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Employment At-Will: Sacred Writ or Big Lie?

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Abstract:

Texas was the fourth state to adopt the at-will rule of employment termination, an inferential rebuttal defense to an employee’s action for breach of a contract of employment of indefinite duration. The 1888 decision in *East Line & R. R. Co. v. Scott*, 10 S.W. 99 (Tex., 1888), looks to Horace Woods’ 1877 treatise *MASTER & SERVANT*, and has been slavishly followed in Texas despite dubious intellectual provenance and a complete lack of relevance to actual reality in the contemporary employment market.

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Employment at Will: Sacred Writ, or Big Lie?

Texas adopted the at-will doctrine of employment terminations in 1888.¹ An inferential rebuttal defense to an action for breach of an employment contract of indefinite term, it has enjoyed unparalleled success as an unquestioned legal doctrine from that date to the present. This article examines the doctrine’s antecedent precedents in both legal and historical contexts; the underlying rationale; common law exceptions to the doctrine in Texas and other jurisdictions; and the legal and economic environment of a jurisdiction that has legislatively abandoned the rule.

East Line v. Scott

The East Line case arose deep in the piney woods of Marion County. W.F. Scott was injured while working for the East Line in 1882. He filed suit for damages and settled the case in 1884. The terms of the settlement were for the railroad to pay Scott $4,500, and to employ him as engineer so long as he desired to be employed. The company paid the $4,500, but when Scott healed up from his injuries and applied for work on July 1, 1886, the company refused to hire him back. Scott filed a new suit for breach of contract.

The company denied making the agreement, and with classic forked-tongue advocacy said if any such agreement was made with its agents, it was without authority. The company affirmatively raised the Statute of Frauds; claimed the agreement was contrary to public policy; was not incorporated in the judgment, which memorialized the 1884 settlement; was not mutually binding on both parties; and was unenforceable due to its indefinite term.

The case was tried to a jury, which found for Scott and awarded damages in the amount of $2,400. On appeal, the Supreme Court concluded there was sufficient evidence to support the jury’s finding that defendant’s agents were authorized to make the commitment for life time
employment, but reversed and rendered judgment that Scott take nothing because of the indefinite duration of the agreement.

Chief Justice Stayton, writing for a unanimous court observed there was no doubt that Scott’s option to return to work, and the term of such service, if any, depended upon his own will. The court held that when the term of service is left to either party, then either party is permitted to terminate the relationship at will and without cause. It also held that under such circumstances, “it is no breach of contract to refuse to receive further services,” and that an employer’s refusal to accept any services at all “would entitle the engaged servant only to nominal damages.”

**East Line Precedents**

The Texas court sited Horace Wood’s 1877 treatise, *MASTER & SERVANT*, and five cases from other jurisdictions, in support of its holding. We start with the published cases.

In *Harper*, the employee was a skilled oil and water color maker engaged by a consortium of dye merchants for “a term not exceeding three years.” There was no express agreement for three years’ employment, and no stipulation from which such agreement could be implied. The defendant employers insisted they had bargained for the plaintiff’s exclusive services for “[A] term which cannot be more, but may be less, than [three years].” The Massachusetts court sitting in 1873 cited two English cases where the Plaintiff’s recovery was limited to the compensation, which the defendant had agreed to pay for a fixed time, without elaborating those courts’ rationale. It also cited four cases that apparently held for the plaintiff/employee, with only slight reference to distinguishing facts. No legal doctrine was proclaimed, but the court held that the defendants had the right to terminate their agreement with the plaintiff at any time by reasonable notice.
The Coffin case, decided in 1862, involved a real estate developer’s termination of his salesman’s employment shortly before the first sales were closed and funded. The agreement was for an unspecified term, but provided that the salesman would receive 50% of the net profits from closed and funded transactions. The Pennsylvania court quoted but did not follow the plaintiff’s sterling argument that when construing an agreement of uncertain intent, the court will lean in favor of finding the intent to be fair and reasonable, not fraudulent on the one side and foolish on the other. It acknowledged, but declined to follow the English cases, which presumed employment agreements for an indefinite term to be for a year, on the grounds that the English cases involved menial, domestic, and husbandry servants. The court went on to cite a perceived American business practice, though no legal authority for an American legal rule that unless the parties expressly agreed to the contrary, employment agreements of indefinite duration were terminable at the pleasure of either party.

The 1870 Railroad case did not involve employment, but was cited by the Texas court for a general principle of contract law, and some colorful language: A promise to perform, given without consideration for the promised performance is unenforceable; or as Justice Grover of the New York Court of Appeals characterized, “a mere nude pact, for the breach of which no action can be maintained.”

