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An Employer Cannot Avoid Its Obligation to Contribute to an Employee-at-Will's Pension Plan by Terminating the Employee.

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CASENOTE

EMPLOYMENT LAW—Employment-at-Will—An Employer Cannot Avoid Its Obligation to Contribute to an Employee-at-Will's Pension Plan by Terminating the Employee.

McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

In August, 1972, Perry McClendon, a distributor and salesman, agreed to work for the Ingersoll-Rand Company on a commission basis for an unspecified period of time.[1] Ingersoll-Rand transferred McClendon to Dallas, where he successfully developed a market for the company.[2] The company terminated McClendon four months prior to the vesting of McClendon's pension benefits.[3] McClendon sued Ingersoll-Rand, alleging breach of its duty of good faith and fair dealing and wrongful discharge.[4] McClendon claimed that Ingersoll-Rand terminated him to avoid its obligation to contribute to his pension plan.[5] The trial court rendered summary judgment for

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1. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 69 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990). The "Compensation Arrangement" extended through December, 1982. This arrangement did not apply to the specific term of employment. *Id.*

2. *Id.* Ingersoll-Rand transferred McClendon from San Antonio to Dallas to develop a market in construction equipment. McClendon's supervisor testified that McClendon performed his job satisfactorily while in Dallas. *Id.*

3. *Id.* (length of service 9 years, 8 months). McClendon was terminated on November 19, 1982 for alleged economic reasons, even though his supervisor had no complaints about his performance. The vesting of McClendon's pension obligated Ingersoll-Rand to contribute to his pension benefits. *Id.*

4. *Id.* at 70. McClendon's allegation of breach of good faith and fair dealing was not addressed by the majority, because they found for McClendon on other grounds. *Id.* at 70 n.1.

5. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 70 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990). Subsequent to McClendon's termination, Ingersoll-Rand vested McClendon's pension; however, McClendon asserted that the retroactive vesting did not mitigate any bad faith conduct on part of Ingersoll-Rand. *Id.* at 70 n.2.

Ingersoll-Rand.[6] The Houston Court of Appeals for the Fourteenth District affirmed the trial court's decision.[7] McClendon then appealed the judgment to the Texas Supreme Court.[8] Held - *reversed and remanded*.[9] An employer cannot avoid its obligation to contribute to an employee-at-will's pension plan by terminating the employee.[10]

In the late 1800's, American courts adopted the employment-at-will doctrine because it reflected the needs and expectations of employment relationships during the industrial revolution.[11] American courts held that employment for an unspecified period was employment-at-will.[12] The courts

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6. *Id.* at 69.

7. *Id.*

8. *Id.*

9. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935. The Texas Supreme Court reversed the Houston Court of Appeals, and remanded the case back to the trial court to determine if Ingersoll-Rand had wrongfully discharged McClendon to avoid its pension obligations. *Id.*

10. *Id.*

11. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1030 (Ariz. 1985) (employment-at-will doctrine recognized from treatise by H.G. Wood); *see also* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 920-21 (Cal. Ct. App. 1981) (general history of employment-at-will doctrine); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 443-44 (N.Y. 1982) (employment-at-will found conducive to laissez-faire economics). *See generally* Hambright & Hambright, *Labor and Employment Law*, 19 TEX. TECH L. REV. 731, 775 (1988) (review of early Texas cases involving employment-at-will doctrine); Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332 (1982) (employment-at-will doctrine in response to American economics). The late nineteenth century saw the decline of the master-servant relationship in both England and America. Murg & Sharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. Rev. 329, 332-35 (1982). The industrialization of the United States in the late nineteenth century resulted in a more impersonal relationship between employer and employee. *Id.* at 334. As employers became less paternalistic towards their employees, they incurred only obligations which they expressly agreed to in the employment contract. *Id.* Thus, the employer under this doctrine could adapt more readily to changing business cycles. *Id.* at 335; *see also* Feinman, *The Development of the Employment-at-Will Rule*, 20 AM. J. LEGAL HIST. 118, 133 (1976) (legal formula encompassed in the employment-at-will doctrine supported establishment of industrial elite business owners). Middle level employees are deterred from posing a threat to the owner of the business due to the owner's authority to terminate the employee at the owner's discretion. Murg & Sharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. Rev. 329, 335 (1982); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 667 (1984) (influence of industrial revolution and laissez-faire economics induced American courts to adopt employment-at-will doctrine in late nineteenth century).

12. *See* Lord v. Goldberg, 22 P. 1126, 1128 (Cal. 1889) (permanent employment for indefinite time terminable at-will); *see also* Bentley v. Smith, 59 S.E. 720, 722 (Ga. Ct. App. 1907) (permanent employment held as employment-at-will); Speeder Cycle Co. v. Teeters, 48 N.E. 595, 596 (Ind. Ct. App. 1897) (employee can be terminated at anytime). The courts generally hold that the employer is liable for wages earned by an employee up to the time of termination. *See Speeder Cycle Co.*, 48 N.E. at 596; *see also* Faulkner v. Des Moines Drug Co.,

found that the concept of mutuality of obligation between employer and employee supported the employment-at-will doctrine,[13] because the doctrine allows either the employer or employee to terminate the employment relationship at anytime, with or without cause.[14] The freedom of either

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90 N.W. 585, 587-88 (Iowa 1902) (permanent employment lasts until one party terminates contract); Rape v. Mobile & O.R. Co., 100 So. 585, 587-88 (Miss. 1924) (employer hiring pursuant to at-will doctrine could terminate employee at anytime); Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (annual salary term does not indicate employment for one year); East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (employment-at-will adopted in Texas). *See generally* Tepker, *Oklahoma's At-Will Rule: Heeding The Warnings of America's Evolving Employment Law?*, 39 OKLA L. REV. 373, 378 (1986) (employment-at-will outgrowth of labor market in civil society); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 668 (1984) (influence of industrial revolution and adoption of employment-at-will).

13. *See* Criscione v. Sears, Roebuck & Co., 384 N.E.2d 91, 95 (Ill. App. Ct. 1978) (cause of action would destroy mutuality of obligation in employment-at-will contract); *see also* Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761 (La. 1932) (contract must bind both employer and employee to prevent lack of mutuality); McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 74 (Tex. 1989)(Cook, J., dissenting) (mutuality of obligation in employment-at-will relationship precludes imposition of tort damages), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990); Johnson v. Ford Motor Co., 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (proof of modification of employment-at-will creating good cause termination requirement precludes mutual obligation of contract). *But see* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444 (N.Y. 1982) (mutuality not necessary). The court in *Weiner* held that mutuality was not essential to the employment contract if the fundamental requisite of consideration was established by the parties. *See Weiner*, 443 N.E.2d at 444. *See generally* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 at 272 (1877) (understanding between employer and employee must be mutual); Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 336 (1982) (development of doctrine supported by principles of mutuality of obligation and consideration); Tepker, *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 381-82 (1986) (mutuality of obligation defense to harshness of doctrine).

