Walt-zing Through an Employment Termination: Is There a Duty to Investigate Before Discharging in Alaska?*

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This article examines the issue of whether employers have a common law duty to investigate before discharging an at-will employee. After analyzing Alaska case law to determine that Alaska does not currently impose such a duty at common law, the article evaluates Alaska’s view of contract provisions and the implied covenant of good faith and fair dealing. The article concludes by considering the possible ramifications of such a duty to investigate and suggests that a final decision on the matter is best left in the hands of the legislature, not the judiciary.

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* The reference is to Walt v. State, 751 P.2d 1345 (Alaska 1988), an Alaska Supreme Court decision discussed extensively in this article.

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I. INTRODUCTION

In the collective bargaining context, contractual provisions requiring "just cause" for dismissal have long imposed upon employers a duty to investigate before discharging an employee. Although nonunion employers also occasionally agree to terminate only for cause, they ordinarily do not. Absent such an agree-

1. "Just cause" is "a common standard for termination in collective bargaining agreements." Proctor & Gamble Mfg. Co. v. Independent Oil & Chem. Workers, 386 F. Supp. 213, 223 (D. Md. 1974); see also Sanders v. Parker Drilling Co., 911 F.2d 191, 196 (9th Cir. 1990) (Reinhardt, J., concurring) (stating that provisions requiring just cause for termination have been "used in most collective bargaining agreements throughout the nation for the past fifty-odd years"); cert. denied, 500 U.S. 917 (1991); Locke v. Kansas City Power & Light Co., 660 F.2d 359, 367 (8th Cir. 1981) (referring to the "just cause' clause in a typical collective bargaining agreement"); Show Indus., Inc., 312 N.L.R.B. 447, 455 (1993) (characterizing the "just cause standard for disciplinary actions" as one of the "bulwark[s] of job security provisions in a typical collective bargaining agreement").


"Just cause" is a multi-faceted consideration which has been applied by Arbitrators to fact portraits in various ways. A thread which runs through these numerous decisions is the concept that the Company make a full, fair and objective investigation in order to be satisfied that the charged individual is in fact guilty of the offense or breach.

3. See Sanders, 911 F.2d at 196 n.2 (Reinhardt, J., concurring); see also Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1411 (1967) ("Aside from the protection offered by limitations on the right of discharge reached by collective bargaining, just cause limitations . . . are found in individually negotiated contracts of employment for a specified term."); see generally David M. Young, Note, The Ninth Circuit Requires Alaskan Employers to Prove Misconduct to Justify Termination of Employees in Hazardous Workplaces: Sanders v. Parker Drilling, 14 GEO. MASON U. L. REV. 201, 204 n.21 (1991) ("The parties can create a just cause contract by explicit agreement or by an implied contract based either on oral statements or written statements contained in employee handbooks which would lead employees to believe they had job security.").

ment, the law generally has not imposed upon employers an obligation to investigate an employee's conduct or performance before exercising the right to discharge.5

Courts ordinarily have concluded that the recognition of a common law, extra-contractual duty to investigate before discharging would be inconsistent with the "employment at-will" rule,6 which traditionally has permitted employers to discharge their employees "at any time for any reason."7 Recently, however, the employment at-will rule has been the focus of extensive judicial and


7. Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 786 (Alaska 1989). "The classic statement of the at-will rule is that an employer may discharge an employee 'for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.'" Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 211 (N.D. 1987) (quoting Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915)); see generally Penny L. Crook, Employment at Will: The "American Rule" and Its Application in Alaska, 2 ALASKA L. REV. 23, 23 (1985) ("American courts have adopted a laissez-faire attitude toward employment contracts, favoring a presumption that contracts of indeterminate length are terminable at will.").
academic criticism, and the Alaska Supreme Court has recognized a number of exceptions to it.

An exception exists, for example, when the terms of an employee handbook or other representations give rise to an implied contract limiting the employer's right to discharge. Alaska also recognizes a public policy exception allowing at-will employees to recover when they have been discharged in violation of a public policy that "strike[s] at the heart of a citizen's social rights, duties, and responsibilities . . . ." Finally, Alaska prohibits employers from discharging their employees in violation of a covenant of good faith and fair dealing implicit in the employment relationship.

The occasional recognition in other jurisdictions of claims for negligent discharge may reflect yet another emerging exception to the employment at-will rule. Indeed, the continuing assault on
the rule suggests that it ultimately may be abandoned altogether in favor of the recognition of a "new duty of due care owed by an employer... rendering [it] liable for damages for the negligent breach of [that] duty." One component of such a tort-based duty undoubtedly would be a requirement that employers "investigate allegations with due care before discharging an employee."

The possibility of such a requirement has significant implications. The erosion of the employment at-will doctrine already has substantially increased the amount of employment litigation, and the phenomenon "has not left Alaska unaffected."

14. See, e.g., Boudar v. E.G. & G., Inc. 742 P.2d 491, 494 (N.M. 1987) ("The terminable-at-will rule is undergoing considerable erosion in the various states, whether by legislative fiat or judicial reconsideration."); Crook, supra note 7, at 23 (observing that "the courts and legislatures of many states have created exceptions to the... rule"); Young, supra note 3, at 204 ("The trend in the United States courts over the past several decades has been to move away from the presumption of employment at-will, and to provide greater job security for employees.").

15. See Cornelius J. Peck, Unjust Dismissal from Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1, 1 (1979) (predicting that "American courts will abandon the principle that... a contract of employment for an indefinite term is... terminable at will by either party").


19. See Lisa B. Bingham, Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions, 55 OHIO ST. L.J. 341, 372 (1994) ("There is already ample concern that the wrongful discharge tort has vastly increased potential employer liability.").

20. Rutledge, supra note 9, at 265. In a case applying Alaska law, Judge Kozinski of the Ninth Circuit decried the increase in employment litigation on the following basis:

Judicial proceedings... are expensive and protracted, with litigation costs amounting to 80% of the average total recovery in settled cases and 130% in cases that go to trial.... They require the courts to second-guess management decisions made years earlier... [and] largely ignore the legitimate interests of others, including those of fellow workers who may be affected by the decision.
recognition of a duty to investigate before discharging undoubtedly would have a similar impact. Indeed, one judge observed that the recognition of a duty to investigate would create an atmosphere in which "[a]ll most any dispute with a factual component . . . could end up in court." Because an increased potential for jury review of personnel decisions may deprive employers of the flexibility necessary to run their businesses, another judge has characterized that possibility as an "immensely troubling prospect."

Given these views, relatively few courts have been willing to recognize a claim for "negligent investigation" in the employment context. In *Walt v. State*, the Alaska Supreme Court joined those courts that have refused to impose upon employers an extra-contractual duty to investigate before discharging. However, Alaska's recognition of the implied covenant of good faith and fair dealing and the court's interpretation of that covenant in cases


21. See Wilson v. Vlasic Foods, Inc., 116 L.R.R.M. (BNA) 2419, 2422 (C.D. Cal. 1984) ("Recognizing a duty of care in this situation would turn nearly every termination into a potential tort suit and would circumvent the policy . . . which authorizes most employment contracts to be terminated at will."); see generally Owens, *supra* note 8, at 306 (referring to the "significant increase in [employment] litigation that inevitably accompanies the broadening of recovery theories").


24. *Sanders*, 911 F.2d at 211 (Kozinski, J., dissenting).


27. *Id.* at 1351.

decided subsequent to *Walt* suggest that whether employers generally have a duty to investigate before discharging is still an open issue in Alaska.30

This article begins with a review of cases from other jurisdictions that appear to impose upon employers a duty to investigate before discharging.31 It then discusses Alaska’s treatment of the issue and notes that while the Alaska Supreme Court has refused to recognize a tort-based duty to investigate in the employment context,32 its interpretation of the implied covenant of good faith and fair dealing may impose a contractual duty to investigate on all employers.33 Finally, the article considers the ramifications of that possibility34 and concludes that the imposition of any duty to investigate should be the result of legislative enactment rather than judicial decision.

II. THE VIEW THAT EMPLOYERS HAVE A COMMON LAW DUTY TO INVESTIGATE BEFORE DISCHARGING

A common law duty to investigate prior to discharging an employee has received only mixed support in a number of states. *Chamberlain v. Bissell, Inc.*,35 often is described as the “seminal” case recognizing a duty on the part of employers to use due care in discharging their employees.36 In *Chamberlain*, the plaintiff received an annual performance evaluation approximately three months before being discharged.37 Applying Michigan law,38 the

29. See infra notes 249-58 and accompanying text.
30. See, e.g., Sanders v. Parker Drilling Co., 911 F.2d 191, 215 n.16 (9th Cir. 1990) (Kozinski, J., dissenting) (observing in a case arising under Alaska law that the good faith obligation “requires the employer to conduct a reasonable investigation of the alleged [rule] violation” before discharging an employee), cert. denied, 500 U.S. 917 (1991).
33. See *Sanders*, 911 F.2d at 215 n.16 (Kozinski, J., dissenting).
34. See generally Lambert, 843 P.2d at 1119 (concluding that the imposition of a general duty to investigate before discharging would be inappropriate “[a]s a matter of policy”).
court held that the employer was negligent in failing to inform the plaintiff at the time of the evaluation that he faced possible termination unless his performance improved. It concluded that an employer that undertakes to conduct performance reviews has a duty to use reasonable care in doing so.

Although indicating that a complete failure to evaluate the plaintiff might have been actionable "only as a breach of contract," the court nevertheless concluded that the negligent performance of the plaintiff's evaluation was actionable in tort. In reaching that conclusion, the court observed that "[t]he fact that no actionable breach of contract may have occurred does not preclude a finding that the performance of [the] contractual undertaking has been negligent," because a contractual duty to evaluate an employee's performance is distinct from the duty to use ordinary care in conducting the evaluation.

recognized a cause of action for "negligent job evaluation" in that case. Chamberlain, 547 F. Supp. at 1081. In Kostello v. Rockwell Int'l Corp., 472 N.W.2d 71, 73 (Mich. Ct. App. 1991), however, the Court of Appeals subsequently described Schipani as the "only Michigan [case] to recognize a negligent evaluation claim in the context of an employment contract" and stated that "[s]ince its release, Schipani has been routinely rejected by other panels of [the Michigan] Court [of Appeals]."


