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Fulfilling *Lucy*'s Legacy: Recognizing Implicit Good-Faith Obligations Within Explicit Job Duties

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Wood v. Lucy, Lady Duff-Gordon[1] is often cited for the principle that every contract contains an implied covenant of good faith and fair dealing.[2] Yet the very source of that decision—the New York Court of Appeals—has been emphatically unwilling to recognize an implied good-faith covenant in the context of employment relationships, given the judicial presumption of employment at will.[3] This essay criticizes the New York Court

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1. 118 N.E. 214 (N.Y. 1917).

2. *See, e.g.*, Tymshare, Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984).

> [T]he doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes 'bad faith.' In other words, the authorities that invoke, with increasing frequency, an all-purpose doctrine of "good faith" are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v. Lucy, Lady Duff Gordon* . . . .

Id. Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 386 (1986) (stating that the origins of the covenant "go back at least to a number of opinions of the New York Court of Appeals in the years surrounding World War I . . . mostly written by Cardozo," including *Lady Duff-Gordon*). The existence of the implied covenant was codified in the Restatement (Second) of Contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

3. New York is not alone in this reluctance. Only a handful of states broadly recognize an implied covenant of good faith and fair dealing in employment contracts, although a greater number—including, as discussed *infra*, New York—have recognized the covenant in at least one narrowly-defined situation. *See, e.g.*, STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR. & GILLIAN L.L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS 183 (4th ed. 2006) ("Fewer than a dozen states have accepted the covenant of good faith and fair dealing in employ-

of Appeals' conclusion that the implied covenant of good faith and fair dealing must yield to the presumption of employment at will, and advocates a more balanced approach.

Specifically, I argue that even an at-will employee should be able to recover for breach of the implied covenant of good faith and fair dealing when he can show that he was terminated simply for performing the very job duties that were required of him.[4] This argument encompasses two related points. First, I discuss why job duties should be viewed as giving rise to an implicit good-faith covenant that the employee will not be terminated merely for fulfilling them. Second, I argue that this covenant can be vindicated in a way that does not eviscerate the presumption of employment at will.

The piece proceeds in that order. I begin by identifying three key sources of job obligations: (1) internal job descriptions; (2) applicable external laws, regulations and professional codes; and (3) constitutional requirements (in the case of government employees). Within these obligations, I argue, exists an implicit good-faith covenant that the employee, notwithstanding his at-will status, will not be terminated simply for adhering to them. In making this argument, I closely analyze several of the cases in which the New York Court of Appeals has concluded otherwise (as well as the one case that the court allowed to go forward), and explain why I believe the decisions rejecting the employees' breach of good faith claims were mistaken.

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ment. The biggest worry in other states is whether the covenant can be limited to definable situations, or whether it would inevitably become broader."); Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 AM. BUS. L.J. 205, 223 (2004) ("The weight of judicial authority in the United States does not require that an employer exercise good faith and fair dealing in its termination decisions. Thirty-nine states do not impose a good faith requirement upon employers.").

4. This argument is consistent with the position adopted in the current draft of the Third Restatement of Employment Law, which states that every employment contract contains an implied duty of good faith and fair dealing on the parties, and specifies two "principal" examples of where that duty is breached: (1) when the employer terminates the employee "to prevent the vesting or accrual of an employee right or benefit" and (2) when the employer terminates the employee "to retaliate against the employee for performing the employee's obligation under the employment contract." *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW, Chapter 3 (Discussion Draft 2006). In focusing on the latter example in this piece, I do not mean to reject the former, nor to suggest that there are no other potential circumstances in which the implied covenant might also be breached.

I then argue that judicial recognition of this narrow covenant can occur in a way that does not unduly encroach upon the presumption of employment at will. Here, I analogize to the evidentiary frameworks that courts, including the New York Court of Appeals, have embraced for proving causation in employment discrimination claims. Under these judicially-created frameworks, employers charged with discrimination must articulate alternative reasons for their actions in order to avoid liability. This requirement, in turn, places pressure on the underlying tenet of employment at will: that an employer can terminate an employee not only for a good reason, but also for a bad reason or even no reason at all (provided that the reason is not impermissible discrimination).[5] That courts have nonetheless adopted these frameworks supports the idea that employment at will should not trump all else, and can roughly co-exist with other competing principles. The New York Court of Appeals should heed this lesson with respect to the category of good-faith claims described above, which, while not based on statutory prohibitions, do derive from deep common-law roots, including *Lady Duff-Gordon*.