On April 16, 1864, Dane had accepted the railroad company’s April 15 offer to deliver not less than 6,000 tons of iron from New York to Chicago during the months of April, May, June, July, and August, 1864. He had not, however, obligated himself to deliver any amount of iron at any time in New York. The New York court said the lack of mutuality made the railroad offer a “mere nude pact,” with no legal consequence.
Following its summary of the Railroad holding, the East Line court, cited an 1801 New York case involving a slave trade gone bad for the principle,

“… a contract may be so made as to be optional on one of the parties, and obligatory on the other, or obligatory at the election of one of them …”\(^{11}\)

Doffing its hat to judicial conservatism, the Texas court summed up:

“We need not go so far as to adopt the entire proposition, but the last branch of it is doubtless correct in all cases in which the option to make an agreement obligatory is supported by valuable consideration.”\(^{12}\)

The last case cited by the East Line court involved a Minneapolis mineral water salesman, Bolles, who was in debt to his supplier Sachs in the amount of $9,500. He sold his business to the supplier for the amount of the debt, obtaining the buyer’s written promise to employ him for so long a time as he might elect to work as the operator of the still-going business. He was to be paid $2,000 out of the first moneys collected after the sale, plus one half of the profits. Despite the written agreement, the new owner fired Bolles after two weeks and sold the business to a third party ten days later. Bolles was paid only $176, and feeling cheated, sued the supplier.\(^{13}\)

The Minnesota court, sitting in 1887, held first that the lack of mutuality inherent in Bolles exclusive right to set the term of the employment agreement was not an impediment to enforcement. The employee/plaintiff’s verdict was, however, set aside for lack of certainty respecting the damages.

“He could not be allowed to recover, as damages for breach of the contract, the profits or remuneration which the business might have yielded during any period beyond the time when the contract was broken and the employment terminated.”\(^{14}\)

The Minnesota court’s difficulty was obviously not with the indefinite duration of the obligation to employee Bolles, but the uncertainty in the proof of lost profit damages. The East Line court ignored the Minnesota court’s legitimate concern with the plaintiff’s inability to prove damages.
with certainty and focused instead on the intolerable circumstance of an employee who could walk off the job.

Had he not been discharged, he might, at will, at any time, after making the contract, have himself abandoned the employment, because of dissatisfaction, or for any other reason.\textsuperscript{15}

\textit{East Line Rationale}

The \textit{East Line} court hammered Scott with what it found to be an intolerable variance between his pleadings and evidence.

“…[T]here is no binding contract for service for a future period until the term of its duration is fixed, while there may be a contract, if supported by a sufficient consideration, which will give the right to one party to make the contract for service complete, by fixing the term during which it becomes obligatory on the one to serve and the other to accept and pay for the services… He states that such was the agreement at the time the compromise was made, but this is inconsistent with his pleadings.”\textsuperscript{16}

The agreement could only be binding if the parties agreed to a fixed term of employment. The idea that employees could walk off the job at any time with impunity to legal consequence was unthinkable. The only conceivable result was to allow the same latitude to the employer.

\textbf{Horace Wood, MASTER \& SERVANT, 1877}

The primary support for the \textit{East Line} court’s decision to reverse Scott’s jury verdict was Horace Gray Wood’s 1877 treatise on employment law. Horace Wood was a lawyer living in Albany, New York when he wrote his oft cited treatise. I have found no record that he ever presided over a legally empanelled court, or was ever elected to any public office. Whatever else he might have been, when it came to announcing new legal doctrine, he was not timid. He wrote:

“With us, the rule is inflexible, that a general or indefinite hiring is, \textit{prima facie}, a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show that the mutual understanding of the parties was in reference to the matter;
but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.”

Wood claimed to be announcing a departure from English precedent, which had to that time presumed employment agreements of indefinite duration to be for one year. He cited three English and five American cases in the footnote following his “inflexible” rule. Unfortunately, none of the precedents actually or even remotely supported the announced rule.18

**Wood’s Precedents**

Wood first cited *Fosdick v. The North British Railway*19 in support of his “inflexible” American rule. This 1850 English decision did not involve the at-will doctrine as presented by Wood, nor an “English” rule of presumed yearly hiring. Fosdick, worked under an employee handbook, which, contrary to contemporary practice, was treated as though it were a written contract. The handbook spelled out the company’s express authority to terminate employees at will, with two weeks notice or two weeks severance pay. Fosdick, however, was fired for cause – a false accusation that he failed to deliver two baskets of fish to freight customers of the railroad. He brought suit for damages stemming from the false and defamatory circumstances of the termination. A divided court dismissed the complaint with soothing words that he might have a defamation claim against the false accuser, but no breach of contract claim against the company.