42. Id.; cf. Ferrett v. General Motors Corp., 475 N.W.2d 243, 248 n.12 (Mich. 1991) ("Cases rejecting a tort of negligent evaluation generally draw no distinction between a failure to evaluate and negligence in the evaluation.").
The holding in *Chamberlain* has been criticized and has been undermined by subsequent Michigan cases "declin[ing] to impose upon employers an extra-contractual duty in applying policies and procedures." In particular, the conclusion that an employer who undertakes to evaluate an employee may be liable for failing to use reasonable care in doing so seems likely to prompt at least some employers to refrain from evaluating their employees.

Despite its questionable vitality, *Chamberlain* continues to be cited for the proposition that Michigan recognizes a claim for negligent evaluation in the employment context. Moreover, the *Chamberlain* court's reasoning appears to be consistent with the prevailing view on general private-entity tort liability in Alaska. This suggests that Alaska may join those courts that impose upon

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45. The New Mexico Supreme Court recently made a similar point in Hartbarger v. Frank Paxton Co., 857 P.2d 776 (N.M. 1993), cert. denied, 114 S.Ct. 1068 (1994). The plaintiff argued that the employer should be required to establish just cause for his termination because one of the employer's supervisor's testified that "it was not [the employer's] custom and practice to go around firing people and that when [it] did fire someone, [it] usually had a good reason." *Id.* at 784-85. The court concluded that, "[a]s a matter of policy, [it would] not consider evidence that a company does not usually fire employees without a good reason as by itself establishing that the company does not maintain an at-will employment policy" because "[i]f we otherwise would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so." *Id.* at 785 (emphasis deleted).


47. See City of Kotzebue v. McLean, 702 P.2d 1309, 1313 (Alaska 1985) ("The basic question is whether the defendant has undertaken a responsibility. If it has, and it has failed adequately to discharge that responsibility, it may be liable to people who have been injured." (citing RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965))).
employers a duty to exercise "ordinary and reasonable care in investigating the need to terminate . . .".48

Montana, for example, recognized a claim for negligent investigation in the employment context in Crenshaw v. Bozeman Deaconess Hospital.49 In Crenshaw, the plaintiff was employed as a hospital respiratory therapist.50 She was accused of misconduct by three nurses working in the hospital's intensive care unit.51 Among other things, the nurses claimed that the plaintiff breached a duty of patient confidentiality, attempted to perform medical tests without authorization, and disrupted patient care.52

Upon being notified of her discharge, the plaintiff met with the hospital administrator, who indicated that he would review the matter.53 After the administrator interviewed various employees present at the time of the alleged misconduct, he affirmed the discharge.54 The plaintiff then filed suit against the hospital,55 claiming that the administrator was negligent in "fail[ing] to interview all of the witnesses present on the night in question . . . ."56

The Montana Supreme Court concluded that the hospital's conduct had fallen below the legal standard for protecting others against unreasonable risks57 and affirmed a jury verdict in favor of the plaintiff on the negligence claim.58 The court based its conclusion on evidence that the hospital administrator had failed to

48. Heltborg v. Modern Mach., 795 P.2d 954, 959 (Mont. 1990) (declining to impose a duty to investigate); see also Tollefson, 268 Cal. Rptr. at 558 (observing that "a tort action for negligent performance of a contractual duty to evaluate . . . . has been recognized in . . . . other jurisdictions").
49. 693 P.2d 487 (Mont. 1984); see Heltborg, 795 P.2d at 960 ("This Court first allowed a negligence cause of action in an employment termination case in Crenshaw.").
50. Crenshaw, 693 P.2d at 488.
51. Id.
52. Id. at 489.
53. Id.
54. Id.
55. Id. at 490.
56. Id. at 493.
58. Crenshaw, 693 P.2d at 493.
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interview all of the relevant witnesses and on the conclusion of an expert in personnel management that the allegations against the plaintiff were not properly investigated before the discharge decision was made.\(^59\) The court observed that the charges against the plaintiff should not have been sustained without a "careful consideration of the consequences to [her] professional livelihood and reputation."\(^60\) Thus, the court effectively held that a finding of negligence is proper where an employer fails to investigate allegations of misconduct before discharging an employee.\(^61\)

The conclusion in *Crenshaw* was endorsed in *Flanigan v. Prudential Federal Savings & Loan Ass'n*,\(^62\) where the Montana Supreme Court held that the contention that the plaintiff's former employer failed to review her prior performance and work history before discharging her would support a claim for negligence.\(^63\) Finding *Crenshaw* to be "compelling" precedent, the *Flanigan* court concluded that "[n]egligence [is] a proper basis for recovery in wrongful termination cases."\(^64\)

In *Hollars v. Southern Pacific Transportation Co.*,\(^65\) the New Mexico Court of Appeals also concluded that there is a common law duty to investigate before discharging.\(^66\) The plaintiff in

\(^{59}\) Id.

\(^{60}\) Id. at 496; cf. *Ashway*, 59 Fair Empl. Prac. Cas. (BNA) at 377 n.6 (recognizing a duty to investigate before discharging in part because false accusations about an employee place "his job, his ability to earn a livelihood, and his reputation . . . in jeopardy").

\(^{61}\) See Heltborg v. Modern Mach., 795 P.2d 954, 960 (Mont. 1990) (construing *Crenshaw*). A similar concern led the court in *Ashway* to impose a duty to investigate upon the employer in that case. See *Ashway*, 59 Fair Empl. Prac. Cas. (BNA) at 3770 & n.7.


\(^{63}\) Id. at 263.

\(^{64}\) Id.; see also *Kizer v. Semitool, Inc.*, 824 P.2d 229, 236 (Mont. 1991) (observing that "an employer may be liable for negligence . . . for failing to make a proper investigation before discharge"); Karell v. American Cancer Soc'y, 779 P.2d 506, 510 (Mont. 1989) ("Montana has recognized [a] cause of action for negligent discharge from employment."). But see *Kittelson v. Archie Cochrane Motors, Inc.*, 813 P.2d 424, 426 (Mont. 1991) (observing that "negligent discharge is no longer a recognized exception to termination of employment 'at will'" in Montana).


\(^{66}\) See id. at 1156 (Hartz, J., concurring in part, dissenting in part) (observing that New Mexico did not recognize a cause of action for negligent investigation in the employment context "prior to this case").
Hollars was discharged for allegedly being intoxicated while on call. He appealed the dismissal under the terms of a collective bargaining agreement and, as a result, was reinstated to his position as an engineer.

The plaintiff then filed suit, alleging that his employer had been negligent in handling the investigation that led to his discharge. He claimed that the employer had a duty to investigate the charges against him before making the decision to discharge and to disregard those charges if there was insufficient evidence to support them. The trial court dismissed the claim, holding that it was preempted by the Railway Labor Act (the "RLA"), and the plaintiff appealed.

The New Mexico Court of Appeals concluded that the preemption issue was governed by the United States Supreme Court's decision in Lingle v. Norge Division of Magic Chef, Inc., a case arising under § 301(a) of the Labor Management Relations Act (the "LMRA"), rather than the RLA. Under that decision, the negligence claim in Hollars would be preempted if its resolution required interpretation of the collective bargaining agreement.

67. Id. at 1148.
68. Id.
69. Id. at 1148, 1150.
70. Id. at 1150.
75. Hollars, 792 P.2d at 1149-50.
76. The propriety of applying the Lingle test in a case arising under the RLA is not in serious dispute. See, e.g., Davies v. American Airlines, Inc., 971 F.2d 463, 466 (10th Cir. 1992) ("[T]he test articulated by Lingle . . . is just as valid under the RLA as it is under the LMRA."), cert. denied, 113 S.Ct. 2439 (1993).
agreement. The court observed that interpretation of the collective bargaining agreement would be necessary, and the plaintiff's negligence claim preempted, if the agreement "outline[d] steps to be taken, or impose[d] a standard of care for investigations and grievance procedures." If the agreement was silent on those matters, however, the court was of the view that the claim could proceed under a general negligence standard. Because the collective bargaining agreement was not part of the record on appeal, and there was no indication that the trial court had applied Lingle in ruling upon the preemption issue, the New Mexico Court of Appeals remanded the case for a determination of whether interpretation of the collective bargaining agreement was necessary.

Judge Hartz dissented from the relevant portion of the court's opinion. Judge Hartz agreed that the plaintiff's negligence claim would be preempted if the collective bargaining agreement "deal[t] with the employer's duty in investigating [the] alleged misconduct." He disagreed, however, with the majority's conclusion that the trial court could consider the claim under a general negligence standard if the collective bargaining agreement did not address the issue.

Because New Mexico employers generally can discharge at will, Judge Hartz concluded that they must have the right to dismiss employees "on the basis of charges which [they] may not have investigated adequately, unless [a] contract of employment provides otherwise." Thus, if the collective bargaining agree-

77. Hollars, 792 P.2d at 1150.
78. Id.
79. Id.
80. Id. at 1148.
81. Id. at 1153 (Hartz, J., concurring in part, dissenting in part).
82. Id. at 1156 (Hartz, J., concurring in part, dissenting in part).
83. Id. (Hartz, J., concurring in part, dissenting in part).
85. Hollars, 792 P.2d at 1156 (Hartz, J., concurring in part, dissenting in part); cf. Wilson v. Vlastic Foods, Inc., 116 L.R.R.M. (BNA) 2419, 2422 (C.D. Cal. 1984) ("The Court is aware of no authority . . . which holds that a party who is free to terminate a relationship at will is nonetheless liable . . . when the relationship is terminated negligently."); Dowling v. Blue Cross of Florida, Inc., 338 So. 2d 88, 88-89 ( Fla. Dist. Ct. App. 1976) (holding that the contention that appellants were
ment did not establish a duty to investigate, Judge Hartz believed that the dismissal of the plaintiff's negligence claim should be affirmed on the ground that "no non-contractual duty to investigate allegations before discharging an employee has been recognized in New Mexico," and "there can be no breach of a non-existent duty." Because Judge Hartz's analysis was not embraced by the Hollars majority, the court's conclusion appears to indicate that employers in New Mexico may have a generalized, extra-contractual duty to "investigate allegations with due care before discharging an employee."