14. *See, e.g.*, Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 824 (E.D.N.Y. 1980) (traditional employment-at-will allowed termination without cause); East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (term of service depends on will of parties). *East Line* was the first case in Texas to recognize the employment-at-will doctrine. *East Line*, 72 Tex. at 75, 10 S.W. at 102; *see also* United Servs. Auto. Ass'n v. Tull, 571 S.W.2d 551, 554 (Tex. Civ. App.—San Antonio 1978, writ ref'd) (oral contract for indefinite time is employment-at-will permitting employer to terminate employee at any time); Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 159 (Tex. Civ. App.—Austin 1935, writ ref'd) (employer's motive immaterial in employment-at-will contract). *But see* Foley v. Interactive Data Corp., 765 P.2d 373, 385 (Cal. 1988) (absence of oral or written contract not presumption of at-will employment). The lack of a specific term of employment is not necessarily indicative of an employment-at-will contract. *Foley*, 765 P.2d at 385. Evidence of contrary intent by the parties can overcome the presumption of employment-at-will. *Id. See generally* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877); Beasley, *1983 Report of the Employment-at-Will Subcommittee*, 1983 A.B.A. SEC. LITIG. (employment-at-will general rule in Texas); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Rela-*

party to terminate the relationship at-will, though, does not translate into a relationship of equal bargaining power.[15] Thus, federal and state legislatures' scrutiny of this doctrine has culminated in various statutory exceptions[16] to alleviate the sometimes harsh effects on employees.[17] As a result of the active role of the legislature, federal and state courts have deferred to the legislature the power to adopt broad exceptions to the employment-at-will doctrine.[18] However, both state and federal courts have adjudicated

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tionship, 36 BAYLOR L. REV. 667, 667 (1984) (defines employment-at-will doctrine); Comment, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983) (discussion of evolution of employment-at-will doctrine).

15. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 921 (Cal. Ct. App. 1981) (recognized stronger bargaining power on part of employer); *see also* Norris-LaGuardia Act, 29 U.S.C. § 102 (1988) (purpose of act is to equalize ability to negotiate between employer and employee). *See generally* Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631, 647 (1988) (discussion of disparity between employees protected by unions or special statutes and unprotected employees).

16. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1988) (prohibits age discrimination in employment); *see also* National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), (4) (1988) (protects employee's right to organize); Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (1988) (protects employee while performing jury duty); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1988) (protects whistle-blowers); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977) (employer may not discriminate in hiring on basis of race, color, creed, or religion); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1988) (protects employee benefit plans); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988) (provides for employee safety on job site); TEX. REV. CIV. STAT. ANN. art. 5207c (Vernon Supp. 1990) (employer cannot penalize employee for complying with valid subpoena); TEX. REV. CIV. STAT. ANN. art. 5159d (Vernon Supp. 1990) (employer must pay statutory minimum wage). *See generally* Hambright & Hambright, *Labor and Employment Law*, 19 TEX. TECH L. REV. 731, 776 (1988) (enumerates various federal statutes which modify employment-at-will doctrine); Comment, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1934 (1983) (discussion of various legislative modifications to doctrine).

17. *See* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 837 (Wis. 1983) (congress and state legislature recognize need to diminish harshness of doctrine); *see also* Meredith v. C. E. Walther, Inc., 422 So.2d 761, 762 (Ala. 1982) (employment-at-will doctrine can impose harsh and inequitable results); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 921 (Cal. Ct. App. 1981) (non-union employees vulnerable under doctrine); Tepker, *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 388 (1986) (inflexibility of doctrine and harsh effect on employee); Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 330 (1982) (emphasis on protection of employee's job security).

18. *See* Salanger v. U.S. Air, 560 F. Supp. 202, 205-06 (N.D.N.Y. 1983) (modification of employment-at-will doctrine is for legislature). The court in *Salanger* also asserted it was inappropriate for a federal court to modify the state's employment-at-will doctrine, when the highest state court had refused to modify. *Id.*; *see also* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (court must exercise judicial restraint); Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (employment-at-will doctrine should be modified by legislature). *See generally*

various challenges to the employment-at-will doctrine, resulting in very narrow exceptions or modifications.[19]

A minority of jurisdictions recognize an implied contract exception to the employment-at-will doctrine allowing termination only with cause.[20] In these jurisdictions, employers who raise the defense of statute of frauds because there is no written employment contract may be defeated by the terms of employment articulated in employee handbooks and manuals.[21] Another

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Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631, 671 (1988) (court should use precedent in the absence of statutes).

19. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 384-85 (Cal. 1988) (employment agreement enforceable if not violative of legal restraints); *see also* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983) (courts recognize need to protect workers). The court in *Brockmeyer* recognized workers are often wrongfully discharged under situations not considered by the legislature. *Brockmeyer*, 335 N.W.2d at 838. Thus, the courts use contract and tort theories to protect workers not covered by collective bargaining agreements or civil service regulations. *Id.*; *see also* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 922 (Cal. Ct. App. 1981) (employer does not have absolute power to terminate employee); Comment, *Protecting Employees-at-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983) (public policy exceptions for employee under employment-at-will doctrine).

20. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980) (job assurance in employee handbook evidence of implied contract). The court found that the employee policy statements could contain contractual rights, notwithstanding the lack of evidence of a mutual agreement. *Id.* at 893. The court reasoned that an employment contract for a definite duration had an implied agreement of termination with cause. *Id.* at 885. The court also found that employment for a definite term had an implied contract of job security; therefore, termination for cause was not against public policy. *Id.* at 891; *see also* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982) (just cause requirement implied by employee handbook terms); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 (Cal. Ct. App. 1981). Evidence of longevity of service, commendations and promotions, lack of direct criticism, assurances of good performance, and employer's acknowledged policies regarding performance may be construed to demonstrate an implied contract not to act arbitrarily toward the employee. *See Pugh*, 171 Cal. Rptr. at 927; *see also* Comment, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1935 (1983) (recognizing implied promises of tenure in employment contracts). *See generally* Comment, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 154-55 (1981) (implied contracts are initial deviation from employment-at-will doctrine).