These evidentiary frameworks also offer a useful road map for how such good-faith claims could proceed in court. Their methods of discerning causation have already been adapted to other contexts, and are similarly adaptable here. Their existence thus suggests that the good-faith covenant can be effectively defined and limited, so that it provides a right of recovery for the narrow category of cases outlined above, without inevitably leading to a wholesale evisceration of employment at will. Accordingly, the New York Court of Appeals should re-examine its unwillingness to permit employees to bring this type of breach of good-faith claims, and instead adopt a more balanced approach consistent with its recognition of the implied covenant in the *Lady Duff-Gordon* era.

5. For a discussion of the roots and development of this principle in the United States, see generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

I. Sources of Explicit Job Duties (and Corresponding Implicit Good-Faith Obligations)

The New York Court of Appeals broadly rejected the notion that at-will employees could bring claims for breach of the implied covenant of good faith and fair dealing in connection with their terminations in the seminal 1983 case of *Murphy v. American Home Products Corporation*.[6] There, the plaintiff employee had served in a variety of accounting positions, ultimately rising to the level of assistant treasurer.[7] In performing this job, he allegedly discovered that certain other employees had engaged in massive illegal account manipulations of secret pension reserves.[8] After disclosing his findings to top management executives—as he was allegedly required to do under the employer's internal regulations[9]—he was terminated. He subsequently filed suit, alleging, *inter alia*, that the termination violated the implied covenant of good faith and fair dealing.[10]

The *Murphy* majority, however, rejected his claim. While acknowledging that "New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied" (and explicitly citing *Lucy, Lady Duff-Gordon* in support), the *Murphy* court nonetheless concluded that the employee's claim could not be sustained.[11] "No obligation can be implied . . . which would be inconsistent with the other terms of the contractual relationship," the majority opinion reasoned.[12]

> [P]laintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination.[13]

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6. 58 N.Y.2d 293 (1983).
7. *Id.* at 297.
8. *Id.* at 297-98.
9. *Id.* at 310 (Meyer, J., dissenting).
10. *Id.* at 299.
11. *Id.* at 304-05.
12. *Id.* at 304.
13. *Id.* at 304-05.

By contrast, the *Murphy* dissent argued that the plaintiff's breach of good faith claim should have been allowed to go forward.[14] The dissent did not urge that an employer must generally have a good-faith basis for terminating an employee (i.e., some reasonable basis for doing so), but instead advocated a far more limited good-faith covenant. Focusing on the plaintiff's allegation that he was terminated precisely for doing what he had been required to do as assistant treasurer—namely reporting "any deviation from proper accounting practice to defendant's top management"—the dissent asserted that this provided the basis for a cognizable good-faith based claim.[15] In response, the majority did not discuss the merits of this particular argument, but simply stated that it was unwilling to "judicially engraft[ ] on what in New York has been the unfettered right of termination lying at the core of an employment at will."[16]

As the *Murphy* dissent pointed out, there are strong arguments for recognizing this sort of narrow good-faith obligation on an employer's part. This is particularly true when, as in *Murphy*, the employer itself has affirmatively prescribed the job duty in question.[17] Where an employer, in exercising its power to allocate work responsibilities and create job descriptions, has

14. *Id.* at 310 (Meyer, J., dissenting).

15. *Id.* at 310-15 (Meyer, J., dissenting).

16. *Id.* at 305 n.2. Several years later, the New York Court of Appeals reaffirmed this refusal in *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329 (1987). There, the plaintiff—a director of financial projects—alleged that he was terminated after disclosing various tax avoidance and slush fund schemes to his supervisor, in compliance with corporate policies. *Id.* at 332. Citing *Murphy* and summarizing its reasoning at length, the court affirmed the dismissal of his implied-in-law claim. *Id.* at 336. The concurrence, while conceding that Murphy required dismissal, stated that this result was "particularly unfortunate" given the plaintiff's allegation that he "was fired for doing precisely what he was compelled to do by defendant's written 'Accounting Code,'" and asserted that *Lady Duff-Gordon* would have supported a contrary result. *Id.* at 337-38 (Hancock, J., concurring).

17. Other examples of such situations can be found throughout case law. *See, e.g.*, Dooley v. Metro. Jewish Health Sys., 2003 U.S. Dist. LEXIS 16520, at *2-*10 (E.D.N.Y. 2003) (plaintiff employee's job responsibilities as Medical Director of a geriatric center included ensuring the center's compliance with state and federal regulations for long-term care facilities; she was terminated after raising compliance-related concerns with management); Balla v. Gambro, 145 Ill. 2d 492, 495-97 (1991) (plaintiff, as "Manager of Regulatory Affairs," was "responsible for ensuring . . . compliance with federal, state and local laws and regulations affecting the company's operations and products"; he was terminated after stating that he would do whatever was necessary to stop the sale of dialyzers that did not comply with FDA regulations).

chosen to make a responsibility—particularly a delicate one—part of an employee's job, that decision seems "instinct with an obligation," to borrow Justice Cardozo's famous *Lady Duff-Gordon* phrase,[18] on the employer's part not to terminate the employee merely for fulfilling the employer's own request.