III. ALASKA'S TREATMENT OF THE DUTY TO INVESTIGATE

A. Alaska Does Not Recognize a Common Law, Tort-Based Duty to Investigate Before Discharging

The Alaska Supreme Court's only specific consideration of whether employers have a duty to investigate before discharging occurred in Walt v. State. The plaintiff in Walt was employed as a development specialist for the Alaska Department of Commerce and Economic Development. In that position, he was subject to the terms of a collective bargaining agreement. The plaintiff was discharged as a result of his remarks at an economic development conference that he attended on behalf of the department.

Promptly after being discharged, the plaintiff filed a grievance in accordance with the terms of the collective bargaining agreement. The grievance was partially successful, and, as a result,
the plaintiff was reinstated to his position. Shortly thereafter, the plaintiff brought suit against the State of Alaska and several of his supervisors, alleging, among other things, that the defendants had breached a duty to use reasonable care in determining whether there was cause for his termination.

The trial court entered summary judgment in favor of the defendants, finding that the grievance procedure provided for in the collective bargaining agreement constituted the plaintiff's "exclusive method of recourse," and the plaintiff appealed. On appeal, the Alaska Supreme Court concluded that the trial court had erred in holding that the plaintiff's negligence claim was barred by the terms of the collective bargaining agreement because the State had "stipulated that [the plaintiff's] tort claims were not arbitrable." That ruling, in turn, necessitated a determination of whether the plaintiff's negligence claim was substantively viable "apart from the remedies . . . afforded [under] the collective bargaining agreement." The Alaska Supreme Court concluded that the claim was not substantively viable, affirming the trial court's dismissal of the plaintiff's negligence claim on the ground that Alaska does not recognize a common law tort for negligent investigation in the employment context.

B. Contract Provisions Limiting the Right to Discharge May Give Rise to a Duty to Investigate

Although it concluded that there is no tort-based duty to investigate before discharging, the Walt court indicated that the State's alleged failure to exercise reasonable care in investigating whether grounds existed for the plaintiff's termination might have provided the basis for a viable breach of contract claim. This

93. Id. at 1346-47.
94. Id. at 1347.
95. Id.
96. Id. at 1350-51.
97. Id. at 1351.
98. Id. at 1351, 1354 n.18.
99. Id. at 1351. More specifically, the court characterized the plaintiff's allegation that the State had been negligent in investigating the basis for his termination as "an attempt to change a claim for breach of contract into a tort claim." Id. (emphasis added). Had the plaintiff asserted a claim for breach of contract premised upon the State's allegedly inadequate investigation, however, the claim presumably would have been subject to the exclusive remedy provisions of the collective bargaining agreement. The trial court's conclusion that the plaintiff's
suggestion apparently was premised upon the existence of a provision in the applicable collective bargaining agreement requiring just cause for dismissal.  

Elsewhere, the Alaska Supreme Court has indicated that although there is no uniform right to just cause for termination, employers who agree to terminate only for cause "must comply or be liable for damages." Other courts have concluded that in such a situation, an employer is subject to potential liability if it discharges an employee without conducting an adequate investigation to determine whether cause for the discharge actually exists.

In Ashway v. Ferrellgas, Inc., for example, the existence of an implied contract term requiring just cause for dismissal led a federal district court in Arizona to conclude that, before discharging the plaintiff, the employer was required to investigate the allegations of sexual harassment upon which the discharge was based. The court reasoned that although few courts have

other contract claims were barred on that basis, while apparently not challenged on appeal, received at least implicit approval from the Alaska Supreme Court. See id. at 1347, 1350-55.

100. See id. at 1351 (observing that the collective bargaining agreement "incorporated the standard of just cause for employee discipline"); see also Owens, supra note 8, at 300 (observing that the plaintiff in Walt "was not an at-will employee").


104. Id. at 376. Many of the reported decisions discussing a duty to investigate before discharging involve allegations that the discharged employee had engaged in sexual harassment. This phenomenon may be attributable, at least in part, to the legal obligation of employers to investigate the allegations of an employee claiming to have been sexually harassed. See Garziano v. E.I. Du Pont de Nemours & Co., 818 F.2d 380, 387-88 (5th Cir. 1987); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977); 29 C.F.R. § 1604.11 (1993). The court in Ashway, for example, described as "somewhat absurd" the proposition that this obligation "protect[s] a complainant, but does not protect ... [a] person who has been accused," and observed that "public policy could support a dual duty on the part of the employer to both the apparent victim and the accused to investigate charges of sexual harassment." Ashway, 59 Fair Empl. Prac. Cas. (BNA) at 377; see also Lawson v. Boeing Co., 792 P.2d 545, 548 (Wash. Ct. App. 1990) (assuming, without deciding, that an employer may owe an employee accused of sexual harassment "a duty to conduct a reasonable investigation"), review denied,
addressed the meaning of contract provisions requiring just cause for dismissal, 105 "leaving the determination solely up to the employer would make the meaning of the term illusory." 106

The conclusion that a contract term requiring cause for dismissal obligates an employer to investigate allegations upon which a discharge decision is to be based is not surprising. 107 As noted earlier, courts and arbitrators long have held this view in cases involving the interpretation of collective bargaining agree-


However, not all courts share that view. In Martin v. Baer, 928 F.2d 1067, 1072 (11th Cir. 1991), for example, the court stated:

[The plaintiff] apparently claims that an implied duty to investigate exists that runs not only to the alleged victims of harassment, but also to persons accused of such harassment. Such a reading is an attenuated and unwarranted stretch of [the defendant's] sexual harassment policy. Although all parties involved in a company's investigation of sexual harassment complaints obviously benefit from attempts to discover the truth surrounding such complaints, . . . the primary emphasis of [the defendant's] sexual harassment policies and procedures is on protecting harassment victims.


Labor arbitrators have generated a large body of decisions interpreting and applying such terms as "just cause" . . . , and some of their work may be useful. It must be remembered, however, that arbitrators are selected . . . on the basis, partly, of . . . their knowledge and judgment concerning labor relations matters. . . . For courts to apply the same standards may prove overly intrusive in some cases.

Cf. Warren Martin, Comment, Employment at Will: Just Cause Protection Through Mandatory Arbitration, 62 WASH. L. REV. 151, 164-65 (1987) (concluding that labor arbitration decisions merely provide a "useful starting place to define just cause in the wrongful termination context," where just cause "must be analyzed independently").

106. Ashway, 59 Fair Empl. Prac. Cas. (BNA) at 376 & n.2 (noting that "a stated cause without some basis for belief is no cause at all").

107. See generally Crosier v. United Parcel Serv., 198 Cal. Rptr. 361, 366 (Cal. Ct. App. 1983) (observing that a "promise to dismiss an employee only for cause would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the . . . discharge"); Young, supra note 3, at 223 n.126 ("[A] subjective standard [of just cause] would be too susceptible to abuse. It would be far too easy for an employer to prove his own subjective beliefs, so that the rule would not adequately protect against opportunistic behavior by the employer.").
ments. A number of courts have extended that view to cases involving nonunion employment as well.

Moreover, the applicability of this analysis does not appear to be limited to cases involving provisions requiring "cause" for discharge; an employer may also have a duty to investigate before discharging when the employment contract enumerates "specific reasons for dismissal." In Gaglidari v. Denny's Restaurants, Inc., for example, the plaintiff brought suit against her former employer alleging that it failed to discharge her in accordance with the terms of her employment contract. After a jury verdict in favor of the plaintiff, the employer appealed.

Although the Washington Supreme Court reversed and remanded for a new trial, it noted that an employment handbook provided to the plaintiff specified various grounds for immediate termination and concluded that the handbook constituted a part of the plaintiff's employment contract. The court then held that "[i]n order for [the] plaintiff's discharge to have been proper under the immediate discharge provision, [the employer] must have conducted an adequate investigation prior to terminating [the] plaintiff."

A similar view was expressed in Kestenbaum v. Pennzoil, Inc. In that case, the plaintiff had been employed by Pennzoil as a vice president in charge of guest operations at a recreational ranch in northern New Mexico. While employed in that

108. See supra notes 1-2 and accompanying text; cf. Blades, supra note 3, at 1410 ("Through the 'just cause' provisions typically found in collective bargaining agreements unions not only protect their constituents from discharges for ulterior purposes, but also prohibit discharges for no reason or for reasons erroneously believed by the employer to be justified." (emphasis added)).

109. See, e.g., Gaglidari v. Denny's Restaurants, Inc., 815 P.2d 1362, 1379 (Wash. 1991) (Brachtenbach, J., concurring in part, dissenting in part) (stating that to properly terminate for cause, the employer "should conduct an objectively reasonable investigation to ascertain the facts").


112. Id. at 1365.

113. Id.

114. Id. at 1366.

115. Id. at 1366-67.

116. Id. at 1368.


118. Id. at 281.
capacity, he was accused of sexual harassment\textsuperscript{119} and other acts of misconduct.\textsuperscript{120} Pennzoil initiated an investigation into the accusations, which consisted primarily of interviews of present and former female employees of the ranch.\textsuperscript{121} Upon completion of the interviews, the investigators presented Pennzoil officials with a report summarizing the evidence they obtained.\textsuperscript{122} The investigators then confronted the plaintiff with the allegations of sexual harassment, which he denied.\textsuperscript{123}

The plaintiff was informed of the names of the persons who had been interviewed, and given an opportunity to comment about each.\textsuperscript{124} Pennzoil also permitted the plaintiff to identify witnesses who would speak on his behalf.\textsuperscript{125} After a meeting with another Pennzoil vice president, however, the plaintiff’s employment was terminated.\textsuperscript{126}

The plaintiff then filed suit against Pennzoil, claiming that he was discharged without a fair investigation and consideration of the evidence.\textsuperscript{127} Pennzoil argued that the plaintiff was an at-will employee who could be discharged for any reason, and alternatively, that if a valid reason for discharge was required, it had reasonable grounds to believe that its decision was justified.\textsuperscript{128} The jury found by special verdict that the plaintiff’s employment was not terminable at-will and was subject to an implied contract requiring a “good reason” for termination, and that “there was no good reason to discharge [the plaintiff].”\textsuperscript{129} Pennzoil then appealed.\textsuperscript{130}