Wood also cited *Mitchell v. Smith*, decided in 1836.20 Mitchell worked as manager of the Western Bank of Scotland in Glasgow under a contract that expressly provided for dismissal upon a 2/3rds vote of the directors. The directors voted unanimously to dismiss Mitchell, who sued for reinstatement and back pay, or in the alternative for damages, claiming that the directors had no cause to fire him. The sole issue before the court was whether the directors had power to discharge the employee without a specification of cause. The court read the contract, which
expressly provided for dismissal upon a vote of 2/3rds of the directors, found evidence of a unanimous vote, and held for the bank. There was no mention of an English presumption of yearly hiring, nor of any legal concept that automatically imposed at-will conditions. There was an express contract in place, and the parties complied with its express terms.

*London, et al, Shipping Co. v. Ferguson* was another English case decided in 1850, and cited by Wood. In this case, Ferguson, worked for twenty years as agent for the shipping company’s Greenock facility under a commission agreement that paid him a percentage of profits realized from operations. Sales fell off, there were no profits, and the owners elected to close the facility. Ferguson sought to purchase the equipment and assume the business in his own name. The company sued Ferguson for an accounting of sums he had withheld. Ferguson defended, claiming he was entitled to withhold £100 as an arbitrary annual commission, in lieu of notice that a year-to-year employment was being terminated. The court found that there were no profits from which a commission could be determined and ordered Ferguson to make the accounting, remarking in passing that there was no room in the case to discuss custom, or usage in the trade. The only reference to a concept of hiring for a year was in the court’s dismissive *dictum*.

Wood’s string of citations included *DeBrair v. Minturn*, an 1851 decision from the Supreme Court of California, which dealt with employment law only tangentially, and was actually a landlord tenant dispute. DeBrair was a bartender working for Minturn, an innkeeper. The wages were $300 per month plus the right to occupy a room in the inn for “so long as he remained in the defendant's employ.” The plaintiff was fired from his bartending job and given notice to vacate the room at the end of the month. He did not comply with the notice to vacate, was forcibly ejected, and sued for damages “for being thus ejected.” The jury awarded $600 in
damages. The California Supreme Court succinctly held, “The plaintiff had no right to remain in the defendant's house after being notified to leave, and the defendant had a right to eject him.”

No excessive force was involved. The case was remanded for a new trial with the admonition that no more than nominal damages were recoverable under the facts.

Wood cited Tatterson v. Suffolk Manufacturing Co., an 1870 decision from the Supreme Court of Massachusetts.\(^{23}\) This American case actually upheld the terminated plaintiff’s claim that his oral contract of employment was implicitly deemed to be for one year. The losing defendant employers sought analogy to real estate tenancy practice, claiming that since they paid the plaintiff quarterly, and gave three months notice, they were not obligated to pay for the final quarter of the second year, after they had shut down the mills.

Wood also cited the Franklin Mining Company case, an 1871 decision from the Supreme Court of Michigan, which actually involved the premature breach of a one-year employment agreement.\(^{24}\) The jury’s verdict for the employee was sustained. There is nothing in the case to support Wood’s theory of an “inflexible rule.”

Finally, Wood cited Wilder’s Cases, a pair of 1869 decisions from the United States Supreme Court.\(^{25}\) Both cases involve military contractor claims. Neither case deals with employment termination. The only aspect of either case remotely touching on Wood’s issue was the statute of March 12, 1861, which provided, one month before the bombing of Fort Sumter, that no contract with the Quartermaster’s Department of the United States Army or any of its subordinates, made since the 2\(^{nd}\) day of March 1861, was to be if any force or validity for longer than the current year from its date. (12 Stat. L., p. 220.)

Wood’s numerous critics, some cited below, who claim that he conjured his “inflexible rule” from whole cloth, are exactly right.
Wood’s Context

It is noteworthy that Wood was writing in the decade following the Civil War. It was a time of ferment and upheaval. The economy was changing from agrarian to industrial. The free market philosophy of laissez-faire capitalism was in vogue. The legal landscape was also changing. Most notably to our topic, the 13th Amendment to the United States Constitution had only recently outlawed involuntary servitude.26

Agricultural interests had dominated the ante-bellum economy and public policy.27 Wood’s dishonest research to the contrary notwithstanding, there was an English rule of employment contract construction, which presumed that an employment contract of indefinite or unstated term was for one year. American courts tended to follow the rule, which prevented the employer, usually a land-owner, from firing the workers after planting; and prevented the employees from quitting during the harvest.28 In a word, farm workers – be they slaves, indentured servants, or freedmen – were not permitted to walk off the job. On the other side of the law-balanced social equation, farmers and other employers were not permitted to fire their field hands without good cause.

