
23 Blumrosen, supra note 14, at 432. The pervasiveness of the rule is illustrated by what one commentator has called its "most pernicious use"—limiting permanent employment contracts to "terminable at will" contracts. Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 345 (1974). The same year Wood's treatise was published, the Kentucky Court of Appeals decided in Perry v. Wheeler, 75 Ky. 541 (1877), that a minister's "permanent" employment was actually intended by the parties to continue only until one of them desired to terminate it. This application of the rule has increased to the point that today the majority of American courts construe permanent or lifetime contracts as "being an agreement at will, terminable by either party at his election." 9 Williston § 1017, at 131. Courts will not find a "permanent" contract enforceable unless the employee can show that he gave some consideration in addition to his services. This rule is evidenced by the following language in Edwards v. Kentucky Util. Co., 150 S.W.2d 916, 917-18 (Ky. 1941): "A universally recognized rule of law is that a contract for permanent employment which is not supported by any consideration other than the obligation of services to be performed on the one hand and wages to be paid on the other is a contract for an indefinite period, and, as such, is terminable at the will of either party." Accord, Stauter v. Walnut Grove Prods., 188 N.W.2d 305 (Iowa 1971).
26 See Rodes, Due Process & Social Legislation in the Supreme Court—A Post Mortem, 33 Notre Dame Law. 5 (1957) [hereinafter cited as Rodes]. Freedom of the individual was still a revolutionary concept to which the country was strongly attached emotionally and philosophically. The commitment was so strong that the courts were unwilling to uphold social legislation that restricted individual freedom. Id. In particular, the United States Supreme Court held unconstitutional statutory limitations on
oughly individualistic socio-economic worldview so dominated American consciousness in the last quarter of the nineteenth century that it was automatically a major premise for judges when they reviewed employment contracts. The doctrine of complete freedom of contract was a useful tool for maintaining this perspective. Indeed, the notion of complete freedom of contract is at the root of the terminable-at-will doctrine.27

"[T]he last statement of the unadulterated individualist position"28 and the "high water mark of the laissez-faire doctrine,"29 is contained in *Coppage v. Kansas*30 where the Supreme Court held that a state may not statutorily forbid the "yellow-dog" contract (i.e., it may not forbid an employer from discharging the employee for union activity). The Court found that an employer's right to hire and fire at will was a constitutionally protected property right. Implicit in the opinion is the idea that the exclusive right of the employer and the employee to determine the terms of employment must remain undisturbed by the courts or legislatures. The Court's belief that the doctrine of freedom of contract ought to prevail even in the face of a marked disparity of bargaining power is demonstrated by the following language:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.31

Mr. Justice Holmes, in his dissenting opinion, referred to the "equality of bargaining position at which freedom of contract

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27 Blades, supra note 10 at 1416.
28 Rodes, supra note 26 at 13.
29 Id. at 12.
30 236 U.S. 1 (1915).
31 Id. at 17.
begins,” but the Court was not yet ready to accept his position.

"Mutuality of Obligation" and Consideration

Economic policies may have fostered initial acceptance of the terminable-at-will rule, but traditional contract principles nurtured it and insured its survival to the present. One commentator has sadly concluded: "In the last analysis, then, it is not policy but the technical difficulty of relaxing the rather rigid rules of consideration which makes it unlikely that the employer's right to terminate the at will employment relationship can be limited under contract law."33

Originally the doctrine of "mutuality of obligation" was invoked to sanction discharges without cause in indefinite or permanent contracts of employment. That mutuality of obligation is necessary is one of the most commonly repeated statements known to the law of contracts. "Both parties to a contract must be bound or neither is bound."34 If the employee is not bound to give services for any specific length of time, then neither can the employer be required to continue to employ. In Adair v. United States,35 the Supreme Court said that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."36

Although "mutuality of obligation" is an attractive doctrine because it "seems to connote equality, fairness, and justice,"37 it is simply not true that both parties to a contract must be bound or neither is bound. Courts have long recognized and enforced unilateral and option contracts in which one of the