The New Mexico Supreme Court concluded that there was substantial evidence to support the conclusion that the parties had agreed to an implied contract permitting termination only for good reason.\textsuperscript{131} The court held that “the jury could have absolved

\begin{itemize}
\item \textsuperscript{119} See supra note 104.
\item \textsuperscript{120} Kestenbaum, 766 P.2d at 281.
\item \textsuperscript{121} Id. at 281-82.
\item \textsuperscript{122} Id. at 282.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id. at 281.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 285.
\end{itemize}
Pennzoil of liability under [its] implied contract with [the plaintiff] provided that Pennzoil had reasonable grounds to believe that sufficient cause existed to justify [the plaintiff's] termination,"132 but concluded that the jury’s finding that Pennzoil failed to act reasonably was supported by the evidence.133

The court based its conclusion on the fact that Pennzoil’s vice president had failed to “take a close look at the way the investigation had been handled, but [instead had] relied upon the professionalism of his investigators.”134 Specifically, the court considered that the only document Pennzoil officials had reviewed before discharging the plaintiff was the investigators’ report, which “failed to differentiate between first-hand knowledge, attributed hearsay, or mere gossip or rumor,”135 and that Pennzoil had made no attempt to “evaluate the credibility of the persons interviewed.”136

Ashway, Gaglidari and Kestenbaum suggest that a provision in an employment contract requiring just cause, or a “good” or “stated” reason, for dismissal obligates the employer to conduct a reasonable investigation before terminating an employee and that a failure to comply with that obligation constitutes a breach of the employment contract.137 Indeed, the recognition of a duty to investigate under those circumstances appears to be an unremarkable application of the “implied contract” exception to the employment at-will rule.138 It nevertheless remains unclear

132. Id. at 287.
133. Id. at 288.
134. Id.
135. An expert for the plaintiff identified “numerous deficiencies in the investigation” and concluded that “Pennzoil’s investigators did not observe the standards of good investigative practice.” Id.
136. Id.
137. See Lambert v. Morehouse, 843 P.2d 1116, 1119 (Wash. Ct. App.) (“To the extent an employee has an employment contract requiring specific reasons for dismissal, then the employer must conduct an adequate investigation or be liable for breach of that contract.”), review denied, 854 P.2d 1084 (Wash. 1993).
whether there is any basis for imposing a duty to investigate in cases where no such contractual provision exists.\textsuperscript{139}

C. The Implied Covenant of Good Faith and Fair Dealing May Impose a Duty to Investigate

1. Alaska's Limited References to the Issue. In addition to suggesting that an employer's failure to conduct a reasonable investigation before discharging may breach a contractual "just cause" provision, the court in \textit{Walt v. State}\textsuperscript{140} indicated that the failure to conduct an adequate pre-discharge investigation might provide the discharged employee with a viable claim "based on a bad faith, unfair discharge."\textsuperscript{141} Although the court's discussion of the issue was cursory, its observation presumably was based on the covenant of good faith and fair dealing implicit in the employment relationship,\textsuperscript{142} the violation of which gives rise to a claim for breach of contract under Alaska law.\textsuperscript{143}

The view that this implied covenant gives rise to a duty to investigate is consistent with the position expressed by Judge Kozinski's dissent in \textit{Sanders v. Parker Drilling Co.}\textsuperscript{144} In \textit{Sanders}, a Ninth Circuit decision interpreting Alaska law,\textsuperscript{145} Judge Kozinski concluded that the employer's good faith obligation "protects the employee from being dismissed based on personal animosity, ill will and any other ulterior motive,"\textsuperscript{146} and also "requires the employer to conduct a reasonable investigation" of the employee's alleged conduct before discharging.\textsuperscript{147}

\begin{footnotes}
\item[139] \textit{See generally} Perritt, supra note 36, § 5.48, at 572 ("The majority of recent decisions deny that any duty of care in supervising the employment relationship arises in tort law, independent of contract.").
\item[140] 751 P.2d 1345 (Alaska 1988).
\item[141] \textit{Id.} at 1351.
\item[142] \textit{See} Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983).
\item[144] 911 F.2d 191 (9th Cir. 1990), \textit{cert. denied}, 500 U.S. 917 (1991).
\item[145] \textit{See id.} at 194; \textit{see also} Young, \textit{supra} note 3, at 202 n.7 (observing that the court in \textit{Sanders} "purported to apply Alaska law").
\item[146] \textit{Sanders}, 911 F.2d at 215 n.16 (Kozinski, J., dissenting); \textit{cf.} ARCO Alaska, \textit{Inc.}, 753 P.2d at 1154-55 (evidence that the plaintiff "was terminated because of personal animosity and not for any legitimate work-related reason" was sufficient to present a claim for breach of the implied covenant to the jury).
\item[147] \textit{Sanders}, 911 F.2d at 215 n.16 (Kozinski, J., dissenting).
\end{footnotes}
Unfortunately, Judge Kozinski's characterization of the implied covenant was unaccompanied by any supporting analysis, presumably because the majority in Sanders found it unnecessary to address the merits of the plaintiff's claim for breach of the covenant. However, Judge Kozinski's conclusion that the covenant may impose upon employers a duty to investigate before discharging is consistent with the prevailing view in Montana and, perhaps, in a few other states, as well.

2. The View in Other States. Subsequent to its decisions in Crenshaw v. Bozeman Deaconess Hospital and Flanigan v. Prudential Federal Savings & Loan Ass'n, the Montana Supreme Court revised the basis for its view that employers may have a duty to investigate before discharging an employee. In Heltborg v. Modern Machinery, the plaintiff alleged that the employer was negligent in "failing to exercise ordinary and reasonable care in investigating the need to terminate." The court agreed with the employer that the negligence allegations "were not essential in either Crenshaw or Flanigan" because the alleged negligence in

148. See id. at 193 n.1; see also Young, supra note 3, at 208 n.51:
It is not clear from the Sanders court's decision on what theory the jury
found for the plaintiffs. On one view, it appears that the jury found that [the employer] did not prove by a preponderance of the evidence that
the plaintiffs used drugs in violation of company policy. On another
view, however, it appears that the jury found that [the employer] violated an implied covenant of good faith and fair dealing. The majority in Sanders appeared to adopt the former interpretation of the verdict; the concurrence of Judge Reinhardt suggests that the jury may have found for the plaintiffs on both theories, and Judge Kozinski's dissent interprets the instruction as requiring only a good faith belief by the employer that the employee committed the alleged act.

149. In Montana, however, claims for breach of the implied covenant have been preempted by that state's Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1991), in cases to which the act now applies. Dagel v. City of Great Falls, 819 P.2d 186, 194-95 (Mont. 1991).

150. See, e.g., Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 n.25 (Cal. Ct. App. 1981) (suggesting, without deciding, that the implied covenant may obligate employers to provide "procedural safeguards such as . . . [an] opportunity for response to charges of misconduct").

151. 693 P.2d 487 (Mont. 1984); see supra notes 49-61 and accompanying text.

152. 720 P.2d 257 (Mont.), appeal dismissed, 479 U.S. 980 (1986); see supra notes 62-64 and accompanying text.


154. Id. at 959.
those cases occurred “in conjunction with allegations properly forming a basis for breach of the [implied] covenant.”\textsuperscript{155} The court then held that, in the employment context, a failure to investigate can be actionable only as a breach of the covenant of good faith and fair dealing, and that there is no “separate and distinct tort of negligence” in employment cases.\textsuperscript{156}

The analysis in \textit{Heltborg} was recently applied by the Washington Court of Appeals in \textit{Lambert v. Morehouse}.\textsuperscript{157} The plaintiff in \textit{Lambert} was terminated from a managerial position after more than ten years of employment.\textsuperscript{158} The termination resulted from the employer’s investigation of complaints that the plaintiff had engaged in various incidents of sexual harassment.\textsuperscript{159}

Subsequent to his discharge, the plaintiff brought suit against the employer and several of its management representatives, asserting a claim for “negligent investigation.”\textsuperscript{160} After the trial court granted the defendants’ motions for partial summary judgment, the plaintiff appealed, arguing that he had presented sufficient evidence of negligence to preclude summary judgment in favor of the employer.\textsuperscript{161}

In analyzing the plaintiff’s negligent investigation claim, the Washington Court of Appeals began by observing that there may be circumstances under which Washington law would impose a duty to investigate, such as where a state agency’s deficient investigation

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.; see also Kittelson v. Archie Cochrane Motors, Inc., 813 P.2d 424, 426 (Mont. 1991) (observing that after \textit{Heltborg} “negligent discharge is no longer a recognized exception” to the at-will rule in Montana); Martin v. Special Resource Management, Inc., 803 P.2d 1086, 1087 (Mont. 1990) (observing that, in light of \textit{Heltborg}, “no duty exists in employers to use reasonable care in decisions to discharge based upon a theory of negligence”).
\item Id. at 1117. For many courts, the plaintiff’s longevity of service may be a significant factor in analyzing a claim for breach of the implied covenant. \textit{See}, e.g., Burdette v. Mepco/Electra, Inc., 673 F. Supp. 1012, 1017 (S.D. Cal. 1987) (suggesting that “a claimant [must] establish \textit{longevity of service} before she can invoke the [implied] covenant”); Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917, 927 (Cal. Ct. App. 1981) (observing that “it seems difficult to defend termination of . . . a long-time employee arbitrarily, i.e., without \textit{some} legitimate reason, as compatible with either good faith or fair dealing”).
\item \textit{Lambert}, 843 P.2d at 1117-18.
\item Id. at 1118.
\item Id.
\end{enumerate}
\end{footnotesize}
could result in child abuse. However, the court noted that the Washington appellate courts have declined to recognize a claim for negligent investigation in other contexts. The court observed that the plaintiff failed to explain why a duty to investigate should be imposed in the employment context and declined to recognize a cause of action for negligent investigation in employment cases.

In the Lambert court's view, an employer that agreed to contractual terms requiring specific grounds for the dismissal of an employee would be subject to liability for breach of contract if it failed to conduct an adequate investigation into the reasons for the employee's discharge. Where the employment relationship is at-will, however, the imposition of a duty to investigate "would appear to conflict with the employer's right to discharge the employee for any cause or no cause without liability." The Lambert court acknowledged that at one time Montana recognized a tort claim for negligent investigation in employment cases. It nevertheless observed that in light of the Montana Supreme Court's decision in Heltborg, Montana no longer imposes a duty to investigate "beyond the duty not to breach the covenant of good faith and fair dealing." Because, unlike Montana, Washington does not recognize an implied covenant of

162. Id. at 1119 n.2 (citing Babcock v. Washington, 809 P.2d 143 (Wash. 1991) (involving a claim against social service caseworkers for negligent foster care investigation and placement)). One commentator has concluded that Alaska also would recognize a claim for negligent investigation in the child abuse context. See Susan L. Abbott, Note, Liability of the State and its Employees for the Negligent Investigation of Child Abuse Reports, 10 ALASKA L. REV. 401 (1993).