The ante-bellum agrarian economy engaged the efforts of both owned and indentured workers in significant numbers. Slave owners and indenture holders had considerable, but not unlimited latitude in disposing of their human resources. The employers who had entered into contractual relationships with their workers were not indulged in the free and easy reduction-in-force technique of overhead control practiced by managers in the contemporary economy.

The Industrial Revolution shifted wealth and public policy considerations from the farm into the capital intensive factory environment. Large plants using complex machinery began to replace small workshops. To extract as much profit as possible from the giant mills, the owners
insisted on flexibility to meet changing market and technological developments. Contracts that restricted the right to terminate employees, or guaranteed employees at least some pre-termination notice were intolerable to the new mind-set.

Horace Gray Wood had sensed the growing swell and caught the wave, boldly engaging the inexorable and inflexible logic of contract law and lending a patina of legitimacy to a new way of thinking.

**From Treatise to Law**

Like fad-crazed consumers of any age, state Supreme Courts, mindful of the prevailing mentality, quickly adopted Wood’s Rule, making it established law. Tennessee was the first, writing in 1884:

> All may dismiss their employees at will, be they many or few, for good cause, for no cause [,,] **or even for cause morally wrong**, without being thereby guilty of legal wrong.²⁹ (emphasis added)

Maryland followed Tennessee in 1887, touting [Wood's treatise] as an American authority of high repute.”³⁰ Texas jumped on the band wagon in 1888.³¹ New York joined ranks in 1895.³²

The *Martin* case from New York is regarded by many as the leading case on the doctrine.³³ It did not analyze any prior authority, but did truthfully assert that other states (Tennessee, Maryland and Texas, to be sure) had adopted the at-will rule. It was not atypical. Most courts offered no rationale or analysis for substituting the at-will doctrine for the common law presumption. By the arrival of the twentieth century, the at-will doctrine was well-established throughout the United States and served to reinforce turn-of-the-century ideas concerning *laissez-faire* economic theory sometimes referred to in reverential terms as freedom to contract.³⁴
Today, some vestige of the at-will rule is found in the common law of every state except Montana, where it has been eliminated by statute.\textsuperscript{35} The United States, however, is the only industrial or post-industrial nation in the world hanging on to this child of 19\textsuperscript{th} century \textit{laissez-faire} economic theory. France, Germany, Japan, the United Kingdom, and even newly formed democracies such as post-apartheid South Africa all require that employers have just cause to dismiss non-probationary employees.\textsuperscript{36}

**Common Law Exceptions to the At-Will Rule**

Forty-two states and the District of Columbia recognize public policy as an exception to the at-will rule.\textsuperscript{37} In Texas, the public policy exception is narrowly stated, with a severe procedural penalty tacked on for good measure:

“We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in \textit{East Line & R.R.R. Co. v. Scott}. That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff’s burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.”\textsuperscript{38}

Thirty-seven states and the District of Columbia also recognize an implied contract as an exception to at-will employment.\textsuperscript{39} Texas revisited the implied contract exception in 2006 holding in an unsigned \textit{per curium} opinion that a provision in an employee handbook stating that dismissal may be for cause, and requiring employee records to specify the reason for termination, did not modify an employee's at-will employment status.\textsuperscript{40} The \textit{Matagorda} case relied on a 1998 decision, which reiterated the \textit{East Line} rule that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.\textsuperscript{41}

**Good Faith Exception**
Scholars have argued for a good faith exception to Wood’s Rule. One reports that eleven states have recognized an implied covenant of good faith and fair dealing in actions involving employment terminations.

Texas initially recognized an implied covenant of good faith and fair dealing in all contract cases where there was a gross inequality of bargaining power between the parties. The concept, however, has been expressly repudiated in all Texan employment relationships: private and governmental, union and non-union.