32 Id. at 27.
33 Blades, supra note 10 at 1421 (emphasis added).
34 1A A. CORBIN, CONTRACTS § 152 at 2 (1963) [hereinafter cited as CORBIN]. See, e.g., Storm v. United States, 94 U.S. 76 (1876); Meadows v. Radio Indus., 222 F.2d 347 (7th Cir. 1955); Lord v. Goldberg, 22 P. 1126 (Cal. 1889); Rape v. Mobile & O.R.R., 100 So. 585 (Miss. 1924); Rich v. Doneghay, 177 P. 86 (Okla. 1918); Kiser v. Amalgamated Clothing Workers, 194 S.E. 727 (Va. 1938).
35 208 U.S. 161 (1908).
36 Id. at 174-75.
37 1A CORBIN § 152 at 2-3.
parties is clearly never bound to do anything. However, in unilateral and option contracts both parties do confer a benefit or suffer a detriment (i.e., give consideration). It is now generally agreed by the courts and the treatise writers that the phrase "mutuality of obligation" has been confused with and can mean no more than that contracts require a mutuality of consideration. One text writer says flatly: "[T]he misleading notion that both parties must be 'bound' must be dispensed with. . . . [T]he supposed requirement of mutuality of obligation is merely one of mutuality of consideration: Each contracting party must supply consideration to the other." The Restatement emphatically states that if the requirement of consideration is met, there is no additional requirement of "mutuality of obligation."

The equating of mutuality of obligation with mutuality of consideration brings into focus the real obstacle to enforcement of indefinite employment contracts—consideration. When an

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38 "If mutuality, in a broad sense, were held to be an essential element in every valid contract to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract. Such contracts have long been recognized as valid contracts . . . ." Armstrong Paint and Varnish Works v. Continental Can Co., 133 N.E. 714 (Ill. 1921); "'Both parties must be bound or neither is bound.' That statement is obviously erroneous as applied to an exchange of promise for performance . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 81, Comment F (1969) [hereinafter cited as RESTATEMENT].

In a unilateral contract a promise is given in exchange for a performance instead of for a promise as in a bilateral contract. At no time, in a unilateral contract, is a promisee bound to give performance. Even after performance is begun the promisee is free to terminate his performance—he had made no promise. After he gives performance, he is not obligated to do anything more, although at this point the promisor is legally bound to honor his promise. Thus, in an unilateral contract, before performance no one is bound; after performance by the promisee only the promisor is bound. There is no mutuality of obligation, yet the contract is enforceable. Likewise, in an option contract where there is an executed consideration and a right to receive a performance, only one of the parties is ever bound. See generally 1 WILLISTON § 13.

39 In the past decade courts have rarely mentioned mutuality of obligation. For an exception in the context of employment contracts see Buian v. J.L. Jacobs & Co., 428 F.2d 531, 533 (7th Cir. 1970).

40 See, e.g., Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3rd Cir. 1924); Lewis v. Minnesota Mut. Life Ins. Co., 37 N.W.2d 316, 325 (Iowa 1949).

41 See 1 WILLISTON § 105A; 1A CORBIN § 162 (1963).

42 For an example of a hopeless confusion of "mutuality of obligation" with consideration see Hablas v. Armour and Co., 270 F.2d 71, 78-79 (8th Cir. 1959).


44 See RESTATEMENT § 81.

45 See Blades, supra note 10, at 1420.
employee is not obligated to work for a definite period of time due to an express or implied option to cancel, his promise to render services is illusory and the employment contract is unenforceable.\footnote{An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract. 1 WILLISTON § 105, at 418; "The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable." Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693, 694 (5th Cir. 1924) (commercial contract); accord, RESTATEMENT § 79.}

\textit{Monge v. Beebe Rubber Co.}

\textit{Monge v. Beebe Rubber Co.},\textsuperscript{47} decided in 1974, broke with traditional common law theory and found an abusive discharge in an employment contract of indefinite duration to be a breach of contract and against public policy. The plaintiff in \textit{Monge}, a married woman, refused to be "nice" to her foreman by "going out" with him. Thereafter she was demoted in job grade and pay level; eventually, after work absences due to illness, she was discharged. A jury found that the discharge was prompted by her refusal to "go out" with her foreman and awarded her $2,500 damages. On appeal, the New Hampshire Supreme Court acknowledged the common law rule of terminability-at-will of employment contracts of indefinite duration, but maintained there was a "new climate prevailing generally in the relationship of employer and employee"\textsuperscript{48} which demands a tri-lateral balancing of (1) the interest of the employer in running his business as he sees fit, (2) the employee's interest in maintaining his employment and (3) the public's interest in maintaining a proper balance between the two. The court held that:

A termination by the employer of a contract of employment at will which is motivated by bad faith or malice, or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.\textsuperscript{49}

The rationale of the court is contained within this single
paragraph. Two things are said about a bad faith termination by an employer: (1) it “is not in the best interest of the economic system or the public good” (i.e., it is against public policy), and (2) it “constitutes a breach of the employment contract.” It is uncertain whether the court thought a bad faith discharge is a breach of contract because it is against public policy, or whether the policy considerations are unnecessary to the finding of a breach of contract.

The court does not explain how its holding satisfies the requirements of consideration. This is surprising in view of nearly a century of American cases which have unanimously held that indefinite employment contracts fail precisely because of a lack of consideration, or, as the older cases say, because of a lack of mutuality of obligation. On first reading of *Monge*, the suspicion is all but unavoidable that the court deliberately sidestepped this issue. On closer examination, however, a strong argument can be made that the court satisfied the technical requirement of consideration by finding good faith to be an implied term in employment contracts. It is of paramount importance to focus on the court’s finding that bad faith, malicious, or retaliatory discharges constitute breaches of contract. By negative implication, it may be inferred that a bad faith termination is a breach of contract precisely because good faith termination was a term of the employment contract. It is unclear whether the court thought good faith termination was a term actually (although implicitly) agreed to by the parties, or a constructive condition imposed on the contract on public policy grounds.

**Good Faith as Consideration**

Regardless of the approach the *Monge* court intended, good faith, promised as a condition precedent to termination, constitutes consideration. Before and after entering into an at-will employment contract both the employer and employee are completely free to employ, or not employ, to work, or not work. A promise to employ, or not employ, which is in effect the promise an employer makes in an at-will contract, is *illusory* since the employer is actually promising nothing. However, when an employer (either expressly, implicitly, or as a matter of law) promises to employ and to discharge only in good faith,
his promise is no longer illusory, or rather, it is no longer wholly discretionary. Because the employer has by his promise given up a right to discharge for any reason and has limited himself to good faith discharges, he has suffered a legal detriment which constitutes consideration. Agreements to employ or to give services with options to cancel in good faith constitute alternative promises, each having value. It is legally inconsequential that a promise of good faith termination constitutes minimal consideration. Courts have not favored contracts cancellable at will and have generally responded by finding the most nominal obligation sufficient consideration to bind a bargain. By finding that good faith is an implied term in every employment contract, the court in Monge both supplied a valid consideration (although nominal) sufficient to render the contract enforceable and prohibited abusive discharges.

Prior to 1970, the cases were in agreement that good faith was not a condition of an employment contract unless expressly agreed to by the parties. It was consistently held that "[i]t makes no difference if the employer had a bad motive" in

51 See RESTATEMENT § 79.
52 See 1 WILLISTON § 105. For example, in "satisfaction" contracts, when the parties agree that an employee is to continue working so long as his services are "satisfactory," the contract is not too indefinite for enforcement. The satisfaction requirement renders the contract not terminable at will. The employer may only discharge if he is dissatisfied with the employee's services and the dissatisfaction must be in good faith. Annot., 6 A.L.R. 1497, 1499 (1920). It must be actual and not pretended. Hardison v. A.H. Belo Corp., 247 S.W.2d 167 (Tex. Civ. App. 1952). The courts are usually not concerned with whether the employer's dissatisfaction is reasonable, so long as it is genuine, and not capricious, nor prompted by bad faith. Kramer v. Philadelphia Leather Goods Corp., 73 A.2d 385 (Pa. 1950). In recent years some courts have applied a reasonable man test to determine whether an employer's dissatisfaction is genuine. Stevens v. G.L. Rugo & Sons, Inc., 209 F.2d 35 (1st Cir. 1953).