164. Lambert, 843 P.2d at 1119 n.2.

165. Id. at 1118-20.

166. Id. at 1119.

167. Id. at 1120.


169. 795 P.2d 954 (Mont. 1990); see supra notes 153-56 and accompanying text.

170. Lambert, 843 P.2d at 1119.
good faith and fair dealing in employment contracts, the court concluded that it would be inappropriate to impose upon employers an extra-contractual duty to use due care in investigating reasons for discharge.

A federal district court in Indiana reached a similar conclusion in *Gossage v. Little Caesar Enterprises, Inc.* In that case, the plaintiff was employed as a management trainee for a corporation operating a chain of pizza restaurants. After being discharged for suspected theft of company funds, the plaintiff brought suit claiming that the employer had breached a “duty of due care owed by an employer to an employee-at-will.” The plaintiff cited both *Chamberlain v. Bissell, Inc.* and *Crenshaw v. Bozeman Deaconess Hospital* in support of her argument. The court declined to recognize the cause of action, however, holding that *Chamberlain* and *Crenshaw* were inapplicable because the “Indiana courts . . . have not recognized a duty of good faith and fair dealing in the context of wrongful discharge.”

It appears from these cases that whatever support the Montana Supreme Court’s decisions in *Crenshaw* and *Flanigan v. Prudential Federal Savings & Loan Ass’n* might provide for the imposition of a duty to investigate before discharging has been limited to jurisdictions recognizing an implicit covenant of good faith and fair dealing in the employment relationship. Indeed, one can argue that the applicability of *Crenshaw* and *Flanigan* is limited to jurisdictions that interpret the implied covenant to

174. *Id.* at 161.
175. *Id.*
177. 693 P.2d 487 (Mont. 1984).
179. *Id.* at 163.
require "cause" for discharge,\textsuperscript{183} of which Montana may be the only current example.\textsuperscript{184}

3. A Duty to Investigate May Exist in Jurisdictions Where the Implied Covenant Requires Cause for Discharge. The view that employers have a general duty to investigate before discharging only if the implied covenant of good faith and fair dealing is interpreted to require cause for discharge is illustrated by the Wyoming Supreme Court's recent decision in \textit{Wilder v. Cody Country Chamber of Commerce}.\textsuperscript{185} The plaintiff in \textit{Wilder} had been employed as the executive director of the Cody Country Chamber of Commerce.\textsuperscript{186} He resigned in lieu of being discharged after the Chamber's Board of Directors learned that he concealed from the Board certain financial difficulties that the Chamber of Commerce was experiencing.\textsuperscript{187} After his resignation, the plaintiff filed suit against the Chamber.\textsuperscript{188} He argued that his employment was to be "permanent" for "as long as [he]
did the work that was required” and alleged that the Board had breached “a duty of reasonable care ... by [its] failure to properly investigate the financial problems at the Chamber” prior to making the decision to discharge him. The trial court granted the Chamber’s motion for summary judgment, and the plaintiff appealed.

On appeal, the Wyoming Supreme Court noted that the only authority the plaintiff had cited in support of his position was the Montana Supreme Court’s decision in Crenshaw v. Bozeman Deaconess Hospital, which the Wilder court indicated held that “a negligence cause of action was stated by the employer’s failure to properly investigate allegations of impropriety before terminating the employee for cause.” Despite the decision in Crenshaw, however, the Wyoming Supreme Court was “persuaded that no tort cause of action exists for negligent investigation in employment relationships.” It concluded that Crenshaw did not alter that fact because, in Heltborg v. Modern Machinery, the Montana Supreme Court “limit[ed] Crenshaw by stating that the employer’s duty to use reasonable care is restricted to situations involving negligent investigation of a for cause termination.” Therefore, because the Chamber had not dismissed the plaintiff in Wilder for cause, but instead had chosen to dismiss him “as an at will employee ... [while] the investigation into [the Chamber’s] financial problems ... was [still] being conducted,” there was no

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189. Id. at 214.
190. Id. at 222.
191. Id. at 215-16.
193. Wilder, 868 P.2d at 222.
194. Id. Quoting Lambert v. Morehouse, 843 P.2d 1116, 1119 (Wash. Ct. App.), review denied, 854 P.2d 1084 (Wash. 1993), the Wilder court stated:

[E]mployment creates a contractual relationship. If that contract is breached, relief lies with an action for breach of contract. “To the extent an employee has an employment contract requiring specific reasons for dismissal, then the employer must conduct an adequate investigation or be liable for breach of that contract.”

Wilder, 868 P.2d at 222. The Wilder court also cited Morris v. Hartford Courant Co., 513 A.2d 66, 68 (Conn. 1986), which dismissed a claim for negligent investigation because a discharge that results from a “fail[ure] to investigate [a] charge ‘reasonably and adequately’” is not “demonstrably improper.” (Emphasis deleted).
196. Wilder, 868 P.2d at 222.
breach of a duty to investigate before discharging that could give rise to a tort claim for negligence.197

The conclusion that employers have a duty to investigate before discharging only if the implied covenant of good faith and fair dealing requires cause for discharge is also supported by the decision of the United States District Court for the District of Massachusetts in Treadwell v. John Hancock Mutual Life Insurance Co.198 The plaintiff in Treadwell claimed that he had been forced to accept involuntary retirement in lieu of termination after twenty-eight years of employment.199 He brought suit alleging claims for breach of contract and negligence, premised on the contention that the employer failed to warn him that he was in jeopardy of being terminated if his performance did not improve.200

In partially dismissing the plaintiff’s breach of contract claim, the court found no evidence that the plaintiff was promised employment for a specified period or that he was told that he could be discharged only for cause, and, therefore, concluded that his employment was terminable at will.201 Because employers are free to discharge at-will employees whose performance has been satisfactory “or even excellent,” the court concluded that a breach of contract claim could not be premised upon an alleged obligation to “apprise [the] plaintiff of unsatisfactory work performance or of the fact that his termination was imminent.”202

With respect to the plaintiff’s negligence claim, which was premised upon Chamberlain v. Bissell, Inc.,203 the court observed that the critical issue was whether employers have “some duty of care with regard to . . . evaluation that [is] imposed by law, independent of the promises of the parties.”204 In the employment at-will context, the court concluded, such a duty could be imposed only by virtue of the existence of a covenant of good faith and fair dealing implicit in the employment relationship.205 Because in Massachusetts an action for breach of the implied

197. Id.
199. Id. at 280.
200. Id. at 288.
201. Id.
202. Id.
204. Id. at 290.
205. Id.
covenant sounds in contract rather than tort, the court conclud-
ed that the plaintiff's claim for "negligent performance of promises to . . . conduct job evaluations" failed to state a claim upon which relief could be granted.

The court went on to hold that, in any event, "the inadequate performance of . . . job reviews would not constitute breach of the implied covenant of good faith and fair dealing." The court cited Tenedios v. Wm. Filene's Sons Co. in support of that conclusion, noting that the Massachusetts Court of Appeals had held in that case that there could be "no liability for a dismissal resulting from an inadequate investigation."

The plaintiff in Tenedios had been discharged from her position as a sales clerk after being accused of helping a customer attempt to steal a sweater from her employer's store. Relying upon the Massachusetts Supreme Court's decision in Fortune v. National Cash Register Co., which many consider to be the seminal case recognizing an implied covenant of good faith and fair dealing in the employment context, the plaintiff in Tenedios


207. Treadwell, 666 F. Supp. at 290.

208. Id.


211. Tenedios, 479 N.E.2d at 724-25.


213. See Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1039 n.7 (Ariz. 1985) ("Some courts trace the recognition of the good faith covenant in employment-at-will contracts to Fortune . . . ").
brought suit against the employer for "wrongful termination of employment."\textsuperscript{214}

The \textit{Tenedios} court first noted that the analysis in \textit{Fortune} was not controlling because the plaintiff's employment was governed by a collective bargaining agreement.\textsuperscript{215} Because both parties had "assume[d] that the doctrine of the \textit{Fortune} case would apply," however, the court proceeded to address the merits of the plaintiff's claim.\textsuperscript{216} The court then concluded that even assuming that the plaintiff's discharge "was a product of inadequate investigation," there had been "no such breach of an [implied] covenant of fair dealing as is embraced by the \textit{Fortune} rule."\textsuperscript{217} The court explained that a discharge "contrived to despoil an employee of earned commissions or similar compensation due for past services will qualify under \textit{Fortune},"\textsuperscript{218} as will "a discharge actuated by a

\begin{itemize}
\item \textsuperscript{214} \textit{Tenedios}, 479 N.E.2d at 725.
\item \textsuperscript{215} See id. ("[T]he plaintiff's employment was covered by a collective bargaining agreement and was not an employment at will, to which alone the \textit{Fortune} doctrine applies."); see also Price v. United Parcel Serv., 601 F. Supp. 20, 23 (D. Mass. 1984) (concluding that "the implied covenant of good faith and fair dealing has no application" where the plaintiff is "protected by a union-negotiated collective bargaining agreement"). But cf. Greater Kansas City Laborers Dist. Council v. Builders' Ass'n, 213 F. Supp. 429, 433 n.2 (W.D. Mo. 1963) (citing Archibald Cox, \textit{Reflections upon Labor Arbitration}, 72 HARV. L. REV. 1482 (1959), while observing that "the principle . . . that 'in every contract there exists an implied covenant of good faith and fair dealing' . . . is particularly applicable to collective bargaining agreements"), aff'd, 326 F.2d 867 (8th Cir.), cert. denied, 377 U.S. 917 (1964).
\item \textsuperscript{216} \textit{Tenedios}, 479 N.E.2d at 725 (citations omitted). The court caustically commented on this point: "For purposes of the appeal, we are content to allow the parties to make their own law." \textit{Id}.
\item \textsuperscript{217} \textit{Id.} at 725-26.
\item \textsuperscript{218} \textit{Id.} at 726; see also Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985) ("The [implied] covenant . . . protect[s] an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee, such as the sales commissions in \textit{Fortune} . . . ").
\end{itemize}
reason that offends a public policy . . . .”²¹⁹ However, because in Massachusetts the implied covenant does not impose upon employers a duty to discharge only for just cause,²²⁰ discharging an employee “arbitrarily” and without an adequate pre-discharge investigation does not constitute a breach of the covenant, “however meretricious . . . . the dismissal [may] have been.”²²¹