The *City of Midland* court exhaustively reviewed the employment jurisprudence of other states, noting that thirty-four recognized an implied covenant of good faith and fair dealing in one permutation or another; while twenty-three states hold there is none in employment relationships of indefinite duration. The same court found one case that recognized a remedy, limited to contract damages, for breach of an express covenant of good faith; two jurisdictions that recognized an implied covenant of good faith and fair dealing not to nullify the benefits of a definite term contract; one "just cause" jurisdiction that rejected the covenant of good faith and fair dealing, but allowed its juries to determine whether there was just cause; and four states that recognize a covenant of good faith and fair dealing in a "just cause" contract or a contract for a definite term.

The Texas court chose to move further to the right and into the past than any other state, completely removing any vestige of good faith and fair dealing from all of Texas employment law. The compelling argument was that to do otherwise would threaten the sanctity of the at-will doctrine.

“A court-created duty of good faith and fair dealing would completely alter the nature of the at-will employment relationship, which generally can be terminated by either party for any reason or no reason at all, and we accordingly decline to change the at-will nature of employment in Texas.”
The Texas Supreme Court has consistently refused to recognize a common-law cause of action protecting private sector whistleblowers. It has only reluctantly recognized the common law tort of outrage, the intentional infliction of emotional distress, in the Texas workplace.

The national map of common law applications and exceptions to Wood’s Rule is a crazy quilt of overlap and inconsistency. Alabama, Florida, Georgia, Louisiana, Maine, Nebraska, New York, and Rhode Island have not recognized a public policy exception, while Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia do not recognize an implied in law contractual exception. In contrast Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming all recognize an implied covenant of good faith and fair dealing, which does operate as an exception to the rule in those jurisdictions.

In summary, only six western States—Alaska, California, Idaho, Nevada, Utah, and Wyoming—recognize all three of the major exceptions. Three southern states – Florida, Georgia, and Louisiana – and Rhode Island do not recognize any of the three major exceptions to at-will employment terminations.

Amoral Rationale – The Big Lie

As noted by the Utah court, few, if any of the courts adopting Wood’s “inflexible” deviation from the common law presumption bothered to articulate a rationale for the decision. Most, including Wood, genuflected to *stare decisis*, but the precedents originally cited did not hold as the author claimed. Nevertheless, Wood’s bold lie gained steam and became a juggernaut from board rooms to the break rooms of American business, and especially in American court rooms. The supreme court of Tennessee even bragged about its amoral legal analysis.
Many contemporary employee handbooks contain a velvet glove statement to the effect that employees may quit their job at any time they chose, followed by the mailed fist reminder that the employment relationship may be terminated at any time, without notice, without cause, and without legal consequence to the employer. Some theorists point to such statements as proof of equality in bargaining power between employer and employee. This, too, is a lie.

Except in the anomalous cases of some corporate executives, talented athletes, and entertainers, the employer always holds an overwhelming advantage in bargaining power over the employee. There is always someone waiting to do the job, and usually for less pay. Now that national borders and geographical barriers are irrelevant, the eager replacement worker does not even have to be in the same locale as the newly disposed former employee.60

**Mutuality of Obligation**

Some courts and scholars offer the theoretical eyewash called mutuality of obligation as a legal sounding justification for the “inflexible rule.” This theory, however, has never been accepted as legal justification for enforcement of any contract.

Courts have always allowed contracting parties to unilaterally impose terms and conditions as warranted by the inequality of their bargaining power. Common law courts have never pretended to provide a level playing field between contracting parties, and most certainly not between the parties to an employment agreement.

Chief Justice Stayton flatly rejected mutuality of obligation as a justifying rationale for adopting Wood’s rule into Texas law, even though the East Line lawyers had unctuously offered the theory as a justifying rationale.

“It was optional with appellee, when the agreement was made, whether he would serve appellant or not, but by the terms of the agreement he was given the right to fix the period he would serve, if he willed to serve at all. *The right to this option*
could not be sustained on the theory of reciprocal promises as the consideration, for, as we have seen, the appellee, at the time of the agreement, made no express promise to serve, and no implied promise to that effect arises from the agreement; but the consideration, to which we have before referred, was sufficient to support the promise of appellant to permit appellee to fix the period of service, and to have employment during that time, subject, however, to lose the right for inability to discharge the duties of the employment or by misconduct."

He did, however, adopt half of New York’s rule of unilaterally imposed contract terms.

"There can be no doubt but that a contract may be so made as to be optional on one of the parties, and obligatory on the other, or obligatory at the election of one of them," is the declaration of the supreme court of New York. *Giles v. Bradley*, 2 Johns. Cas. 253. We need not go so far as to adopt the entire proposition, but the last branch of it is doubtless correct in all cases in which the option to make an agreement obligatory is supported by valuable consideration."