Another example of a nominal consideration which some courts have held constitutes valid consideration is a notice provision in an employment contract. Where the parties agree the contract is cancellable at will upon notice, it has been held that such notice constitutes sufficient consideration to make the contract enforceable. Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642, 645 (2d Cir. 1945): "[T]he United States promised by implication to take and pay for the trap rock or give notice of cancellation within a reasonable time. The alternative of giving notice was not difficult of performance, but it was a sufficient consideration to support the contract."

53 See cases cited in notes 6 and 7 supra.
54 Mallard v. Boring, 6 Cal. Rptr. 171, 174 (Dist. Ct. App. 1980); "precisely as may the employee cease labor at his whim or pleasure and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand,
discharging an employee. In a 1960 California case, Mallard v. Boring, a court wrestled with public policy considerations, as did the court in Monge, but decided that pronouncement of policy was the province of the legislature. The case concerned a plaintiff who was discharged from an “at will” employment contract because she made herself available for jury duty. The court held bad faith irrelevant, given the present status of the law, and said that even though it might consider it bad policy to permit such discharges, “we feel it [finding such discharges against public policy] should be done by the legislature.” The court in Monge was not so timid, but many other courts are likely to agree with the California court’s conclusion that public policy pronouncements are not within the province of the judiciary.

Two recent New York cases found good faith to be an implied term of the employment contract without resorting to public policy considerations. In Reale v. International Business Machines Corp., the plaintiff alleged a maliciously motivated discharge from his employment contract which was for a definite term. The court found that the defendant employer should have been granted summary judgment, since the plaintiff failed to demonstrate an “exclusive malicious motivation” on the part of the employer. “Plaintiff was bound to present proofs tending to exclude any motive other than a desire on the part of the defendants to cause harm to the plaintiff.” Apparently the court would tolerate malice if there was also a just cause for the plaintiff’s discharge, but the implication is clear that an exclusively malicious motivation in discharging an employee would give him a cause of action for breach of contract.

In Zimmer v. Wells Management Corp., the plaintiff employee entered into a stock transaction and escrow agree-

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may the employer discharge, and, whatever be his reason, good, bad, or indifferent, no one has suffered a legal wrong.” Union Labor Hosp. Ass’n v. Vance Redwood Lumber Co., 112 P. 886, 888 (Cal. 1910).

* Id. at 175.
* Id.
* Id. at 767.
* Id. at 768.
ment with his employer, whereby, after five years employment, the stock was to be fully vested in the employee. Eight months before the end of the five year term the plaintiff was fired because he was not a "swinger" and did not "mix well". The court held that while the employer was under no obligation to continue the plaintiff's employment, in view of the stock transaction and escrow agreement, the employers "did have a duty to deal with him in good faith in reaching their decision as to whether or not to renew and continue his employment. This is clearly what the contract contemplated." As in Reale, the court made no mention of public policy, but in imposing the requirement of good faith on the contract it saw itself as merely effectuating the intentions of the parties. Although the facts peculiar to Zimmer may make it likely that the parties to the contract contemplated good faith and fair dealing, it is nevertheless arguable that the parties to an ordinary industrial employment contract also expect fair treatment.

Although the issue of terminability may never arise in a job interview and the employee never consciously thinks about the matter, it is reasonable to suppose that the employee tacitly assumes he will be dealt with in all matters, fairly and in good faith including his discharge. Courts should enforce these

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61 Id. at 542.

62 See Blumrosen, supra note 14, at 433. The employment relationship has been altered dramatically since the terminable-at-will rule was formulated and since the United States Supreme Court in Adair v. United States, 208 U.S. 161 (1908) and Coppage v. Kansas, 236 U.S. 1 (1915) struck down state legislation which prohibited an employer from discharging an employee for union organizational activity. The National Labor Relations Act, 29 U.S.C. § 158 (a)(3) (1970), now prohibits such discharges. Other statutes forbid discrimination in hiring or discharge based on: age, see Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970); race, color, religion, sex, or national origin, see Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e)-(e) (2); and veterans are assured their former employment, see Universal Military Training and Service Act, 50 U.S.C. § 469 (c) (1970). Additionally, the Fair Labor Standards Act, 29 U.S.C. § 206 (Supp. 1974) provides that a minimum wage be paid to covered employees.