4. Alaska’s Interpretation of the Implied Covenant. The significance of Massachusetts’ view of the implied covenant for cases arising in Alaska is unclear. One court, after observing that Massachusetts considers the covenant to be breached “only if the discharge results in loss of compensation that is clearly identifiable and related to the employee’s past service, such as future commissions based upon past sales,” concluded that “Alaska purports to follow the rule as formulated in Massachusetts.”²²² That conclusion undoubtedly is based upon the Alaska Supreme Court’s reliance upon a series of Massachusetts cases, including Fortune v. National Cash Register Co.,²²³ in adopting the implied covenant exception to the employment at-will rule.²²⁴ In addition, despite repeatedly having indicated that the covenant of good faith and fair

²¹⁹. Tenedios, 479 N.E.2d at 726. Alaska also holds that a “[v]iolation of [public] policy by an employer may rise to the level of a breach of the implied covenant of good faith and fair dealing.” Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989); see also Knight v. American Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986) (observing that “the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing”); Owens, supra note 8, at 309 n.218 (“[T]he Alaska Supreme Court . . . . has acknowledged that discharges in violation of public policy can constitute a breach of the implied covenant of good faith and fair dealing.”); Erb, supra note 206, at 46 (arguing that by subjecting the covenant to considerations of public policy, “[t]he court has increasingly used the implied covenant as a tool for furthering social policy. In so doing, the court has imposed something of a code of ethics into the law of contracts above and beyond the reasonable expectations of the parties.”). However, the converse apparently is not true: the Alaska Supreme Court has described as “unsound” the view that breaches of the implied covenant should be regarded as falling within the public policy exception to the employment at-will rule. ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153 n.1 (Alaska 1988).

²²⁰. Tenedios, 479 N.E.2d at 726 n.4.

²²¹. Id. at 726.


²²⁴. See Mitford, 666 P.2d at 1006-07.
dealing is implicit in *all* at-will employment relationships, the Alaska Supreme Court has cited the Massachusetts Supreme Court's decision in *Gram v. Liberty Mutual Insurance Co.* for the proposition that "there is not a uniform right to just cause for termination" in employment cases.

In *Gram*, the Massachusetts Supreme Court concluded that although the jury was warranted in finding that the plaintiff's discharge was "the product of [an] inadequate investigation," an employer cannot be held liable for breach of the implied covenant "simply because there was no good cause for [an] employee's discharge." In a portion of the opinion subsequently cited with approval by the Alaska Supreme Court, the *Gram* court stated:

It is difficult to determine whether it is worse to discharge an employee without good cause where no adequate investigation was conducted or to do so after a full hearing that resulted in an improper decision that there was good cause.


227. *Rutledge*, 727 P.2d at 1056; see also Sanders v. Parker Drilling Co., 911 F.2d 191, 199 (9th Cir. 1990) (Reinhardt, J., concurring) (observing that although Alaska has recognized "an implied covenant of good faith and fair dealing in *all* at-will employment contracts," only "certain employment contracts for an indefinite term [are] terminable by the employer only for good cause") (quoting *Rutledge*, 727 P.2d at 1056), cert. denied, 500 U.S. 917 (1991).


229. *Id.* at 26; see also *id.* at 28 ("We decline . . . to adopt a general rule that the discharge of an at-will employee without cause is alone a violation of an employer's obligation of good faith and fair dealing. We are aware of no case that has gone this far.").

230. See *Rutledge*, 727 P.2d at 1056.

231. *Gram*, 429 N.E.2d at 28-29 n.9. The analysis in *Gram* also was relied upon by the Massachusetts Court of Appeals in determining that a discharge that is the "product of an inadequate investigation" does not violate the implied covenant of good faith and fair dealing. *Tenedios v. Wm. Filene's Sons, Inc.*, 479 N.E.2d 723,
On the other hand, there are a number of reasons for concluding that courts in Alaska might interpret the covenant to impose upon employers a duty to investigate before discharging. The Alaska Supreme Court has indicated that the prohibition upon an employer “impair[ing] the right of an employee to receive the benefits of the employment agreement” is merely the “minimum” that the implied covenant requires. In addition, one commentator discussing Alaska’s view of the employment at-will rule has observed that the implied covenant “is broad enough to allow recovery for any discharge which a jury finds was ‘unfair’ or in ‘bad faith.’”

Perhaps most importantly, however, in adopting the implied covenant exception, the Alaska Supreme Court cited with apparent approval a law review note that states that “in order to give content to the good faith standard,” the courts should “look to the large body of arbitration decisions that have... developed relatively clear and workable standards for defining unjust dismissals.” In the arbitration context, the note’s author observed, “the arbitrator considers whether the employer’s decision to fire the worker followed a fair procedure and was reasonable in the light of surrounding circumstances.”

Significantly, the author cited the decision in Grief Bros. Cooperage Corp. in support of this analysis. The arbitrator

232. See, e.g., Owens, supra note 8, at 279 (observing that the implied covenant permits an employer to discharge an employee “only on a good faith belief that the discharge is warranted”).
234. Owens, supra note 8, at 309; cf. Perritt, supra note 36, § 4.55, at 392 (“The early cases suggested that a breach of the covenant could be shown by a nearly infinite variety of employer decisions, which in the opinion of the fact finder, contravened good faith or fair dealing.”).
236. Note, supra note 235, at 1840. But see Young, supra note 3, at 216 (observing that “arbitration decisions... are not a reliable basis for use by courts faced with private employment contracts”).
237. Note, supra note 235, at 1840 n.133.
239. Note, supra note 235, at 1840 n.133.
in *Grief Bros.* held that a discharge can be upheld only if a fair and objective investigation of the employee's conduct produces "substantial evidence" that the employee violated a rule or order of management. The arbitrator also indicated that, except in situations where the employer has no alternative but to "react immediately to the employee's behavior," its investigation "must . . . be made before its disciplinary decision is made."241

The importance that the arbitrator in *Grief Bros.* placed upon the duty to investigate is clear from the particular facts of that case.242 The grievant there had been discharged while "in effect . . . on probation" as the result of prior warnings and discipline he had received.243 The arbitrator observed that although the grievant's conduct "might not have been serious enough to warrant dismissal if the offense had been a first one," the discharge would have been upheld "[i]f [his] guilt had been properly established by a fair pre-discharge investigation" because his prior disciplinary record was so poor that "even a proven minor offense would have been enough to justify his discharge."244 Because there had been "no proper pre-discharge investigation," however, the arbitrator found it "impossible . . . to rule that the discharge must 'stick.'"245 The arbitrator provided the following colorful explanation for that conclusion:

> Every accused employee in an industrial democracy has the right of "due process of law" and the right to be heard before discipline is administered. These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. The Arbitrator is fully mindful of the Company's need for, equity in, and right to require careful, safe, efficient performance by its employees. But before the Company can discipline an employee for failure to meet said requirement, the Company must take pains to establish such failure. Maybe [the grievant] was guilty as hell; maybe also there are many gangsters who go free because of legal technicalities. And this is doubtless unfortunate. But company and government prosecutors must understand that the legal technicalities exist also to protect the

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241. *Id.* at 558; see also *Lockheed Corp.*, 83 Lab. Arb. Rep. (BNA) 1018, 1023 (1984) (Taylor, Arb.) ("It is important that the [accused employee's] 'day in court' be given before a decision to impose discipline is made.").
242. *See Grief Bros. Cooperage Corp.*, 42 Lab. Arb. Rep. (BNA) at 557 (observing that the duty to investigate has "great weight in any discipline case").
243. *Id.* at 556-57.
244. *Id.* at 557.
245. *Id.*
innocent from unjust, unwarranted punishment. Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action.\(^{246}\)

The correctness of the arbitrator's sweeping suggestion that all employees are entitled to a full panoply of due process rights before discipline is administered is debatable,\(^{247}\) particularly in the at-will context.\(^{248}\) Nevertheless, intimations of a similar view appear in *Luedtke v. Nabors Alaska Drilling, Inc.*,\(^{249}\) where the Alaska Supreme Court indicated that the implied covenant of good faith and fair dealing requires more than "honesty"\(^{250}\) or an "absence of evil motive"\(^{251}\) on the part of the employer. Because the covenant also requires that the employer reach its decision to discharge in a manner that is "objectively fair"\(^{252}\)—that is, "in a


[B]asic considerations of due process . . . require the employer to: (1) notify the charged employee of the charges against him; (2) inform him of the nature of the evidence in its possession so that he might respond to it; and (3) commence and complete [an] investigation within a reasonable period, at the conclusion of which either the charges will be dropped or the employee will be disciplined.

\(\text{247. }\)See, e.g., American Hoist & Derrick Co., 53 Lab. Arb. Rep. (BNA) 45, 56-57 (1969) (Stouffer, Arb.) (concluding that grievants "were not deprived of 'due process' by the Company's refusal to interview them before imposing . . . discipline" because the employer had no procedural obligations independent of those specified in the collective bargaining agreement).

\(\text{248. }\)See, e.g., Crosier v. United Parcel Serv. Inc., 198 Cal. Rptr. 361, 367 (Cal. Ct. App. 1983) (observing that "there is no precedent for extending procedural due process or fair hearing requirements to at will employees"); cf. Young, *supra* note 3, at 225:

The criminal law presumption of innocence does not seem appropriate in contract law, where we can view one party as vested with some kind of property right. The property right is either the employer's right to fire without proof of an act justifying termination for cause, or the employee's right to require proof of an act constituting just cause.


\(\text{250. }\)Id. at 1224 (quoting *RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d* (1981)).

\(\text{251. }\)Id.