The Texas Supreme Court of 2002 tacitly embraced the other half of New York’s doctrine of unilaterality in the *Halliburton* arbitration case where the Supreme Court approved the great oil and battlefield service contractor’s unilateral decision to impose binding arbitration as the exclusive means of resolving all disputes with its employees. In November 1997, all employees were told that by continuing to work after January 1, 1998 they would be accepting the new Dispute Resolution Program. Seeking mandamus relief from an adverse lower court ruling, Halliburton took its Dispute Resolution Program to the Supreme Court of Texas, which stated:

“Halliburton's offer was unequivocal and … Myers' conduct [by continuing work after January 1, 1998] was an acceptance of that offer.”

In most cases, it is the management side that benefits from this lack of a mutuality requirement. In the *Mann Frankfort* case the plaintiff/employee’s work as a Certified Public Accountant in a CPA firm required that he be given confidential firm and client information. The employer *impliedly* promised to provide the confidential information. This promise was performed -- and ceased being illusory or unilateral -- when the confidential information was
actually provided. Thus, the employment contract provision, which required the CPA employee to buy the book of business taken from the employer when he set up his own shop was enforceable because it was designed to hinder the employee's ability to use the confidential information to compete with the employer.65

One of the few, and surprising exceptions to the management-friendly trend in Texas involved an assistant fire chief’s age discrimination claim against the City of Houston.66 In this case, the district court denied the employee’s claim for front-pay as speculative because he was an at-will employee who served at the pleasure of the Fire Chief and with the approval of the Mayor and City Council of Houston. The federal appellate court reversed, holding that employment-at-will status, taken alone, was not a sufficient basis for denying the request for front pay. The court observed, “[c]alculations of front pay cannot be totally accurate because they are prospective and necessarily speculative in nature.” (Citation omitted) “The courts must employ intelligent guesswork to arrive at the best answer.” (Citation omitted) Finally, the court gave recognition to the City’s law-breaker status, remarking,

“Because the jury found that the City denied Julian a promotion on the basis of his age, the fact that calculating front pay involves some degree of speculation is a risk that the City must bear as a proven discriminatory employer.”67

National Demise of the At-Will Rule

The industrial revolution, which likely gave Horace Wood inspiration to make up the rule, also planted the seeds of its demise. When employees began forming unions, the collective bargaining agreements they subsequently negotiated frequently contained provisions that required just cause for adverse employment actions.68 As early as 1912, Congress passed the Lloyd-LaFollette Act, which generally prohibits the federal government from discharging federal employees without just cause.69 Over time, the vast majority of public employees in the United
States were also granted protection, through statutes and ordinances against dismissal without cause.\(^7\)

The Civil Rights movement of the 1960s spawned the Civil Rights Act of 1964, which, along with the Age Discrimination in Employment Act (ADEA) and a host of other state and federal statutes now prohibit employment discrimination based on race, religion, sex, gender, age, and national origin. Whistleblowers and those who oppose discriminatory practices are also given statutory protection from retaliatory terminations.\(^7\)

The collective bargaining agreements and statutory protections reflect the realistic view that most employers and employees do not operate on a level playing field. Moreover, employment is generally seen as an essential element in most peoples’ livelihood and well being; close, if not equal to Jefferson’s unalienable human rights to life, liberty, and the pursuit of happiness. Still, the supreme court of an otherwise advanced and purportedly progressive state overreacted to a suggestion that the sacred writ of at-will terminations be considered subject to as benign and salutary concept as good faith and fair dealing.\(^7\)

What then is the real-world rationale for Texas’ slavish adherence to a discredited legal doctrine, conceived in dishonesty, and popularized in an era of economic theory long since discredited? Some politicians, business apologists, and economists proclaim that the Texas economy would collapse, that there would be fewer and fewer jobs for Texans, if the sacred at-will rule were to be modified, or heaven forbid, abolished.\(^7\) The Montana experience, however, suggests a different result.

**Montana’s Just Cause Statute**
In 1987, the Montana legislature passed the first state statute that requires private sector employers to have just cause to discharge their non-probationary employees. It provides that an actual or constructive discharge is unlawful where (a) “it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy”; (b) “the discharge was not for good cause and the employee had completed the employer’s probationary period of employment”; or (c) “the employer violated the express provisions of its own written personnel policy.”

The statute defines the term “public policy” to mean “a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.” It defines “good cause,” as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.”