21. *See* Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989) (unilateral contract can be created by language in employee handbook); *see also Foley*, 765 P.2d at 381 ("indefinite" employment contract not barred by statute of frauds). *See generally* Comment, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1935 (1983) (implied contracts construed from terms in employee handbooks and applications). *But see* Joachim v. AT & T Information Sys., 793 F.2d 113, 114 (5th Cir. 1986) (federal court applying Texas law refused to recognize implied contract from employment handbook); TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987) (oral contracts which cannot be completed within one year are unenforceable); Preis and Moyed, *Employment and Labor Law*, 33 LOY. L. REV. 715, 742-43 (1987) (employee handbooks are simply guidelines).

exception to the employment-at-will doctrine recognized by a minority of jurisdictions is the implied covenant of good faith and fair dealing.[22] This exception allows the employee to recover damages for breach of the employment contract due to malicious or bad faith termination.[23] Texas, however, does not recognize implied contract[24] or implied covenant of good faith and

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22. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 398 (Cal. 1988) (sole remedy for breach of implied covenant of good faith and fair dealing in employment relationship should be contract damages). The court in *Foley* read the covenant of good faith and fair dealing into the employment contract to protect expressed promises. *Id.* at 399-400; *see also* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 729 (Cal. 1980) (court established factor analysis approach to determine cause of action). The court in *Cleary* established two factors to determine a cause of action for breach of the implied covenant of good faith and fair dealing: 1) longevity of service; and 2) policy which stated the employer would engage in good faith conduct. *See Cleary*, 168 Cal. Rptr. at 729; *see also* Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977) (termination not made in good faith is breach of contract); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (termination in bad faith or malice is breach of employment contract). The court in *Monge* held that termination in bad faith or malice was not in the best interest of the economic system or public good. *See Monge*, 316 A.2d at 551; *see also* Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836 (1980) (discussion of employer's good faith duty toward employees). *But see* Schmidt, *Development of the Public Policy Exception to the At-Will Doctrine*, 29 ARIZ. L. REV. 295, 304 (1987) (concern that duty of good faith and fair dealing will unduly restrict management).

23. *See Foley*, 765 P.2d at 398 (contractual remedies available for breach of implied covenant of good faith and fair dealing); *see also* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 729 (Cal. 1980) (court may allow punitive damages); Monge v. Beebe Rubber Co., 316 A.2d 549, 551-52 (N.H. 1974) (employee may seek lost wages); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (created right to recover compensatory damages for wrongful discharge). *See generally* Comment, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 158-61 (1981) (brief discussion of implied covenant of good faith and fair dealing in employment contracts).

24. *See, e.g.*, Schroeder v. Texas Iron Works, Inc., 769 S.W.2d 625, 628 (Tex. App.—Corpus Christi 1989, writ granted) (employee must show written contract expressly denying employer right to terminate at-will to prove wrongful discharge); Stiver v. Texas Instruments, Inc., 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ) (contract must specifically state in writing employer did not have right to terminate at-will); Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.) (language in handbooks and job application does not limit employer's rights); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (oral contracts unenforceable under statute of frauds); Watson v. Zep Mfg. Co., 582 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (no implied contract of employment based on employee performance); *cf.* Johnson v. Ford Motor Co., 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (modification of employment-at-will contract altered effect of contract). The *Johnson* court asserted that if the employee can prove the at-will contract was modified by actual oral agreements made by persons with authority, the employee was no longer an employee-at-will; thus, employee and employer were subject to oral agreement. *Johnson*, 690 S.W.2d at 90; *see also* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 671 (1984) (employer has absolute right to terminate absent specific contractual provision); Note, *An Employee Dis-*

fair dealing[25] as exceptions to the employment-at-will doctrine.[26]

A majority of jurisdictions, including Texas, recognize public policy exceptions to the employment-at-will doctrine.[27] In the seminal case, *Palmateer v. International Harvester Co.*,[28] the Illinois Supreme Court stated that public policy determines what is right and just, and affects the citizens of a state as a whole.[29] This exception, however, is narrowly construed to include only clear mandates of public policy,[30] not causes of action where

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missed for Refusing to Commit an Illegal Act States a Cause of Action Under a Narrow Exception to the Employment-At-Will Doctrine, 17 TEX. TECH. L. REV. 273, 279 (1986) (Texas courts refuse to alter employment-at-will doctrine).

25. Turner v. Owens-Corning Fiberglas Corp., 777 S.W.2d 792, 794-95 (Tex. App.—Beaumont 1989, writ denied); Lumpkin v. H & C Communications, Inc., 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied). *But see Lumpkin*, 755 S.W.2d at 540 (Levy, J. dissenting) (court should consider good faith and fair dealing doctrine). Justice Levy, writing for the dissent, recommends the adoption of the good faith and fair dealing doctrine to provide a more equitable relation between employer and employee. *Id.*

26. *See Schroeder*, 769 S.W.2d at 628 (written employment contract must state no termination at employer's discretion); *see also* Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (employee handbooks are simply guidelines); *Watson*, 582 S.W.2d at 179 (employee's receipt of raise does not constitute implied contract); Panhandle & Santa Fe Ry. Co. v. Curtis, 245 S.W. 781, 785 (Tex. Civ. App.—Amarillo 1922, no writ) (hiring for indefinite time does not imply obligation by employer); Comment, *An Employee Dismissed for Refusing to Commit an Illegal Act States a Cause of Action Under a Narrow Exception to the Employment-At-Will Doctrine*, 17 TEX. TECH L. REV. 273, 279 (1986) (Texas courts are reluctant to make judicial exceptions to employment-at-will doctrine). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 671-75 (1984) (only expressed contractual provisions can limit employer's right to terminate employee-at-will).

27. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) (no termination for refusing to violate indecent exposure statute); *see also* Palmateer v. International Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981) (no termination for refusing to give false testimony); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (no termination for not requesting reprieve from jury duty); Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631, 658 (1988) (public policy exception identifies illegitimate reasons for termination); Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936-37 (1983) (most widely accepted common law constraint is public policy exception).

28. 421 N.E.2d 876 (Ill. 1981).

29. *See id.* at 878 (employee terminated for refusing to give false testimony violates what is good and just); *see also Wagenseller*, 710 P.2d at 1033 (interests of society promoted if employer forbidden to terminate employee unjustly); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) (employer bound to know public policy of state); Harless v. First Nat'l Bank, 246 S.E.2d 270, 273 (W. Va. 1978) (employer may subject himself to liability for termination that contravenes public policy). *See generally* Schmidt, *Development of the Public Policy Exception to the At-Will Doctrine*, 29 ARIZ. L. REV. 295, 300-06 (1987) (discussion of parameters for public policy exception); Comment, *The At-Will Doctrine: A Proposal To Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 677-84 (1984) (public policy difficult to define).

30. *Boyle*, 700 S.W.2d at 871 (employee's discharge violates clear mandate of public pol-

only private interests are at stake.[31] Accordingly, the public policy exception applies to employees terminated for refusing to perform illegal acts,[32] performing public obligations or duties,[33] or exercising a legal right or privilege.[34]

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icy); *see also* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) (action in tort or contract may be based on termination in violation of clear mandate of public policy); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978) (employer liable for damages to employee terminated for reasons that conflict with public policy); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (termination which contravenes fundamental and well-defined public policy is wrongful).

31. *See* Keneally v. Orgain, 606 P.2d 127, 129 (Mont. 1980) (dispute over quality of services offered by company goes to internal management of company not public good); *see also Pierce*, 417 A.2d at 512 (code of ethics serving only interests of profession is not public policy); Campbell v. Ford Indus., 546 P.2d 141, 146 (Or. 1976) (proprietary interests of owners of corporation not sufficient for public policy exception); Jones v. Keogh, 409 A.2d 581, 582 (Vt. 1979) (dispute over use of sick time does not involve public policy); Schmidt, *Development of the Public Policy Exception to the At-Will Doctrine*, 29 ARIZ. L. REV. 295, 306 (1987) (public policy does not include infringement upon personal values).

32. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 378 (Cal. 1988) (employer's duty not to terminate employee for refusing to engage in illegal activity derived from public policy reflected in state's penal statute); *see also* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) (absence of crime not conclusive as to exclusion of public policy exception). The court in *Wagenseller* held that even if there is no crime committed, to compel an employee to perform an act which would normally be prohibited by law was a violation of public policy. *Wagenseller*, 710 P.2d at 1035; *see also* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980) (employee need not make election between job and legal sanctions); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978) (wrongful termination for informing auditor of State and Federal Consumer Credit and Protection violations); Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 28 (Cal. Dist. Ct. App. 1959) (forcing employee to give false testimony was improper); Tepker, *Oklahoma's At-Will Rule: Heeding The Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 395 (1986) (employer cannot retaliate against employee who refuses illegal conduct); Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983) (refusal to commit unlawful act is a public policy exception).

33. *See* Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (termination after expressing desire to be on jury is against public policy); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121-22 (Pa. 1978) (against public policy to terminate employee for not requesting excuse from jury duty). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 682-84 (1984) (discussion of public policy exceptions); Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983) (general discussion of various public policy constraints).

34. *See* Hughes Tool Co. v. Richards, 624 S.W.2d 598, 599 (Tex. App.—Houston [14th Dist.] 1981), *cert. denied*, 456 U.S. 991 (1982) (employee must establish causal link between termination and filing of claim); *see also* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (worker's compensation law undermined by employer's threat of discharge); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 426 (Ind. 1973) (termination after filing worker's compensation claim); Leonard, *A New Common Law of Employment Termination*, 66 N.C.L.

In a minority of jurisdictions, state courts also recognize a public policy exception to the employment-at-will doctrine that favors the protection of employee pension plans.[35] These courts hold that an employer cannot avoid its obligation to contribute to an employee's pension plan by terminating the employee prior to the vesting of pension benefits.[36] Though both the legislatures and the courts recognize a public policy interest in protecting employee pension plans,[37] the United States Supreme Court holds that the Employee

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REV. 631, 661 (1988) (worker's compensation laws example of legislative source of public policy). The court in *Frampton* held that an employee must be able to exercise his rights without fear of reprisal for the workman's compensation act to be totally effective. *Frampton*, 297 N.E.2d at 427. *But see* Santex Inc. v. Cunningham, 618 S.W.2d 557, 560 (Tex. Civ. App.—Waco 1981, no writ) (employee need not establish sole cause of termination was worker's compensation claim). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 678-84 (1984) (discussion of sources of and parameters of public policy exceptions).

35. *See* McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989) (employee cannot be terminated to avoid employer's pension obligation), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990); *see also* Hovey v. Lutheran Medical Center, 516 F. Supp. 554, 558 (E.D.N.Y. 1981) (employee's monies maintained by employer shall belong and be held in trust for employee's pension); Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 826 (E.D.N.Y. 1980) (strong public policy for protection of pension plans). *But see* Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 87-91 (N.Y. 1983) (tort claim for wrongful discharge not available to at-will employee terminated one day before pension vested). *See generally* Minda & Reed, *Time for an Unjust Dismissal Statute in New York*, 54 BROOKLYN L. REV. 1137, 1147-50 (1989) (emphasis on adopting an unjust dismissal statute by legislature).

36. *Hovey*, 516 F. Supp. at 558; *see also McClendon*, 779 S.W.2d at 71 (employer cannot terminate employee to avoid pension obligation). *But see Murphy*, 448 N.E.2d at 87-91 (court refused to permit tort claim for wrongful discharge relating to pension fund).

37. *See* Nixon v. Celotex Corp., 693 F. Supp. 547, 555 (W.D. Mich. 1988) (unlawful to discharge employee as means to interfere with vesting of pension); Rose v. Intelogic Trace, Inc., 652 F. Supp. 1328, 1330 (W.D. Tex. 1987) (employee can recover under ERISA if he demonstrates employer terminated him to avoid pension obligations); *McClendon*, 779 S.W.2d at 71 (significance of pension plans evidenced by ERISA and Title 110B of Texas statutes); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (1988) (employer cannot interfere with employee's right to accumulated employment benefits). ERISA was enacted after Congress found that employee benefit plans were increasing in number, size and scope over the past years. 29 U.S.C. § 1001(a). The purpose of this legislation was to insure that minimum standards were met in employee benefit plans. *Id.* Furthermore, Congress intended ERISA to provide employees with a full range of legal and equitable remedies in both federal and state courts. H.R. DOC. NO. 533, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4655. The importance of this legislation is evidenced by the mandate that ERISA supersede any state law that relates to employee benefit plans. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (1988). The enforcement of the standards promulgated by ERISA also serve to protect the financial soundness of the pension plan. *See id.* at § 1001.

An employee pension benefit or pension plan is defined as any fund, plan or program established and maintained by the employer to provide tax deferred income for retirement. *Id.* at § 1002(2)(A)(ii). Non-vested participants are employees with a forfeitable right under the plan. *Id.* at § 1052(b)(4)(c). Upon attaining retirement age, the employee's rights to his pension

Retirement Income Security Act ("ERISA") preempts any state common law action relating to the protection of employee pension benefits.[38]

The Court's interpretation of ERISA's premptive powers has caused confusion in the lower federal courts concerning whether ERISA or common

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benefits under this plan are generally nonforfeitable. *Id.* at § 1053(a). The absence of vesting, however, is not necessarily grounds for the loss of an employee's anticipated retirement benefits. *Id.* at § 1001(a).

ERISA also protects an employee from any form of intimidation that is intended to limit the employee's access to his entitled rights under the pension plan. *Id.* at § 1141. In addition, an employee cannot be discharged, suspended, disciplined or discriminated against for exercising any right promulgated under the employee pension plan. *Id.* at § 1140. *See generally* Fischel, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1106 (1988) (discussion of ERISA and employee benefit plans); Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519, 520-33 (1988) (discussion of congressional intent).

38. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988) (state statute enacted to protect pension benefits from garnishment preempted by ERISA); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987). The *Dedeaux* Court found that the policies relied on by Congress would be undermined if states were also allowed to provide their own remedies to protect pension plans. *Dedeaux*, 481 U.S. at 54; *see also* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (not necessary to have defense of ERISA preemption on face of complaint). The Court in *Metropolitan Life* stated the touchstone for removal from a state court to a federal court was the intent of Congress, not the obviousness of the preemption. *Metropolitan Life*, 481 U.S. at 66. The Court further stated that § 502(a) of ERISA expressed Congressional intent to preempt any cause of action within the scope of this provision. *Id.*; *see also* Shaw v. Delta Air Lines, Inc., 463 U. S. 85, 97 (1983) ("related to" means "has a connection with or reference to such a plan"); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981) (pension plans exclusively a federal concern). The Court in *Alessi* also reasoned that an indirect action by the state in the area of employee benefits could be construed as an encroachment on federal matters. *Alessi*, 451 U.S. at 525; *see also* Howard v. Parisian, Inc., 807 F.2d 1560, 1564 (11th Cir. 1987) (state claim arising under administration of plan benefits preempted by ERISA); Sorosky v. Burroughs Corp., 826 F.2d 794, 799 (9th Cir. 1987) (ERISA supersedes state laws concerning benefit plans); Clorox Co. v. United States Dist. Court, 779 F.2d 517, 521 (9th Cir. 1985) (removal permitted because denial of employee benefits covered by ERISA). In *Clorox*, the employee filed a cause of action in a California state court claiming loss of salary and employee benefits because of a wrongful termination. *Clorox*, 779 F.2d at 519. There were no ERISA claims brought in the state court. *Id.* The court in *Clorox* held that the action could be removed to a federal court, because loss of employee benefits was under the protection of ERISA. *Id.* at 521; *see also* Ursic v. Bethlehem Mines, 556 F. Supp. 571, 575 (W.D. Penn. 1983) (reasons given for employee's termination pretextual). The employee in *Ursic* was terminated prior to the vesting of the employee's full retirement benefits for allegedly stealing tools from the job site. *Ursic*, 556 F. Supp. at 573-74. The court found that the deprivation of pension benefits was the actual motive for his termination. *Id.* at 574. The court held that this was the type of conduct ERISA was intended to prevent. *Id.* at 575; *see also* Employee Retirement Income Security Act of 1974 (ERISA) § 514, 29 U.S.C. § 1144(a) (1988) (ERISA preempts state laws relating to employee benefits). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1314 (1984) (employee benefit plans should be regulated by federal government).

law actions would govern the case.[39] Generally, the lower federal courts hold that a state claim of wrongful discharge resulting from any interference with the vesting of a pension is preempted by ERISA.[40] Accordingly, the new exception adopted by the Texas Supreme Court could be construed by the courts as subject to preemption under ERISA.[41]

In *McClendon v. Ingersoll-Rand Co.*,[42] the Texas Supreme Court held an employer cannot terminate an employee to avoid its obligation to contribute

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39. *Compare* Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir. 1987) (employer must intend to engage in ERISA proscribed activity), *cert. denied*, 484 U.S. 979 (1987) *and* Titsch v. Reliance Group, Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (need to intend to violate ERISA), *aff'd*, 742 F.2d 1441 (2d Cir. 1983) *and* Criscione v. Sears, Roebuck and Co., 384 N.E.2d 91, 94 (Ill. Ct. App. 1978) (allegation of agreement for pension plan necessary to establish cause of action under ERISA) *with* Donohue v. Custom Management Corp., 634 F. Supp. 1190, 1197 (W.D. Pa. 1986) (employee's claim outside of ERISA because pension vested) *and* Corum v. Farm Credit Servs., 628 F. Supp. 707, 717 (D. Minn. 1986) (ERISA not applicable because pension vested) *and* King v. James River-Pepperell, Inc., 593 F. Supp. 1344, 1345 (D. Mass. 1984) (critical inquiry is whether state claim relates to employment benefit plan under ERISA). The *Titsch* court distinguished between the employee who is terminated to avoid the employer's pension obligation and the employee who loses his pension benefits subsequent to a wrongful discharge based on other grounds. *Titsch*, 548 F. Supp. at 985. The court held that ERISA only applied to the employee terminated to avoid pension obligations. *Id.*

40. Pratt v. Delta Air Lines, Inc., 675 F. Supp. 991, 998 (D. Md. 1987). The Court in *Pratt* held that an employee's cause of action was preempted by ERISA because interference with employee pension benefits related to an employment benefit plan. *Id.*; *see also* Folz v. Marriott Corp., 594 F. Supp. 1007, 1021 (W.D. Mo. 1984) (employee terminated after disclosure of chronic illness). In *Folz*, the plaintiff pleaded a prima facie tort case for wrongful discharge. *See Folz*, 594 F. Supp. at 1021. The plaintiff alleged he was terminated because his employer did not want to pay disability benefits. *Id.* The court held that his state claim was preempted under ERISA. *Id.*; *see also* Ursic v. Bethlehem Mines, 556 F. Supp. 571, 574 (W.D. Penn. 1983) (ulterior motive for termination prior to vesting). *See generally* Hambright & Hambright, *Labor and Employment Law*, 19 TEX. TECH. L. REV. 731, 761-74 (1988) (discussion of preemptive effect of ERISA); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313-14 (1984) (preemption discussed).

41. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (state cause of action for termination of disability benefits preempted by ERISA); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981) (state's involvement in protection of pension plans may be encroachment on federal jurisdiction); Howard v. Parisian, Inc., 807 F.2d 1560, 1564 (11th Cir. 1987) (state claim arising under administration of plan benefits preempted); Employee Retirement Income Security Act of 1974 (ERISA) § 514, 29 U.S.C. § 1144(a) (1988) (state statutes which relate to protection of employee benefits preempted). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 512*, 62 TEX. L. REV. 1313, 1314 (1984) (federal government should regulate employee benefit plans); Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519, 520-21 (1988) (ERISA preemption power provides consistency in the protection of pension plans).

42. 779 S.W.2d 69 (Tex. 1989), *cert. granted*, __U.S.__, 1105 S.Ct. 1804, 108 L. Ed. 2d 935 (1990).

to the employee-at-will's pension plan.[43] The *McClendon* decision created a new exception to the longstanding employment-at-will doctrine in Texas.[44] The majority briefly reviewed both federal and state statutory exceptions to the employment-at-will doctrine.[45] Justice Spears, writing for the majority, reviewed cases from other jurisdictions that recognized that public policy exceptions could limit the authority of the employer to discharge at-will employees.[46] Two federal cases specifically recognized by the majority held that public policy supports the protection of pension plans.[47] Furthermore, the majority noted that the Texas and federal legislatures have enacted statutes that specifically protect employee pension benefits.[48] Synthesizing the two federal cases and the Texas and federal statutes, the majority concluded that an exception to the employment-at-will doctrine was necessary to protect the integrity of employee pension plans.[49]

Justice Cook, joined by Chief Justice Phillips and Justice Hecht in his dissent, found that the primary issue to be decided was whether there was an implied covenant of good faith and fair dealing in an employment-at-will

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43. *Id.* at 71.

44. *Id.* at 70. Texas courts previously only recognized a wrongful termination cause of action when an employee was terminated for refusing to commit an illegal act. *Id.*

45. *Id.* (longstanding employment-at-will doctrine had been modified by various state and federal statutes).

46. *Id.* The majority acknowledged that other jurisdictions have accepted the public policy exception as a limitation to the employment-at-will doctrine. *Id.* The majority reviewed several cases with respect to the public policy exception to the employment-at-will doctrine. *See id.*; *see also* Kelsay v. Motorola, 384 N.E.2d 353, 357 (Ill. 1978) (discharge for filing worker's compensation claim); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 426 (Ind. 1973) (termination after filing worker's compensation claim); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977) (bad faith termination is breach of contract); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (bad faith or malicious termination is breach of employment contract); Nees v. Hocks, 536 P.2d 512, 513 (Or. 1975) (termination for performing jury duty); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex. 1985) (discharge for refusing to pump bilge into ocean); Harless v. First Nat'l Bank, 246 S.E.2d 270, 276 (W. Va. 1978) (termination for compliance with federal consumer credit legislation).