Indeed, recognizing such a covenant as inherent in employer-prescribed job duties is consistent with a fundamental purpose of the implied covenant of good faith and fair dealing: to act "in aid and furtherance of other terms" of an agreement between parties. The *Murphy* court itself articulated this purpose.[19] But the court viewed it as a reason for *rejecting* any recognition of the covenant in the context of an at-will employment relationship, on grounds that the covenant would not "aid and further" the relationship's at-will nature.[20] That reasoning fails to recognize that an employee's at-will status is not necessarily the only relevant characteristic of an employment relationship. Where an employer has prescribed a specific duty for the employee to perform, that too is a part of the parties' relationship. And recognizing a narrow good-faith covenant that tracks those duties is in aid and furtherance of *that* aspect of the relationship.

Similarly, recognition of a good-faith covenant along these lines is consistent with another frequently cited purpose of the covenant, and one emphasized by the *Murphy* dissent: the notion that the covenant prevents parties from "frustrat[ing] the contracts into which they have entered," by providing a remedy if one party "intentionally and purposely do[es] anything to prevent the other party from carrying out the agreement on his part"[21] or "hinder[s] or obstruct[s the other party from] doing that which the contract stipulates he should do."[22] An employer who terminates an employee for doing precisely what the employer itself stipulated he should do runs afoul of that principle. Such an action sends the message to similarly-situated employ-

18. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) ("A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed.").

19. *Murphy*, 58 N.Y.2d at 304.

20. *Id.* at 304-05.

21. *Id.* at 311 (Meyer, J., dissenting) (quoting Grad v. Roberts, 14 N.Y.2d 70, 75 (1964)).

22. *Id.* (citing Patterson v. Meyerhofer, 204 N.Y. 96, 101 (1912)).

ees that they should not carry out some of the duties that the employer has itself prescribed, thus obstructing full performance of the employment relationship.

It is one thing to say that an employer is under a good-faith obligation not to terminate an employee for performing the very duty that the employer itself required. But what about job-related requirements, such as those imposed by external professional codes, that were not created by the employer itself? Can the employer still be considered under a good-faith obligation not to terminate the employee for adhering to them?

Interestingly, this is the one situation where the New York Court of Appeals has veered in the opposite direction, at least in one limited circumstance. In *Wieder v. Skala*,[23] the plaintiff employee was a law firm associate who became aware of a fellow associate's misconduct in representing him in the purchase of a condominium apartment.[24] The plaintiff urged the firm partners to report the associate's misconduct to the Appellate Division Disciplinary Committee, as required by the Disciplinary Rules of the New York Code of Professional Responsibility.[25] The partners declined to do so, and when the plaintiff indicated that he would file a report himself, they threatened to fire him.[26] The law firm partners ultimately filed the report themselves, but "continuously berated" the plaintiff for having caused them do so, and fired him shortly thereafter.[27] When the plaintiff brought a good-faith-based claim, on grounds that his employer had an implied-in-law obligation not to terminate him for adhering to the terms of the applicable state rules of professional conduct, the lower courts dismissed his claim, citing *Murphy*.[28]

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23. 80 N.Y.2d 628 (1992).

24. *Id.* at 631-32.

25. *Id.* at 632. The Disciplinary Rule in question—DR 1-103(A)—provided (and still provides, with slight changes in wording) that:

> [a] lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-103 that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Id.

26. *Id.*

27. *Id.*

28. *Id.* at 631.

The New York Court of Appeals, however, reversed and allowed the plaintiff's good-faith claim to go forward. The court explained that—just as the *Murphy* dissent had pointed out—"[i]t is the law that in every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part."[29] It went on to conclude that the law firm had hired the plaintiff to practice law, and that:

> Intrinsic to this relationship, of course, was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.[30]

Having made this strong case for why an implicit good-faith obligation should be recognized here, the *Wieder* court was left to distinguish the *Murphy*-type situation on unpersuasive grounds. The court asserted that in *Murphy*, unlike in *Wieder*, the applicable rule that the plaintiff treasurer followed—the internal employer regulations requiring the reporting of accounting deviations—did not stem from "general rules of conduct and ethical standards governing both plaintiff and defendants in carrying out the sole aim of their joint enterprise, the practice of their profession,"[31] and that the divergent results were therefore justified.