It will come as no surprise to learn that the legislative action came about after a series of judicial decisions, which were generally viewed by the business community as pro-employee, and anti-management. The covenant of good faith and fair dealing was for the first time recognized applicable to employment relationships otherwise terminable at will in 1982. Later cases expanded employer liability and employee recovery rights. Thereafter, pro-business legislators, working with lobbyists from the Montana Association of Defense Counsel, drafted a bill that eventually was enacted as the Montana Wrongful Discharge Act of 1987 (“MWDA”).

If the conservative pundits’ and management economists’ predictions were true, the Montana economy would have by now been reduced to a heap of smoking embers. Barry Roseman’s careful analysis across a broad spectrum of economic indicators demonstrates, however, that the Big Sky did not fall. In unemployment, job growth and job loss statistics the
Montana economy continues to ebb and flow in the same general directions as its neighboring states, none of which have adopted just-cause statutes. Roseman concludes that employees do not risk losing their jobs as a result of gaining greater job protections. Employers do not put themselves at a competitive disadvantage by legislation that protects their employees from arbitrary and unfair discharge decisions. The twin bogeymen of higher unemployment and lower job-growth rates should not shape the public policy debate on the abolition of the doctrine of employment at will.

Conclusion

Horace Gray was, at best, a four-flusher, if not intellectually dishonest. None of his precedents support his freshly minted, “inflexible rule.”

Justice Stayton can fairly be cast as a progressive, activist judge, not afraid of making new law in step with the times. One must remember that “progressive” in late 19th Century Texas did not mean the same thing that it means today. In 1888, progress for Texas was anything that made business and industry stronger; that encouraged businesses to invest capital in the Texas economy. It certainly did not mean adhering to 18th century English precedent based on agricultural practices.

Where then does that leave Texas lawyers, judges, employers, and employees in the opening decade of the 21st century? Clearly, we are at the back of the pack, if the race is to realization of human dignity as a value worthy of legal protection. If, however, the race it to the bottom line of corporate profit, Texans can proudly wear the leader’s yellow jersey.
End Notes

2 East Line, 10 S.W. at 102.
4 Harper, 113 Mass. at 189
5 Harper, 113 Mass. at 189
7 Hartley v. Cummings, 5 Q.B. 247 (agreement to serve defendants “at all times during the term of seven years.”); Elderton v. Emmens, 6 C.B. 160, and 4 H.L. Case 424 (agreement held binding for one year was in terms to employ a solicitor, “at an annual salary”); and Pilkington v. Scott, 15 M. & W. 657 and Revere v. Boston Copper Co., 15 Pick. 351 (expression of a contingency in which the employer might terminate precluded the implication that he could terminate otherwise)
9 Coffin, 46 Pa. St.at 433
10 Railroad Co., 43 N. Y. at 139
11 Giles, 2 Johns. Cas., at 253-54
12 East Line, 10 S.W. at 103
13 Bolles, 33 N. W. Rep., at 863
14 Bolles, 33 N. W. Rep., at 864
15 East Line, 10 S.W. at 103
16 East Line, 10 S.W. at 104.
18 Magnan v. Anaconda Industries, Inc., 479 A.2d 781, 784, n.8 (Conn. 1984) (“Scholars and jurists unanimously agree that Wood’s pronouncement in his treatise, Master and Servant § 134 (1877), was responsible for nationwide acceptance of the rule. They also agree that his statement of the rule was not supported by the authority upon which he relied, and that he did not accurately depict the law as it then existed.”).
20 Mitchell v. Smith, 14 S. (Sc.) 11 (1836)
21 Shipping Co. v. Ferguson, 23 Jur. 4 (1850)
22 DeBrait v. Minturn, 1 Cal. 450 (1851)
24 The Franklin Mining Co. v. Harris, 24 Mich. 115 (1871)
25 Wilder v. U.S., 5 N&H (US) 462 (1869)

26 Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Section 2. Congress shall have the power to enforce this article by appropriate legislation.

27 An outstanding depiction of this economy is Roger G. Kennedy’s book, MR. JEFFERSON’S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE, Oxford University Press, 2003. His understanding of the environmental consequences of human slavery, such as plowing practices – up and down, rather than around the hills, with the consequent wasting erosion of the land – are but the tip of a insightful volume of observations.