47. *See McClendon,* 779 S.W.2d at 71; *see also* Hovey v. Lutheran Medical Center, 516 F. Supp. 554, 558 (E.D.N.Y. 1981) (public policy supports preservation of employee pension plans); Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 826 (E.D.N.Y. 1980) (allowing wrongful discharge action for employee terminated to avoid pension obligation).

48. *McClendon,* 779 S.W.2d at 71; *see also* Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1988) (employer may not interfere in any way with employee's pension benefits); TEX. REV. CIV. STAT. ANN. Title 110b (Vernon 1988) (details public employee's pension benefits). This statute further protects retirement income from court executions and local and state taxation. TEX. REV. CIV. STAT. ANN. Title 110b, § 21.005 (Vernon 1988). The duty of care for investment by the state of the retirement fund for public employees is ordinary prudence with an absence of speculation. TEX. REV. CIV. STAT. ANN. Title 110b, § 25.304 (Vernon 1988).

49. *McClendon,* 779 S.W.2d at 71.

contract.[50] The dissent stated that although Texas courts recognized an implied covenant of good faith and fair dealing in insurance contracts, the covenant did not apply to an employment relationship.[51] In contrast to an insurance relationship, Justice Cook found that in an employment relationship there is no fiduciary duty between employer and employee, no economic benefit derived from the termination of an employee, and no unequal bargaining stance.[52] The dissent stated that the capacity of either party to terminate the relationship created a mutual obligation toward each other.[53] Justice Cook also determined that McClendon's claim for commissions on future sales, based on an implied agreement, was precluded by an express agreement between McClendon and Ingersoll-Rand.[54] Because the covenant of good faith and fair dealing did not apply to employment relationships, and McClendon's pension benefits were subsequently vested, Justice Cook concluded that McClendon did not have a cause of action for wrongful discharge.[55]

Justice Cook then considered the potential for preemption that may arise out of the majority's new exception to employment-at-will and the pension protection afforded under ERISA.[56] Justice Cook pointed out that section 514 of ERISA does not allow for duplication of effort by a state concerning employee pension plans.[57] Justice Cook then admonished the court for misleading employees by offering a claim in a state court that might be pre-

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50. *See* McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1979)(Cook, J., dissenting), *cert. granted,* __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

51. *Id.* at 74 (Cook, J., dissenting) (Texas recognized covenant of good faith and fair dealing in context of insurance contracts); *see also* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (policy behind covenant of good faith and fair dealing in insurance contracts based upon unequal bargaining power between insurer and insured).

52. *See McClendon,* 779 S.W.2d at 74 (Cook, J., dissenting) (compared insurance contracts and employment contracts).

53. *Id.* (Cook, J., dissenting) (mutual obligation precludes imposition of tort damages). Justice Cook distinguished an employment relationship from an insurance relationship, stating that employees are agents of the employer; therefore, the employee is under an obligation to further the interests of the employer. *Id.* The mutuality of obligation which exists in an employment at-will relationship permits either employer or employee to terminate the relationship. *Id.* Justice Cook, however, would not recognize a cause of action for a breach of good faith and fair dealing or the imposition of tort damages. *Id.*

54. *See* McClendon v. Ingersoll-Rand Co., 779 S. W.2d 69, 74 (Tex. 1989)(Cook, J., dissenting) (express terms of agreement cannot be disavowed by implied covenant of good faith and fair dealings), *cert. granted,* __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

55. *Id.* at 70 n.2 (Cook, J., dissenting) (McClendon alleged subsequent vesting did not negate Ingersoll-Rand's original motive for terminating him).

56. *Id.* at 71 (Cook, J., dissenting) (dissent stated ERISA § 510 made interference with employee pension plans unlawful).

57. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 72 (Tex. 1989)(Cook, J., dissenting) (asserting ERISA prohibited duplication of effort in protection of pension plans), *cert. granted,* __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

empted by ERISA.[58] Justice Cook also criticized the majority's failure to determine the length of time that must elapse between termination and vesting to constitute a causal connection resulting in an action for wrongful discharge.[59] He suggested that this failure would allow an employee to allege a wrongful discharge claim at any point after the start of employment, thus chilling the rights of the employer to terminate an employee.[60]

Justice Gonzales, in his dissent, admonished the majority for creating a new exception to the employment-at-will doctrine, instead of responding to the point of error directed to the court.[61] According to Justice Gonzales, writ of error was granted to determine whether the court of appeals erred in not recognizing the covenant of good faith and fair dealing in an employment relationship.[62] Justice Gonzales further suggests that the majority's failure to determine whether this cause of action arises in tort or contract, or to address the issue of damages, will leave the courts in a quandary.[63] Justice Gonzales also criticized the majority for its reliance on federal cases interpreting New York law that New York's highest court had refused to follow.[64] Justice Gonzales reasoned that the majority's silence concerning the duty of good faith and fair dealing in an employment-at-will relationship implicitly denied the existence of this covenant in this type of relationship.[65]

The Texas Supreme Court has added a caveat to the traditional employment-at-will doctrine: an employer cannot avoid its obligation to contribute to an employee's pension plan by terminating the employee.[66] Prior to the instant case, the only exception recognized by Texas courts was an em-

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58. *Id.* (Cook, J., dissenting). Justice Cook pointed out that a recent ERISA case modified the "well-pleaded complaint" rule. *Id.* Thus, the presence of only state claims may not prevent removal to the federal courts when the claims relate to pension plans. *Id.*; *see also* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987) (express ERISA claim does not have to be on the face of complaint); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132(a)(1) (1988) (participant or beneficiary can file under ERISA). *But see* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (federal question must be on face of complaint).

59. *McClendon*, 779 S.W.2d at 73 (Cook, J., dissenting).

60. *Id.* (Cook, J., dissenting). Justice Cook was concerned that an employer's decision to terminate an employee would come under greater scrutiny regardless of when pension vesting would occur. *Id.*

61. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 75 (Tex. 1989)(Gonzales, J., dissenting), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990). McClendon's point of error concerned a breach of duty of good faith and fair dealing in an employment-at-will relationship. *Id.*

62. *Id.* at 75 n.1 (Gonzales, J., dissenting).

63. *Id.* at 75 (Gonzales, J., dissenting).

64. *Id.* at 76 (Gonzales, J., dissenting).

65. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 75 (Tex. 1989)(Gonzales, J., dissenting), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

66. *Id.* at 70 (McClendon terminated by Ingersoll-Rand four months prior to vestment of

ployee's refusal to perform an illegal act.[67] The court in *McClendon*[68] recognized that changes in employer-employee relationships, and concomitant changes in public policy mandate modification of the employment-at-will doctrine.[69] Statutes enacted by both state and federal legislatures reveal a significant interest in protecting the integrity of employee pension plans.[70] Accordingly, the court's pension exception to the employment-at-will doctrine is consistent with other jurisdictions' recognition of the relationship between public policy and statutes.[71]

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pension benefits). The Court in *McClendon* held that an employee-at-will cannot be terminated to avoid the employer's obligation to contribute to the employee's pension plan. *Id.*

67. *See id.* (employer terminated employee to avoid pension obligation); *see also* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex. 1985) (employer terminated employee for refusing to illegally pump bilge of ship); *cf.* Schroeder v. Texas Iron Works, Inc., 769 S.W.2d 625, 628 (Tex. App.—Corpus Christi 1989, writ granted) (no grounds for wrongful discharge unless expressed in employment contract); Stiver v. Texas Instruments, Inc., 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ) (written contract necessary to prove employer cannot terminate employee-at-will). *See generally* Comment, *An Employee Dismissed for Refusing to Commit an Illegal Act States a Cause of Action Under a Narrow Exception to the Employment-At-Will Doctrine*, 17 TEX. TECH L. REV. 273, 285-91 (1986) (discussion of the public policy exception construed by the court in *Sabine*).

68. 779 S.W.2d 69 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

69. *Id.* at 70 (public policy expressed in statutes); *see also Sabine Pilot Serv., Inc.*, 687 S.W.2d at 734-35 (public policy expressed in federal and state statutes). The *Sabine* court found that public policy changes to meet the evolving needs of society, and stated that these changes were expressed in statutes. *Sabine Pilot*, 687 S.W. 2d at 734-35; *see also* Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (principle of law which prevents one from injuring public or public good); Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (public policy included matters of justice which affected citizens collectively).

70. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (1974) (employer precluded from interfering with employee benefit plan); *accord* TEX. REV. CIV. STAT. ANN. TITLE 110B (Vernon 1988) (protection of public employee retirement plan); *see also* Pratt v. Delta Air Lines, Inc., 675 F. Supp. 991, 998 (D. Md. 1987) (interference with employee pension benefits exclusively covered by ERISA); Ursic v. Bethlehem Mines, 556 F. Supp. 571, 575 (W.D. Penn. 1983) (termination to avoid employer's pension obligation to employee covered by ERISA); Rose v. Intelogic Trace, Inc., 652 F. Supp. 1328, 1330 (W.D. Tex. 1987) (employee has cause of action under ERISA against employer who interfered with pension benefits). *But see* Titsch v. Reliance Group, Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1985) (distinguished cases of employee termination to avoid pension obligations and loss of pension benefits due to wrongful discharge).

71. *See McClendon*, 779 S.W.2d at 71 (protection of employee's pension plan favored by public policy); *see also* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (employer's threat of employee dismissal interfered with intent of workman's compensation); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 426 (Ind. 1973) (employee cannot be terminated for filing workman's compensation claim). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 683 (1984) (courts recognize public policy exceptions inferred from statutes).

The dissents are critical of the majority's reliance on ERISA to support this new exception to the employment-at-will doctrine because ERISA expressly prohibits any duplication between state and federal courts with respect to the protection of pension benefits.[72] The majority correctly construed ERISA's preemptive effect as limited solely to the protection of pension benefits.[73] The majority writes that McClendon did not seek recovery of pension benefits, but sought recovery of lost future wages as a result of his wrongful discharge.[74] However, the majority's holding is vulnerable to a substantive attack because its support relates to the public interest in protecting the integrity of an employee's pension plan.[75] The majority's reasoning that public policy supports the protection of employee pension plans mirrors the policy behind ERISA.[76]

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72. *See* McClendon v. Ingersoll-Rand Co, 779 S.W.2d 69, 71-76 (Tex. 1989)(Cook, J., and Gonzales, J., dissenting), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990). The dissents state that the majority has adopted a cause of action which is precluded by ERISA. *Id.*

73. *Id.* at 71; *see also* Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir. 1987) (ERISA limited to violations in administration of employee benefit plans), *cert. denied*, 484 U.S. 979 (1987). A prima facie case is established under ERISA § 510 if the employee demonstrates the following: 1) prohibited employer conduct; 2) intent to interfere; 3) with the acquisition of rights earned by an employee. *Gavalik*, 812 F.2d at 351; *see also* Titsch v. Reliance Group, Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (ERISA does not cover loss of pension benefits subsequent to wrongful discharge), *aff'd*, 742 F.2d 1441 (2d Cir. 1983); King v. James River-Pepperell, Inc., 593 F. Supp. 1344, 1345 (D. Mass. 1984) (state claim relating to employment benefit plan must be intended by ERISA before preempted). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1314 (1984) (discussion of types of benefits which come under ERISA).

74. *See McClendon*, 779 S.W.2d at 71 n.3 (majority acknowledged two lower federal courts had recognized wrongful discharge pursuant to employee termination to avoid employer's pension obligation preempted under ERISA); *see also* Pratt v. Delta Air Lines, Inc., 675 F. Supp. 991, 998 (D. Md. 1987) (interference with employee pension benefits related to employee benefit plan); Donohue v. Custom Management Corp., 634 F. Supp. 1190, 1197 (W.D. Pa. 1986) (ERISA does not apply because employee's pension vested); Corum v. Farm Credit Servs., 628 F. Supp. 707, 717 (D. Minn. 1986) (ERISA does not apply to vested pensions). *See generally* Fischell & Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1105-06 (1988) (suggests ERISA's preemption power is overly broad); Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519, 531-33 (1988) (discussion of recent Supreme Court cases expanding ERISA's preemptive effective to bad-faith claims).

75. *See McClendon*, 779 S.W.2d at 72 (Cook, J., dissenting) (ERISA's preemption clause prevented court from adjudicating claim); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (state causes of action preempted by ERISA); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981) (indirect actions by state on employment benefits plans may encroach on federal jurisdiction); McMahon v. McDowell, 794 F.2d 100, 107 (3d Cir. 1986) (claim for lost pension benefits and wages in state court preempted by ERISA).

76. See McClendon v. Ingersoll-Rand Co., 779 S.W.2d 60, 71 (Tex. 1989) (federal statute expresses protection of integrity of pension plan), *cert. granted*, __ U. S. __, 110 S. Ct. 1804,

Federal case law supports Justice Cook's assertion, in his dissent, that the federal interest in protecting the integrity of employee pension plans might preempt this new state cause of action.[77] Furthermore, case law confirms Justice Cook's contention that a cause of action limited to an employer's interference with employee benefits would be preempted by ERISA.[78] Any state action touching on pension plans would also be complicated by ERISA's ability to preempt a state claim, notwithstanding the absence of any reference to ERISA on the face of the complaint.[79]

The majority did not address the issue raised by McClendon concerning the implied covenant of good faith and fair dealing.[80] However, Justice Cook, in his dissent, expressly refused to recognize the implied covenant of good faith and fair dealing in an employment contract, distinguishing employment contracts from insurance contracts.[81] Justice Cook did not recog-

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108 L. Ed. 2d 935 (1990); *see also* Employee Retirement Income Security Act of 1974 (ERISA) § 510, 29 U.S.C. § 1140 (1988) (employer cannot interfere with employee's right to employee benefits); H.R. DOC. NO. 533, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS 4639, 4655 (intent of ERISA to provide employee with legal and equitable remedies).