A parsing of this language suggests that the New York Court of Appeals deemed relevant four distinctions between *Wieder* and *Murphy*: (1) that the *Wieder* rule in question was a "general rule[ ] of conduct," rather than an employee-specific duty; (2) that the *Wieder* rule derived from an external source as opposed to being a "company rule";[32] (3) that the *Wieder* rule independently governed both the plaintiff employee and the de-

29. *Id.* at 637; Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 311 (1983) (Meyer, J., dissenting).

30. *Wieder*, 80 N.Y.2d at 637-38.

31. *Id.* at 638.

32. *Id.* (referring to the "company rule[ ] underlying the firing of *Murphy*").

fendant employer; and (4) that the *Wieder* rule defined the "sole aim," or "only legitimate purpose of the employment relationship."[33] Each of these distinctions is unconvincing.

First, the New York Court of Appeals provided no explanation for why a generally applicable rule about job-related conduct is more significant, for purposes of giving rise to an implied good-faith covenant, than a specific job responsibility assigned to one particular employee. Similarly, the court did not explain why obligations that derive from external sources are more weighty than those that are prescribed by the employer itself. Such distinctions certainly make sense in the context of a tort claim for wrongful discharge in violation of public policy, which rests on the notion of protecting a broader public interest.[34] But in the context of an implied-in-law contract claim, which is about vindicating the parties' *own* expectations, these distinctions lack relevance.

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33. *Id.*

34. Courts have been more significantly welcoming to such tort claims than to claims alleging breach of the implied covenant of good faith and fair dealing. *See, e.g.*, Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 664 (2000) (stating that by the end of the 1980s, "virtually every state had addressed the public policy wrongful discharge question," and that only nine states outright refused to recognize the doctrine, with the remaining states dividing only over how broadly to define "public policy"). A leading casebook describes the three classic fact patterns in which courts have recognized claims for wrongful discharge in violation of public policy as (1) termination of the employee after his refusal to commit an unlawful act; (2) termination of the employee after his exercise of a statutory right; and (3) termination of the employee after his fulfillment of a public obligation, such as serving on a jury. WILLBORN, SCHWAB, BURTON & LESTER, *supra* note 3, at 122.

Notably, New York is one of the handful of states that has refused to recognize this tort, and it expressed that refusal in *Murphy*. There, in response to the plaintiff's argument that the facts he alleged gave rise not only to a good faith-based contract claim, but also to a tort claim, the New York Court of Appeals stated:

> [P]laintiff urges that the time has come when the courts of New York should recognize the tort of abusive or wrongful discharge of an at-will employee. To do so would alter our long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even no reason. Plaintiff argues that a trend has emerged in the courts of other States to temper what is perceived as the unfairness of the traditional rule by allowing a cause of action in tort to redress abusive discharges. . . . Plaintiff would have this court adopt this emerging view. We decline his invitation, being of the view that such a significant change in our law is best left to the Legislature.

58 N.Y.2d at 300-01 (citation omitted).

The *Wieder* court's emphasis on whether the plaintiff employee and defendant employer are *both* governed by the rule in question—which the New York Court of Appeals has continued to focus upon, as discussed *infra*—is more understandable. It seems particularly appropriate to allow a plaintiff employee's good-faith claim to go forward when it derives from a rule that already independently bound the employer. But that should not be a prerequisite. The central question should instead be whether the particular position for which the employer hired the employee carried with it mandatory regulations that were known—or should have been known—to the employer. If the answer is yes, then the employer should be deemed, by virtue of having hired the employee for that position, as having impliedly agreed to allow the employee to perform his job in accordance with those requirements.[35]

After all, to continue with the *Wieder* example, a lawyer in New York must adhere to the New York Code of Professional Responsibility whether he is working in a law firm or in the general counsel's office of a corporation. The notion that he can bring a good-faith-based claim if he is fired by a law firm for adhering to those rules, but not if he is fired by a corporation for taking the identical action, makes little sense. Indeed, some of the other language in the *Wieder* decision—for example, its statement that "by insisting plaintiff disregard DR 1-103(A)[,] defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment"[36]—is equally applicable to either situation.

Finally, the *Wieder* court's statement that these external regulations carried greater weight because they governed the performance of the "sole aim" of the parties' employment relationship, i.e., the practice of law, fails to hold up. Just as the law firm in *Wieder* hired the plaintiff to "practice law," the *Murphy* plaintiff had been hired to perform accounting functions. Identifying and reporting accounting improprieties are as em-

35. This is the view that Judge Smith of the New York Court of Appeals subsequently articulated in his dissent in Horn v. New York Times, 100 N.Y.2d 85, 98 (2003). *See infra* text accompanying notes 39-56.