\(\text{252. }\)Id. at 1225.
manner which a reasonable person would regard as fair."—it can be violated by mere inaction on the part of an employer.\(^{254}\)

The employer in *Luedtke* was found to have violated the covenant by testing the plaintiff for drug use without providing him with prior notice—and under circumstances where "no other employee was similarly tested"—and then suspending him "immediately upon learning of the results of the test." The court appears to have been concerned with precisely the same right that prompted the arbitrator in *Grief Bros. Cooperage Corp.*\(^{257}\) to impose a duty to investigate before discharging—the right to be heard before discipline is administered.\(^{258}\)

253. *Id.* at 1224. Similarly, in *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1156 (Alaska 1988), the court upheld a jury instruction interpreting the covenant to require employers to act not only in "good faith," but "fairly" and "reasonably" as well. In *Jones v. Central Peninsula General Hospital*, 779 P.2d 783, 789 n.6 (Alaska 1989), the court held that the covenant "also requires that an employer treat like employees alike." *Cf. Grief Bros. Cooperage Corp.*, 42 Lab. Arb. Rep. (BNA) 555, 558 (1964) (Daugherty, Arb.) (concluding that a discharge cannot stand unless the employer has "applied its rules, orders, and penalties evenhandedly and without discrimination to all employees").


255. *Id.* at 1226. With respect to the latter point, the court made the following observation:

> Because we conclude that [the employer] violated the covenant, we need not address . . . whether [the plaintiff] was treated differently than other employees in similar circumstances. We do note, however, that the superior court should have addressed this argument. . . . [The employer] claims that . . . evidence [of] differential treatment . . . would not be relevant to whether it acted fairly and in good faith. [The employer's] position is inconsistent with our earlier cases on good faith and fair dealing.

*Id.* at 1226 n.3.

256. *Id.* at 1226.


258. *Id.* at 557-58. Among other things, the court in *Luedtke* observed that the plaintiff had been suspended "before he was given the option of a retest or any other options." *Luedtke*, 834 P.2d at 1223. If the drug test administered to the plaintiff resulted in a "false positive," that fact might have been discovered by an investigation that included the possibility of retesting. *See*, e.g., *Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 836-43 (S.D.N.Y. 1990). Indeed, the *Luedtke* court had alluded to that possibility in an earlier opinion in the case. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1136 n.11 (Alaska 1989).
DUTY TO INVESTIGATE

IV. SUMMARY AND CONCLUSION

Alaska is among a minority of jurisdictions that recognize an implied covenant of good faith and fair dealing in the employment context. Although the covenant does not impose upon employers an obligation to discharge only for cause, a number of courts have suggested that it may require employers to conduct a reasonable investigation before discharging.

259. Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); see also Young, supra note 3, at 206 ("Alaska . . . [is] one of a minority of states recognizing that all employment contracts contain[] an implied covenant of good faith and fair dealing."); see generally Hillesland v. Federal Land Bank Ass’n, 407 N.W.2d 206, 214 (N.D. 1987) (referring to the fact that an “emerging majority of . . . states . . . have rejected the implication of a covenant of good faith and fair dealing in employment contracts”); Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn. 1986) ("For sound policy reasons, a majority of . . . jurisdictions have . . . rejected the implication of a covenant of good faith termination.").

260. See Rutledge v. Alyeska Pipeline Serv. Co., 727 P.2d 1050, 1056 (Alaska 1986) (observing that “there is not a uniform right to just cause for termination”); see generally Perritt, supra note 36, § 4.26, at 316-17:

Despite [the] theoretical potential for the [implied] covenant doctrine, in no jurisdiction must an employer show just cause, with the possible exception of Montana . . . . Indeed, the . . . courts of [several states] have expressly disavowed any idea that a breach of the covenant can be shown merely by showing dismissal without good cause.

261. See, e.g., Lambert v. Morehouse, 843 P.2d 1116, 1119 (Wash. Ct. App.), review denied, 854 P.2d 1084 (Wash. 1993); Helmborg v. Modern Mach., 795 P.2d 954, 961 (Mont. 1990). Although requiring employers to investigate before discharging may seem to make little sense if employers can discharge without cause, see Hollars v. Southern Pac. Transp. Co., 792 P.2d 1146, 1156 (N.M. Ct. App. 1989) (Hartz, J., concurring in part, dissenting in part), cert. quashed, 791 P.2d 465 (N.M. 1990), there is room for a contrary argument based upon the fact that the implied covenant may impose upon employers “a duty not to discharge for an improper reason.” Helmborg, 795 P.2d at 961 (emphasis added). In Alaska, for example, discharging an employee for an “unconstitutional” reason violates the implied covenant. State v. Haley, 687 P.2d 305, 318 (Alaska 1984). An employer might be able to defend such a claim by showing that it had investigated and concluded in good faith that its reason for discharging was not unconstitutional. See, e.g., Johnson v. International Minerals & Chem. Corp., 40 Fair Empl. Prac. Cas. (BNA) 1651, 1653 (D.S.D. 1986) (concluding that there could be no breach of the implied covenant where the employer had conducted “a thorough investigation of the . . . charges against [the] [p]laintiffs prior to making a final decision to discharge” because an “extensive [pre-discharge] investigation in itself is evidence of [an employer’s] good faith and fair dealing in its relationship with
There appear to be two potentially competing views on this issue. On one hand, the Alaska Supreme Court has demonstrated a willingness to protect employees from abuses of an employer's right to discharge at will by "modify[ing] . . . [the] doctrine with relatively new contract theories," of which the implied covenant exception is but one example. Job security is, moreover, of such fundamental importance to employees that a "forceful argument" undoubtedly can be made in favor of a rule requiring cause for the discharge of any employee. Interpreting the implied covenant to impose such a requirement would be meaningless unless the requirement included an obligation to investigate to determine whether cause for discharge actually exists. Consistent with that view, one line of cases suggests that Alaska may interpret the implied covenant to impose upon employers a duty to investigate before discharging.

[its employees]

262. See generally Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 789 (Alaska 1989) (observing that the implied covenant "does not lend itself to precise definition"); Erb, supra note 206, at 37-38 (observing that "courts and commentators historically have had difficulty defining the implied obligation of good faith and fair dealing").

263. See Crook, supra note 7, at 39.

264. Owens, supra note 8, at 299.


On the other hand, the Alaska Supreme Court has indicated that there is no uniform right to just cause for termination in Alaska.\textsuperscript{270} Thus, another line of cases suggests that Alaska interprets the implied covenant in accordance with the view prevailing in Massachusetts,\textsuperscript{271} where a discharge based upon an inadequate investigation does not violate the covenant.\textsuperscript{272}

From a policy standpoint, the interest of employees in continued employment, although certainly important,\textsuperscript{273} must be balanced against the employer's interest in "running [its] business as [it] sees fit."\textsuperscript{274} Requiring employers to investigate before discharging would be economically inefficient\textsuperscript{275} to the extent that the resulting restriction on their freedom to terminate\textsuperscript{276} would

\textsuperscript{273} See Adler v. American Standard Corp., 432 A.2d 464, 470 (Md. 1981) (concluding that "an at will employee's interest in job security . . . is deserving of recognition"); Crosier v. United Parcel Serv., 198 Cal. Rptr. 361, 366 (Cal. Ct. App. 1983) (observing that an at will employee "has a strong interest in the stability of his employment"); Blades, supra note 3, at 1425 (concluding that "an employee's interest in an at will employment relationship is . . . deserving of legal protection").
\textsuperscript{274} Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1086 (Wash. 1984); see also Adler, 432 A.2d at 470 (stating that "the employer has an important interest in being able to discharge an at will employee whenever it would be beneficial to his business"); Crosier, 198 Cal. Rptr. at 366 (observing that an employer "must be permitted ample latitude in disciplining its personnel").
\textsuperscript{275} See Young, supra note 3, at 211-12 (requiring employers to "exercise more caution about firing employees" is "counter-productive from the view of economic efficiency"). But see Mark R. Kramer, Comment, The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania, 133 U. Pa. L. Rev. 227, 251 (1984) ("[A] discharge for reasons other than just cause will tend to affront the public interest in economic efficiency . . . .").
\textsuperscript{276} See Heltborg v. Modern Mach., 795 P.2d 954, 961 (Mont. 1990) (concluding that imposing a duty to use reasonable care in discharging an employee effectively would "eviscerat[e] the concept of employer latitude in decision-making").
cause them to retain incompetent or unnecessary employees. Employee morale in turn might suffer from the retention of unreliable or incompetent employees. There is also some cost involved in gathering evidence regarding, and documenting the basis for, an employee's termination that employers could be expected to pass on to consumers.

Ironically, the recognition of a duty to investigate may also detrimentally impact employees, since "[e]mployers may be less willing to 'take a chance' on a marginal applicant if termination is made [more] difficult." Indeed, whether a particular business succeeds in today's highly competitive marketplace is largely dependent upon the personnel decisions that it makes. By limiting the flexibility of employers in making those decisions, the recognition of a duty to investigate before discharging may force some marginal employers out of business, in which case many employees would suffer.

In short, the recognition of a duty to investigate before discharging is likely to inhibit the exercise of much employer discretion generally thought to be legitimate and desirable.

278. Coman, 381 S.E.2d at 452 (Meyer, J., dissenting).
279. Id. (Meyer, J., dissenting).
280. See Young, supra note 3, at 221 ("It is acceptable for employers to pass along their increased costs through commerce, because doing so efficiently spreads the costs and prevents any one person, such as the employee, from bearing the full cost of the decision to terminate."); cf. Adams v. State, 555 P.2d 235, 244 (Alaska 1976) (referring to "the adoption in Alaska of the policy of risk-spreading, the policy that society, rather than the injured individual, should bear the cost of . . . negligence").
281. See Bingham, supra note 19, at 387-88 (observing that "the cost[s] of preventative measures to avoid wrongful termination liability are . . . significant enough to influence companies['] utilization of labor").
282. Coman, 381 S.E.2d at 452 (Meyer, J., dissenting); see also Perritt, supra note 36, § 9.4, at 207 n.76 ("Some economists argue that limiting employers' right to dismiss at will tends to make employers more reluctant to hire new employees.").
285. See generally Owens, supra note 8, at 306 (referring to "the effect that expanded liability may have on legitimate employer discretion in the workplace"
That fact has prompted one court to observe that "the burden that liability [for negligent discharge] would impose on [employers] and the community as a whole is unacceptably heavy." Thus, in considering the desirability of recognizing a duty to investigate before discharging, it is useful to bear in mind what one court felt "compelled" to note:

[A]ny substantial change in the "employ[ment]-at-will" rule should first be microscopically analyzed regarding its effect on commerce. There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized.