28 As early as 1562, the English common law presumed employment was for a one-year term. See Gary E. Murg & Clifford Scharman, Employment at Will: Do the Exceptions Overwhelm the Rule? 23 B.C.L. Rev. 329, 332 (1982) [hereinafter Murg & Scharman]. This was for the protection of the seasonal worker, as the presumption was difficult to overcome. Id. English courts held an employer liable for a breach of the employment contract for terminations prior to the expiration of the one-year term absent proof of a “reasonable cause to do so.” Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1030 (Ariz. 1985) (citing 1 W. Blackstone, Commentaries *413). Initially American courts adopted this English rule; however with the Industrial Revolution came the rise of a more impersonal employer-employee relationship and so went the traditional master-servant relationship and the protections that came with it. Murg & Scharman, 23 B.C.L. Rev. at 334. Footnote quoted from Fitzgerald v. Salsbury Chemical, Inc. 613 N.W.2d 275(Iowa, 2000)

29 Payne v. Western & Atlantic Railroad Co., 81 Tenn. 507, 519-520(1884).
30 McCullough Iron Co. v. Carpenter, 11 A. 176, 178-179 (Md. 1887)
31 East Line, supra, n.1.
34 Berube, 771 P.2d at 1040-1041.
38 Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex., 1985)
39 Muhl, supra, n.13. The states that have not recognized an implied contract exception to Wood’s Rule are Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia.
40 Matagorda County Hospital Dist. v.Burwell, 189 S.W.3d 738 (Tex. 2006)

42 Note, Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv.L.Rev. 1816, 1824-26 (1980).
43 Muhl, supra, n.13. The good faith states are Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming.
44 Manges v. Guerra, 673 S.W.2d 180 (Tex.1984)
45 City of Midland v. O’Bryant, 18 S.W.3d 209, 216 (Tex., 2000)
46 City of Midland, 18 S.W.3d at 213-214.
47 City of Midland, 18 S.W.3d at 214-215.
48 Decker v. Browning-Ferris Indus., Inc., 903 P.2d 1150, 1156-57 (Colo. Ct. App. 1995) (holding that recovery of non-economic damages could not stand even though there was a breach of an express agreement to treat employees fairly).

52 City of Midland, 18 S.W.3d at 216.


54 GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605 (Tex. 1999); see also Dean v. Ford Motor Credit, 885 F.2d 300, (5th Cir. 1989).

55 Muhl, supra, n. 13 and 15.

56 Muhl, supra, n. 19.


58 Magnan., 479 A.2d at 784, n. 6 supra.

59 Payne, 81 Tenn. at 519-520.


61 East Line, 10 S.W. at 102-03.

62 East Line, 10 S.W. at 103.

63 In re Halliburton, Co. 80 S.W.3d 566, 568-69 (Tex. 2002)


65 Mann Frankfort, 289 S.W.3d 852, supra

66 Julian v. City of Houston, Tex., 314 F.3d 721, 729 (5th Cir. 2002)

67 Julian , 314 F.3d at 729


69 37 Stat. 539, 555 (1912).


71 See, e.g.: Texas LABOR CODE, §21.051, and §21.055; and GOVT. CODE, Chapter 554.

72 City of Midland, supra, 18 S.W.3d at 216.

73 See, for example, Epstein, In Defense of the Contract At-Will, U. Chi. L. Rev., 946, 956-72 (1984) where it is argued that employment at will benefits both employers and employees. The ability of both employers and employees to terminate their relationship at will, he contends, enables each side to monitor the other’s behavior and to terminate that relationship whenever the net value of the contract turns negative. Employer abuses are minimized because of the reputation costs of unfair dismissals. Both employers and employees can diversify their risks and correct mistakes resulting from erroneous information at the initiation of the contract by terminating their relationships and seeking alternative opportunities. In addition, according to Professor Epstein, employment at will is much cheaper to administer than a just-cause dismissal scheme; see also Edward P. Lazear, Job Security Provisions and Employment. 105 Q.J. ECON. 699 (1990). Other economists disagree with that conclusion. See, e.g., Katherine G. Abraham and Susan N. Houseman, Does Employment Protection Inhibit Labor Market Flexibility? Lessons from Germany, France and Belgium, in SOCIAL PROTECTION VS. ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF? (1994). See alsoThomas Sowell, French Student Riots, THE POST CHRONICLE, March 18, 2006, http://www.postchronicle.com/commentary/article_21210928.shtml (last visited June 16, 2007), where the conservative columnist claimed that French students, protesting a proposed law that would have made it easier to fire younger employees, ignored “elementary economics that adding to the costs, including risks, of hiring workers tends to reduce the number of workers hired.”

74 MONT. CODE ANN. §39-2-903, et seq. 

75 Roseman, supra at 9, n. 65-68.


Roseman, supra at 9

Roseman, supra at 11-17

Roseman, supra.