36. *Wieder*, 80 N.Y.2d at 636-37.

blematic of that mission—particularly when the employer has given explicit instructions to do so—as is reporting attorney misconduct in connection with the practice of law. As such, the *Wieder* court's contention that the plaintiff in *Murphy* was never "required to act in a way that subverted the core purpose of the employment" is truly puzzling. It seems to circle back to the notion that external requirements are more significant in defining the purposes of employment relationships than are the parties' own communicated expectations. Again, however, the *Wieder* court did not explain why this is so.

Interestingly, the *Wieder* court's willingness to allow the plaintiff's good-faith claim to go forward, despite the plaintiff's at-will status, did bespeak an awareness that such a claim could co-exist with the presumption of employment at will. Simultaneously, however, the *Wieder* court continued to assert that having allowed such a claim to go forward in *Murphy* would have been "'destructive of' an elemental term," i.e., the at-will status, of the parties' relationship.[37] Why, then, would it not be similarly destructive in *Wieder*, dooming the good-faith claim there as well? The court simply reiterated, without explanation, that in *Wieder*, but not in *Murphy*, giving effect to an implied good-faith covenant would "aid and further[ ]" the purpose of the parties' employment relationship.[38]

In short, for the very same reasons that the New York Court of Appeals allowed the plaintiff's implied good-faith claim to go forward in *Wieder*, it should have done so in *Murphy*. Indeed, in *Wieder*, the court seemed to be moving—without ever saying so—toward at least some recognition that an at-will employment relationship implicates multiple aspects and purposes. The *Wieder* court was appropriately willing to recognize a narrow good-faith covenant because doing so was in aid and furtherance of one important aspect of the parties' employment relationship (the relevant professional obligations) even though it was in tension with another key aspect of the relationship (the plaintiff's at-will status). This approach is preferable to the *Murphy* court's assumption that any implicit-good faith obliga-

37. *Id.* at 638 (quoting Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 305 (1983)).

38. *Id.* (quoting *Murphy*, 58 N.Y.2d at 304).

tion must yield to, rather than be balanced with, the presumption of employment at will.

But rather than ushering in a greater willingness on the part of the New York Court of Appeals to recognize good-faith claims, *Wieder* has been essentially limited by that court to its facts, as shown by the recent case of *Horn v. New York Times*.[39] The plaintiff there, Sheila Horn, was the former Associate Medical Director of the Medical Department of the *New York Times*.[40] Her main responsibilities, according to her complaint, were to provide medical care, treatment, and advice to *Times* employees.[41] This role included determining whether the employees' injuries were work-related, which would entitle them to workers' compensation payments.[42] According to Horn, personnel in the *Times*' Labor Relations and Human Resources departments frequently instructed her to provide them with the confidential medical records of *Times* employees, without those employees' knowledge or consent.[43] Horn further alleged that the Human Resources department had instructed her to misinform *Times* employees about whether their illnesses and injuries were work-related, in order to reduce the number of workers' compensation claims brought against the *Times*.[44] Horn stated that after consulting with the New York State Department of Health and "other authorities" about the "propriety and legality" of such behavior, and receiving their advice that these actions would violate state law, the Code of Ethical Conduct of the American College of Occupational and Environmental Medicine, the Americans with Disabilities Act and various

39. 100 N.Y.2d 85 (2003). *See also* Dooley v. Metro. Jewish Health Sys., 2003 U.S. Dist. LEXIS 16520, at *22 (E.D.N.Y. 2003) (stating that "no case has extended Wieder beyond the legal profession, and New York appellate courts have consistently rejected lower court decision[s] that have done so"); Scott Moss, *When There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 309-10 (2005) ("After *Murphy*, the New York Court of Appeals only once has opened the door to a public policy whistleblowing claim, and it has since narrowed that claim almost out of existence. . . . Plaintiffs' lawyers pounded on *Wieder*, sensing an opening for a broad-based public policy exception to employment at will. But the New York courts have crushed that effort. . . .").

40. *Horn*, 100 N.Y.2d at 89.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

federal regulations, she refused to follow these orders.[45] The *Times* subsequently phased her position out.[46]

Horn, believing that the *Times* had discontinued her job in order to "get rid of" her, brought an implied-in-law contract claim.[47] She asserted that her situation was similar to that presented in *Wieder*, and that her employment relationship with the *Times* had encompassed the implicit understanding that she would "conduct her practice on the employer's behalf in accordance with the ethical standards of the medical profession"—an implied covenant that the *Times* breached in its termination of her.[48]

Although the trial court allowed Horn's claim to go forward, and the Appellate Division affirmed, the New York State Court of Appeals reversed, ordering dismissal of Horn's good-faith claim.[49] The court attempted to distinguish *Wieder* from Horn's situation on two main grounds, neither of which was persuasive.