In the face of these complex and often competing policy considerations, courts are ordinarily reluctant to provide at-will employees with the same job security that collective bargaining agreements and legislative enactments often give to other employees, and therefore demonstrate little enthusiasm for imposing upon employers a duty to investigate before discharging. Instead, employers generally are given considerable discretion in determining what personnel decisions would be best for their businesses.

Underlying this "laissez-faire" attitude toward the employment relationship appears to be a view that addressing issues of employment security in the judicial process is a poor substitute for doing so through collective bargaining or the legislative pro-
cess.\textsuperscript{293} In \textit{Wagenseller v. Scottsdale Memorial Hospital},\textsuperscript{294} for example, the Arizona Supreme Court refused to adopt the then prevailing view in California that the implied covenant protects employees from a termination without cause.\textsuperscript{295} In reaching that conclusion, the court expressed its unwillingness to "establish[] by judicial fiat the benefits that employees can and should get only through collective bargaining agreements or tenure provisions."\textsuperscript{296} The court emphasized that it was not rejecting the propriety of such a rule, but merely was convinced that its adoption should not be "the result of judicial decision."\textsuperscript{297}

Much the same view underlies the decision of the Massachusetts Supreme Court in \textit{Gram v. Liberty Mutual Insurance Co.}\textsuperscript{298} In that case, the court observed that it had the authority to adopt "a common law right of recovery for discharge without cause"\textsuperscript{299}—with, presumably, an accompanying duty to investigate before discharging\textsuperscript{300}—premised upon the employer's obligation of good faith and fair dealing and that a "forceful" argument could be made for doing so.\textsuperscript{301} The court nevertheless declined that

\begin{itemize}
\item \textsuperscript{293} Id.; Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 858-59 (Minn. 1986); \textit{see} Foley v. Interactive Data Corp., 765 P.2d 373, 397 (Cal. 1988):
\item Significant policy judgments affecting social policies and commercial relationships are implicated in the . . . employment termination context. . . . [A] determination . . . which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decision-making.
\item \textsuperscript{294} 710 P.2d 1025 (Ariz. 1985).
\item \textsuperscript{295} Id. at 1040. California now appears to have repudiated that view as well. \textit{See} Foley, 765 P.2d at 400 n.39.
\item \textsuperscript{296} \textit{Wagenseller}, 710 P.2d at 1040.
\item \textsuperscript{297} Id.
\item \textsuperscript{298} 429 N.E.2d 21 (Mass. 1981).
\item \textsuperscript{299} Id. at 28; cf. Percell v. IBM, 765 F. Supp. 297, 300 (E.D.N.C. 1991) ("Because the employment at-will doctrine is a judicially adopted rule, it is the province of the courts to delineate the scope of that rule."). \textit{aff'd}, 23 F.3d 402 (4th Cir. 1994).
\item \textsuperscript{301} Gram, 429 N.E.2d at 28.
\end{itemize}
opportunity, noting that it was "within the authority of the Legislature to enact such a rule." 302

Not only has the Alaska Supreme Court indicated that it agrees with the result reached in Gram, 303 but it appears to hold the same view of the respective legislative and judicial roles. 304 As it recently stated in another context:

"It is the function of a legislature to shape law prospectively. Besides being able to look forward, a legislature can establish . . . policy in the context of other considerations, such as the overall allocation of the state's resources. This legislative function complements the appellate courts' review of individual cases and synthesis of the individual decisions into a comprehensive set of interpretations of the statutes and constitution." 305

Because there appear to be no principled grounds upon which courts can rely in choosing between the competing policies implicated by the potential recognition of a duty to investigate before discharging, 306 the decision of whether to impose such a duty should be made by the legislature, not the courts. 307 The contrary argument likely to be made by advocates of judicial reform—that a relative lack of political power on the part of

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302. Id.
    While we have remarked occasionally in the past upon the varied elements of policy weighed by the legislature in reaching a . . . decision, we have done so only to illustrate the kinds of competing factors which lie behind determinations of policy, and to demonstrate that the courts are an inappropriate forum in which to re-evaluate those determinations.

306. See generally Young, supra note 3, at 217 n.105 (observing that "there is no principled means by which courts can choose which public policy to implement in a . . . contract dispute").
307. See Dancer v. State, 715 P.2d 1174, 1176 (Alaska Ct. App. 1986) ("Policy arguments . . . must be addressed to the legislature, not the courts."); Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974) (observing that "the choice between competing notions of public policy is to be made by elected representatives of the people"); see generally Foley v. Interactive Data Corp., 765 P.2d 373, 397 n.31 (Cal. 1988) ("Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views . . . addressing terms of discharge.").
nonunion employees makes legislative action in this area unlikely—is debatable.

Montana, for example, recently enacted legislation prohibiting dismissal without cause, as did Puerto Rico and the Virgin Islands. While they are, to date, the only jurisdictions to do so, the legislatures of a number of other states have considered, but not yet enacted, similar legislation. In addition, the National Conference of Commissioners on Uniform State Laws has

308. See Henry H. Perritt, Jr., Wrongful Dismissal Legislation, 35 UCLA L. Rev. 65, 70 (1987) (observing that "non-union employee[s] will not be influential unless the subject of wrongful discharge gains prominence in election politics" because such employees are "poorly organized and largely ignorant of the legal issues involved," and "there is no 'public interest' group that regularly speaks for [them]"); Peck, supra note 15, at 43 (concluding that "legislatures are unlikely to change the rule relating to employment for an indefinite term . . . [because] unorganized employees . . . do not constitute a lobby or an organized interest group capable of exerting the pressure necessary to obtain legislative action"); Blades, supra note 3, at 1433-34 (concluding that "the prospects for any kind of general legislative reform in this area are dim" because "[e]mployees having diverse job specialties and working at varying echelons of employment simply are not equipped to form a cohesive group with enough power to influence legislators").

309. See, e.g., Foley v. Interactive Data Corp., 765 P.2d 373, 398 (Cal. 1988) ("It cannot be disputed that legislation at both the state and national level has profoundly affected the scope of at-will terminations."); Perritt, supra note 308, at 65 ("Increasingly, legislatures are being asked to consider whether the law of [wrongful] dismissal should be codified."); Martin, supra note 105, at 171 (observing that although "[i]t has been frequently suggested that legislatures will not protect employees against unjust dismissal because no organized political group would lobby for such legislation," employers also may have "an interest in supporting wrongful termination legislation"); see also id. at 167 n.110 (observing that "[s]tatutes protecting 'whistleblowers' from retaliatory discharge and prohibiting employers from subjecting employees to a polygraph examination have . . . been enacted in recent years" despite "similar political power concerns").

313. See Foley, 765 P.2d at 397 n.31; Henry, supra note 284, at 100.
314. See Perritt, supra note 308, at 73 (discussing legislative proposals in California, Colorado, Michigan, New Jersey and Pennsylvania); Martin, supra note 105, at 171 & n.132 (discussing the California, Michigan, New Jersey and Pennsylvania proposals, as well as one in Connecticut); Individual Empl. Rights Man. (BNA) 540:26 (1991) ("There have been at least 14 states that have undertaken to draft and/or consider legislation in this area.").
promulgated a "Model Employment Termination Act"\textsuperscript{315} patterned in many respects upon the Montana wrongful discharge statute.\textsuperscript{316}

At a minimum, these developments "should serve to increase the prominence of wrongful discharge legislation as a political topic"\textsuperscript{317} and "may help set the stage for the enactment of legislation of this kind in other states."\textsuperscript{318} Indeed, the drafters of the Model Act have predicted that "many more states" will consider wrongful discharge legislation in the near future,\textsuperscript{319} and at least one pair of commentators has concluded that "further enactment of state legislation of this kind is inevitable."\textsuperscript{320}

To be sure, many state legislatures have been reluctant to tamper with the employment-at-will rule,\textsuperscript{321} and Alaska itself appears to have had no significant legislative activity affecting private employment in more than a decade.\textsuperscript{322} As one commentator observed, however, "states that have been inactive in the past need not be inactive in the future."\textsuperscript{323}

In any event, that one segment of the polity may have had difficulty prevailing in the legislative arena is hardly a valid basis for circumventing the democratic process in favor of judicial policymaking.\textsuperscript{324} Indeed, even some of the staunchest proponents


\textsuperscript{317} Perritt, \textit{supra} note 36, § 9.4, at 204.

\textsuperscript{318} Bierman & Youngblood, \textit{supra} note 316, at 74.


\textsuperscript{320} Bierman & Youngblood, \textit{supra} note 316, at 74 n.150 (citing Alan B. Krueger, \textit{The Evolution of Unjust-Dismissal Legislation in the United States}, 44 IND. & LAB. REL. REV. 644, 658 (1991)).

\textsuperscript{321} See Henry, \textit{supra} note 284, at 100 ("In some states ... there has been a general unwillingness by the legislature to interfere with the at-will doctrine.").


\textsuperscript{323} Henry, \textit{supra} note 284, at 101.

\textsuperscript{324} See, e.g., Harris v. State, 457 P.2d 638, 645-46 (Alaska 1969) ("[Courts] should avoid the fallacy that ... the morality of some groups is, without more, entitled to legal enforcement. ... On [some] subjects there is such sharp division
of judicial reform have acknowledged that issues of this nature "seem to be [best] suited to legislative inquiry and solution" because "[t]he legislative process . . . enjoy[s] an advantage over the judicial process in the manner in which it can . . . make exceptions [to the employment-at-will rule] that generally serve the purposes of justice while accommodating conflicting interests." The Alaska courts should take heed of that fact and leave to the legislature the determination of whether employers should be required to investigate before discharging an employee.

of opinion that only the pluralistic nature of our democratic system . . . prevents a destructive divisiveness in our social order."); see also Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 496 (1982) (Powell, J., dissenting) ("In a democratic system there are winners and losers. But there is no inherent unfairness in this . . ."). But cf. Peck, supra note 15, at 3 ("Judicial reform and revision of the common law do not conflict with our commitment to a representational democracy in which controversial policy decisions are made in the legislative branch of government. They are instead in keeping with the best traditions of the common law, provided the changes made do not conflict with existing legislation."). Professor Peck's view has its share of judicial adherents. See, e.g., Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984):

Public policy is usually defined by the political branches of government . . . But the Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field . . . In this sense, then, courts make law, and they have done so for centuries.

325. Blades, supra note 3, at 1433.