77. *See Pilot Life Ins. Co.*, 481 U.S. at 57 (ERISA preempts state causes of action that affect employee benefits); *see also Alessi*, 451 U.S. at 525 (state statutes which affect employment benefits may be preempted by ERISA); Howard v. Parisian, Inc., 807 F.2d 1560, 1564 (11th Cir. 1987) (ERISA preempts state claims which arise under administration of plan benefits); Clorox Co. v. United States Dist. Court, 779 F.2d 517, 521 (9th Cir. 1985) (action could be removed to federal court because loss of employee benefits is covered by ERISA). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1323 (1984) (suggests ERISA preemption extends only to direct conflict between state and federal law).

78. *See Alessi*, 451 U.S. at 524 (state statutes that relate to pension benefits are preempted by ERISA); Pratt v. Delta Air Lines, 675 F. Supp. 991, 998 (D. Md. 1987) (ERISA preempts state claims for wrongful discharge intended to deprive pension benefits); *see also* Folz v. Marriott Corp., 594 F. Supp. 1007, 1021 (W.D. Mo. 1984) (employee allegedly discharged so employer could avoid disability payments).

79. *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987) (ERISA need not be alleged on face of complaint); *see also* Clorox Co. v. United States Distric Court, 779 F.2d 517, 521 (9th Cir. 1985)(absence of ERISA claim on face of complaint did not prevent removal to federal court); Pratt v. Delta Airlines, Inc, 675 F. Supp. 991, 998 (D. Md. 1987)(ERISA prevents employee's wrongful discharge claim under Maryland law relating to pension benefits); Employment Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1) (1988) (ERISA allowed participant or beneficiary to bring cause of action in federal court). *See generally* Hambright & Hambright, *Labor and Employment Law*, 19 TEX. TECH L. REV. 731, 768 (1988) (discussion of effect of ERISA on "well-pleaded complaint" rule in Fifth Circuit).

80. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 70 n.1 (Tex. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990).

81. *See id.* at 74 (Cook, J., dissenting) (implied covenant of good faith and fair dealing only applicable to insurance contracts); *cf.* Arnold v. National County Mut. Fire Ins., Co., 725 S.W.2d 165, 167 (Tex. 1987) (implied covenant of good faith and fair dealing equalized relationship between insured and insurer).

nize an inequality in the employment-at-will relationship that required protection of the employee.[82] Other jurisdictions recognize an inequality in these relationships and recognize a need to protect workers.[83] Additionally, federal statutes that protect employees from discrimination and unfair labor practices have been enacted, thus mitigating the unequal bargaining power between employer and employee.[84]

Other jurisdictions lend support for Justice Cook's contention that the adoption of a covenant of good faith and fair dealing would destroy the mutuality of obligation between employee and employer in an employment-at-will relationship.[85] However, Justice Cook overlooked the fact that jurisdictions that recognize a breach of this covenant limit it to incidents of bad faith and malice.[86] Bad faith termination of an employee is also held not to be in the best interest of the public good.[87] Interestingly, Justice Cook's reasoning is similar to that of the majority and other courts that have recognized pub-

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82. *McClendon*, 779 S.W.2d at 74 (Cook, J., dissenting).

83. *See* Meredith v. C. E. Walther, Inc., 422 So. 2d 761, 762 (Ala. 1982) (employment-at-will doctrine can result in harsh or inequitable results); *see also* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983) (workers need protection from employer); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 922 (Cal. Ct. App. 1981) (employer without absolute power to terminate). *See generally* Comment, *Protecting Employee at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983) (public policy exceptions provide protection under employment-at-will doctrine).

84. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1988) (prohibiting discrimination on basis of age); National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), (4) (1988) (protection from unfair wage and labor practices); Norris-LaGuardia Act, 29 U.S.C. § 102 (1988) (unorganized employee has limited negotiation ability).

85. *See* Criscione v. Sears, Roebuck and Co., 384 N.E.2d 91, 95 (Ill. Ct. App. 1978) (termination for cause destroyed mutuality of obligation); Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761 (La. 1932) (mutuality requires that both parties be allowed to terminate relationship at any time); Johnson v. Ford Motor Co., 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (modification of employment-at-will doctrine results in lack of mutuality). *But see* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444 (N.Y. 1982) (mutuality can be replaced by consideration). *See generally* Murg & Scharman, *Employment-At-Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 336-38 (1982) (employment-at-will based on principles of mutuality of obligation and consideration).

86. *See* Cleary v. American Airlines, 168 Cal. Rptr. 727, 728-29 (Cal. 1980) (court held employer breached implied covenant of good faith and fair dealing after long-term employee was terminated without cause); *see also* Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977) (employee terminated prior to closing of transaction to preclude employee from receiving monetary compensation for transaction); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (termination in bad faith or malice is breach of employment contract).

87. *See* Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (employee terminated for refusing to date foreman). The New Hampshire Supreme Court stated that there must be a balance between the employer's interest in maintaining his business and the employee's interest in maintaining his employment. The employer's interest must also be balanced against the public interest in maintaining employer-employee relationships. *Id.*

lic policy exceptions to the employment-at-will doctrine.[88]

Employment law has evolved in response to the needs of society. Therefore, gradual changes to the longstanding employment-at-will doctrine should be anticipated to meet the changes in the employment relationship. At first blush, both federal and state courts' zealous protection of the employee appear to be a duplication of effort. ERISA might preempt the Texas Supreme Court's effort to allow a cause of action for the termination of employees by creating an exception to the employment-at-will doctrine relating to pension benefits. This new exception must be narrowly construed by Texas courts to relate only to the issue of wrongful discharge and not to interference with the employee's pension benefits. This narrow interpretation should avoid encroachment on ERISA. Only then will innocent parties not be misled and find their claim and forum preempted by ERISA.

Carol Jendrzey

88. *See* McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 70 (Tex. 1989) (public policy exceptions necessary to meet changing needs of society), *cert. granted*, __ U.S. __, 110 S. Ct. 1804, 108 L. Ed. 2d 935 (1990); *see also* Sabine Pilot Serv. Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (public policy expressed in federal and state statutes). The court in *Sabine* modified the employment-at-will doctrine to preclude an employer from dismissing an employee for refusing to perform an illegal act. *Sabine Pilot*, 637 S.W.2d at 734. This exception was created in response to changes in public policy which are expressed in the statutes. *Id.* at 735; *see also* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (public policy derived from matters of justice which affected citizens as a whole); Petermann v. Local 396, Int'l Bhd of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (public policy defined as mandate which prevented one from injuring public or public good).