First, the court argued that Horn's primary responsibilities had not actually been to treat employees' injuries herself, but rather to determine whether employees' injuries were work-related.[50] To that extent, the court argued, her medical services were being provided "not just for the benefit of the employee," but "in furtherance of her responsibilities as part of corporate management, much like Murphy and Sabetay and unlike Wieder."[51] When Horn did herself treat *Times* employees' injuries, the court added, "her provision of those professional services did not occupy 'the very core' or 'the only purpose' of her employment with the *Times*, unlike Wieder's provision of legal services for his firm's clients."[52]

The New York Court of Appeals thus apparently concluded that because Horn's duties went beyond the provision of medical treatment of injuries, and also included an assessment of the causes of those injuries for workers' compensation-related

45. *Id.* at 89-90.
46. *Id.* at 90.
47. *Id.*
48. *Id.*
49. *Id.* at 90.
50. *Id.* at 95.
51. *Id.*
52. *Id.*

purposes, the relevant laws, regulations and standards regarding physician-patient confidentiality were not central to her job responsibilities. But the fact that Horn had multiple, overlapping responsibilities as the *Times'* Associate Medical Director did not render her any less subject to the external standards governing medical professionals that she identified in her complaint. Indeed, as the dissent pointed out, "[l]ike the associate in *Wieder*, Dr. Horn remained a duly admitted member of a professional body and was bound by its rules."[53]

Second, the *Horn* court reverted to the *Wieder* strategy of focusing on whether the employer was itself independently bound by the professional regulation in question. It noted that even though Horn herself was bound by applicable medical regulations, the *Times* was not, and concluded that as a result, no "mutual obligation" was present.[54] The dissent, arguing along the lines I have outlined above, countered that the *Times*, in hiring Horn to serve as Associate Medical director, "impliedly committed to permitting her to perform her professional responsibilities" in accordance with applicable regulations.[55] In response, the majority simply fell back on slippery-slope concerns, stating that "[b]y loosing *Wieder* from its analytical moorings . . . the dissent would create a broad new exception to the presumption of at-will employment, applicable to hosts of professional employees."[56] As I argue throughout this piece, however, such concerns do not justify peremptory refusals to recognize implicit good-faith covenants altogether. Rather, they should instead come into play in figuring out how to vindicate them appropriately, the topic to which I turn in Part II.

Just as external regulations and professional codes should provide the basis for an implicit good-faith duty, so too—in the case of government employees—should constitutional obligations. The recent Supreme Court case of *Garcetti v. Ceballos*[57] provides a useful vehicle for exploring this point.

The plaintiff in *Garcetti*, Richard Ceballos, was a deputy district attorney for the Los Angeles County District Attorney's

53. *Id.* at 102 (Smith, J., dissenting).
54. *Id.* at 96.
55. *Id.* at 98 (Smith, J., dissenting).
56. *Id.* at at 96.
57. 126 S. Ct. 1951 (2006).

Office, and had ascended to the rank of calendar deputy, which meant that he exercised some supervisory responsibilities over other lawyers.[58] After being advised by a defense attorney that there were inaccuracies in an affidavit that had been used to obtain a search warrant in a pending criminal case, Ceballos—pursuant to his role as calendar deputy—investigated the situation and concluded that the affidavit indeed contained misrepresentations.[59] He prepared a memo documenting his findings, and ended up being called by the defense attorney to testify at a court hearing regarding the motion.[60] After these events, Ceballos alleged, his superiors retaliated against him by reassigning him to another courthouse and removing his calendar deputy position.[61]

Ceballos then filed suit, bringing not a claim for breach of the implied covenant of good faith and fair dealing, but rather a claim under 42 U.S.C. § 1983, alleging a First Amendment violation.[62] The Supreme Court, in a 5-4 decision, concluded that Ceballos' First Amendment claim should be dismissed, on grounds that the speech in question had been made pursuant to his official employment duties as a calendar deputy, rather than in his capacity as a citizen.[63] The majority explained:

> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. . . . The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. . . .
>
> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.[64]

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58. *Id.* at 1955.
59. *Id.*
60. *Id.* at 1955-56.
61. *Id.* at 1956.
62. *Id.*
63. *Id.* at 1957-62.
64. *Id.* at 1960.