The changing legal climate has fostered new expectations of the employment relationship on the part of employees. See generally H. Vollmer, Employee Rights and the Employment Relationship 142-47 (1960). There has been a renaissance of expectations of good faith in all types of contracts. See generally Newman, Renaissance of Good Faith in Contracting in Anglo-American Law, 54 CORNELL L. REV. 533 (1969). This has been influenced, perhaps, by Uniform Commercial Code § 1-203 which states that: "Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement."
tacit assumptions as part of the contract the parties made. In employment and commercial contracts, "[m]en must be able to assume that those with whom they deal in the general intercourse of society will act in good faith." The question is whether men actually do make such assumptions. Arguably, contracting parties do and it is natural for them to do so. When parties agree to an "at will" cancellation agreement in a contract each "presumably agrees merely to the grant of a power, and not also to the grant of a power to abuse that power." It strains credulity to picture an employee consciously bestowing on an employer the right to abusively or maliciously discharge him, particularly if the employment will confer seniority, pension, or other cumulative benefits.

The question of terminability never specifically arises in most at-will contracts. The parties do not usually expressly agree that the employment is cancellable at will. On the contrary, the at-will aspect of an employment contract is usually a by-product of the failure of the parties to expressly provide for a definite term, which raises the strong presumption, according to the common law, that the parties intended the contract to be at-will. If it is true that prospective employees do not consciously grant their employers a power of abusive discharge, then it is certainly true that neither do they do so unconsciously. In short, the court in Monge could have avoided the matter of public policy, if it had chosen to do so, by simply announcing that in requiring a good faith discharge, it was merely enforcing what must have been the intentions of the parties.

**Consideration—A Nonessential?**

It was earlier suggested that a first reading of Monge indi-

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63 See generally L. FULLER & R. BRAUCHER, BASIC CONTRACT LAW, 554-59 (1964) (on the role of tacit assumptions in contracts).
64 R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188 (1922).
66 Id. at 251 n.222.
icates the court deliberately avoided the issue (and hence the traditional requirement) of consideration. Perhaps this is exactly what the court did, focusing instead upon either the intentions of the parties, or the demands of public policy as the court discerned them. It may have viewed good faith as a judicial tool for achieving justice, which no traditional contract theory could have accomplished without fictionalizing existing law.\textsuperscript{49} If this was the approach intended, it has support in recent cases. In \textit{Eilen v. Tappins, Inc.},\textsuperscript{70} the employee alleged a "permanent" contract which is ordinarily terminable at will unless the employee gives "additional" consideration over and above his services. Instead of following the unyielding rule of the common law demanding "additional" consideration, the court saw the rule as merely a guide for judges—a safeguard designed to insure that courts carefully scrutinize permanent employment contracts to determine whether the parties actually intended permanent employment. Thus, \textit{Eilen} focuses on the intent of the parties, and views the requirement of additional consideration expendable where its enforcement would clearly frustrate that intent. The same sentiment was expressed in dictum in \textit{Bussard v. College of Saint Thomas, Inc.},\textsuperscript{72} where the court said: "The rule [of additional consideration] is arguably too mechanical an answer to the more basic issue of ascertaining the real intent of the parties."

The bluntest attack on the rule of "additional consideration" to date came in the recent case, \textit{Drzewiecki v. H. & R. Block, Inc.},\textsuperscript{73} in which the court advocated the avoidance of "mechanical and arbitrary tests" and said that the court's pri-

\textsuperscript{49}See Summers, supra note 65, at 198. Good faith is part of a family of legal doctrines which performs the function of furthering the:
Most fundamental policy objectives of any legal system—justice, and justice according to law. By invoking good faith... it may be possible for a judge to do justice and do it according to law. Without legal resources of this general nature he might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalizing existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability.

\textit{Id.} at 198.

\textsuperscript{70}83 A.2d 817 (N.J. Super. 1951). See Blumrosen, supra note 25, at 482.

\textsuperscript{71}For a discussion of "permanent" contracts see note 23 supra.