The majority's emphasis on the fact that Ceballos had written the memo pursuant to his official duties stemmed from its analysis of the case in the context of *Pickering v. Board of Education*[65] and *Connick v. Myers*.[66] In those two cases, the Supreme Court had developed a general framework for analysis of public employees' First Amendment claims. That well-known framework prescribes that when a public employee alleges that his government employer violated his First Amendment rights by disciplining him for his speech, he must first establish that he was speaking as a citizen on a matter of public concern, rather than as an employee about an internal employment matter. If not, then the claim fails at that juncture. If so, then the court proceeds to a balancing test, weighing the employee's First Amendment interest in uttering the speech against the employer's justification for limiting it.[67]

The interesting wrinkle raised by *Garcetti* was that the employee had spoken as an employee on a matter of public concern, making it unclear whether his speech qualified for First Amendment protection. Ceballos argued that the "matter of public concern" piece of the threshold inquiry should be given more weight,[68] while his government employer emphasized that the "citizen" aspect was more important. The *Garcetti* majority, in stressing that Ceballos had written the memo in his capacity as a calendar deputy and that the speech was therefore not entitled to any First Amendment protection, sided with the latter.[69]

But if Ceballos had instead brought a claim for breach of the implied covenant of good faith and fair dealing, the significance of the fact that he wrote the memo pursuant to his official duties would be very different. Indeed, a re-examination of the facts in *Garcetti* through the lens of a hypothetical claim for breach of the implied covenant of good faith and fair dealing provides an entirely new picture.

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65. 391 U.S. 563 (1968).

66. 461 U.S. 138 (1983).

67. 126 S. Ct. 1951, 1958 (2006).

68. This view was shared by the Ninth Circuit, which had ruled in his favor below. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004).

69. *Garcetti*, 126 S. Ct. at 1956-60 (stating that the Ninth Circuit "did not . . . consider whether the speech was made in Ceballos' capacity as a citizen. . . . The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy").

Had Ceballos brought such a claim, he likely would have emphasized, just as the majority did, that his official duties as calendar deputy required him to write this sort of memo. Moreover, he would have stressed that the Constitution itself required him to disclose any concerns about the propriety of the prosecution's case. As Justice Breyer emphasized in dissent, "[a] prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession."[70] Within these explicit job duties, Ceballos could have argued, existed an implicit obligation on the government's part not to punish him for adhering to them.

Indeed, this argument would track the one situation in which even the New York Court of Appeals has been willing to recognize an implicit good-faith covenant: the *Wieder* situation, where the court found that intrinsic to the employment relationship was the "unstated but essential compact"[71] that both the attorney employee and his employer would practice law in compliance with the prevailing rules and ethical standards. Thus, the very fact that doomed Ceballos' First Amendment claim—that his speech was uttered pursuant to his official job duties—would have provided support for a good-faith-based contract claim. In *Garcetti*'s aftermath, such claims may have increased importance as a source of relief for government employees.

II. Vindicating Good-Faith Obligations Without Eviscerating Employment at Will: Lessons From Employment Discrimination Law

The narrow implied good-faith covenant that I have advocated above—an obligation not to terminate an employee for adhering to the very job duties that were required of him—appropriately aids and furthers one important aspect of an employment relationship. But another key aspect of employment relationships is, of course, their presumptively at-will status. As such, the challenge is to find a way of appropriately balancing the two. The New York Court of Appeals, except in *Wieder*,

70. *Id.* at 1974 (Breyer, J., dissenting).
71. 80 N.Y.2d 628, 637 (1992).

has been quick to conclude that this is not possible. However, a foray into the field of employment discrimination—in particular, its evidentiary frameworks for proving that an adverse employment action resulted from unlawful discrimination—suggests otherwise. Thus, in this section of the piece, I summarize those frameworks and then discuss their implications as well as their potential importation into the context of breach of good-faith claims.

Since shortly after the passage of Title VII of the Civil Rights Act of 1964,[72] discerning causation has been a particular focus of employment discrimination law. In the 1973 case of *McDonnell Douglas v. Green*,[73] the Supreme Court developed the first framework for doing so. Under the three-step *McDonnell Douglas* approach (as further refined by the Court), a plaintiff employee must set forth a prima facie showing of discrimination (step one),[74] at which point the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action in question (step two).[75] If the employer does not do so, the plaintiff employee prevails.[76] If the

72. 42 U.S.C. §§ 2000e–2000e-17 (2000).

73. 411 U.S. 792 (1973).