\textsuperscript{72}200 N.W.2d 155, 161 (Minn. 1972).

\textsuperscript{73}101 Cal. Rptr. 169 (1972).
mary duty was to construe contracts to give effect to the intent of the parties "as demonstrated by the language used, the purpose to be accomplished and the circumstances under which the agreement was made."74

These three cases illustrate that the traditional technical requirements of consideration may be waived where failing to do so would create an injustice or frustrate the intent of the parties. Enforceable contracts founded upon "illusory" promises (which lack value and therefore do not constitute consideration) are not unprecedented. Courts have upheld such contracts where doing so has served the ends of public policy. For example, an infant's promise in a contract with an adult is voidable75 (i.e., cancellable at will and thus illusory) by the infant, but not by the adult. The Restatement, in attempting to rationalize infants' contracts with the general rule that promises cancellable at will are illusory76 makes the interesting statement that: "The value [of a promise] is not necessarily affected adversely by the fact that no legal remedy will be available in the event of its breach."77 The better view is that infants' contracts are simply exceptions to the generally applicable rules of consideration.78

The Monge court may have found on the basis of different but equally compelling public policies that at-will employment contracts are also exceptions to the normal rules of consideration (i.e., although cancellable and illusory, nevertheless enforceable). Although not expressly framed in policy terms, this is likewise the practical effect of Drzewiecki79 and to a more limited extent Eilen80 and Bussard,81 in the area of permanent employment contracts.

74 Id. at 174. In particular, the court said the "general rule requiring additional consideration is a rule of construction, not of substance and that a contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary." Id.
75 See 1 Williston § 15.
76 Restatement § 79. "The value of a promise depends on its terms and on the probability it will be performed." Id.
77 Restatement § 80.
78 See 1 Williston § 105.
79 101 Cal. Rptr. 169 (1972).
81 200 N.W.2d 155 (Minn. 1972).
Conclusion

At the turn of the century the employer ruled the work place with an iron hand. His strength lay primarily in the com-
mon law rule which rendered most employment contracts “at 
will.” Over the past forty years the employer’s power over his 
employees has been steadily eroded by the emergence of labor 
unions and a growing body of legislation. Although Monge v. 
Beebe Rubber Co. is a noteworthy break with well settled com-
mon law principles, its appearance is not surprising in view of 
the changing legal climate in employer-employee relationships. 
Employees do expect to be dealt with in good faith, especially 
when the question of termination arises. Monge gives those 
expectations the force of law by incorporating them into the 
employment contract.

Abusive discharges in indefinite employment contracts 
have been litigated repeatedly in the past. There is every rea-
son to believe they will be litigated in the future. In the interest 
of justice and in the interest of validating the reasonable expec-
tations of the parties, the courts should find that such dis-
charges constitute breaches of contract. As the foregoing dis-
cussion demonstrates, the legal theories necessary to achieve 
that result are available.

The New Hampshire Supreme Court was anxious to say 
that it did not intend to interfere with the normal right of an 
employer to discharge. Outrageous, unconscionable, or abusive 
discharges are not “normal,” and Monge holds that they con-
stitute breaches of contract, whether or not the employment 
was for a definite term. The rationale for the court’s holding is 
uncertain. It may have viewed the requirement of considera-
tion as a rule of construction rather than substance. In this 
view, a judge is to look more closely to determine the intent of 
the parties in the absence of consideration. Or, the court may 
have thought the answer to the question of consideration was 
implicit in its holding. By finding good faith in, or by imposing 
it on, the employment contract, the requirement of considera-
tion was technically satisfied.

It is true that the vast majority of current cases differ toto 
caelo with Monge. Those cases are based on precedents formu-
lated a century ago; a millenium ago in terms of the changes 
that have occurred in the “master-servant” relationship. “[I]t
is a ridiculous waste of time to cite precedents from the time of the Statute of Laborers; it is hardly less so to cite precedents from the nineteenth century or from the first quarter of the twentieth.”82 “The tide has most definitely turned. It is fruitless to speak in terms of weight of authority where it is evident that new approaches are firmly taking hold.”83

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82 3A Corbin § 674 at 207.