74. *Id.* at 802. *McDonnell Douglas* itself was a racial discrimination "failure to hire" case, and so the Supreme Court described that prima facie case as encompassing a showing by the plaintiff

> that (i) he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. The prima facie case changes depending on the underlying factual allegation in the plaintiff's claim. For example, if the plaintiff were suing under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (2000), rather than Title VII, he would need to allege that he was covered by the ADEA (i.e., that he was at least 40 years old, 29 U.S.C. § 631(a)).

75. *McDonnell Douglas*, 411 U.S. at 802. In *McDonnell Douglas*, for example, the employer stated that it had refused to hire the plaintiff because of the plaintiff's "participation in unlawful conduct." *Id.* at 802-03. The Supreme Court has clarified that this burden on the defendant is only a burden of production, and that the burden of persuasion "remains at all times with the plaintiff." *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

76. *See St. Mary's Honor Ctr.*, 509 U.S. at 506 (explaining that this prima facie case establishes a presumption of discrimination, and that in the absence of an explanation from the defendant, it "produces a required conclusion" of discrimination).

employer *does* meet its burden of production, the plaintiff employee can then prevail at step three by demonstrating that the articulated reason is actually a pretext for discrimination.[77] The New York Court of Appeals has not only applied this framework for Title VII claims, but has also embraced it for analogous claims brought under the New York State Human Rights Law.[78]

The *McDonnell Douglas* approach is largely premised on a binary rationale—either the adverse action was caused by discrimination, or something else. The Supreme Court set forth an alternative framework in *Price Waterhouse v. Hopkins*,[79] for the so-called "mixed motive" category of cases, in which a combination of legitimate and illegitimate discriminatory reasons may have prompted the adverse employment action. There, the controlling Court opinion held that once a plaintiff employee had shown by direct evidence that an "illegitimate criterion" (i.e., a statutorily protected characteristic like race or gender) was a "substantial factor" in the employer's decision, the employer bore the burden of proving that it would have made the same decision even absent the impermissible factor.[80] If the employer succeeded in doing so, it would not be subject to any liability.[81]

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77. *McDonnell Douglas*, 411 U.S. at 804-05. If the plaintiff's case "consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action," the jury is entitled—but not required—to infer that the real reason was discrimination. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 137, 146-47 (2000).

78. *See, e.g.*, Stephenson v. Hotel Employees & Rest. Employees Union Local 100, 6 N.Y.3d 265, 270 (2006) ("The standards for recovery under section 296 of the Executive Law [Human Rights Law] are similar to the federal standards under [T]itle VII of the Civil Rights Act of 1964.").

79. 490 U.S. 228 (1989).

80. *Id.* at 261, 276 (O'Connor, J., concurring). O'Connor's concurrence has been viewed as controlling because she provided the fifth vote for the majority's holding and did so on the narrowest grounds. *See, e.g.*, Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 873 (2004). The four-judge plurality opinion in *Price Waterhouse*, authored by Justice Brennan, differed in that it did not limit this framework to situations where the plaintiff adduced "direct evidence" of discrimination (as in *Price Waterhouse* itself, where the plaintiff had been directly told that she was insufficiently feminine). Rather, the plurality simply stated that it should be available whenever the plaintiff has shown that the protected characteristic "played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258.

81. Both the Brennan plurality and the O'Connor concurrence agreed on this point. *See Price Waterhouse*, 490 U.S. at 258 ("[T]he defendant may avoid a finding

The 1991 Civil Rights Act, which amended Title VII, adopted but modified the *Price Waterhouse* approach. The relevant provision states that once an employee has made the "substantial factor" showing, he has proven an unlawful employment practice, regardless of whether other factors also motivated the employer's action.[82] If the employer can then prove that it would have taken the same action even absent the impermissible factor, that will reduce—but not eliminate—its liability.[83] Most recently, in *Desert Palace, Inc. v. Costa*,[84] the Supreme Court held that this "mixed motive" approach is applicable even when the plaintiff has only presented circumstantial, as opposed to direct, evidence of discrimination.[85]

Courts and commentators have taken various approaches to synthesizing *McDonnell Douglas*, *Price Waterhouse*, the 1991 Civil Rights Act and *Desert Palace*, and the nuances of that issue are beyond the scope of this piece.[86] Clearly common to

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of liability only by proving by a preponderance of the evidence that it would have made the same decision even if had not taken the plaintiff's gender into account."); *id.* at 279 (O'Connor, J., concurring) ("I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern.").

82. 42 U.S.C. § 2000e-2(m) (2000) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

83. 42 U.S.C. § 2000e-5(g)(2)(B) (2000). In such an instance, only declaratory relief, very limited injunctive relief and attorney's fees and costs are available.

84. 539 U.S. 90 (2003).

85. *Id.* at 101. The New York Court of Appeals has similarly followed this approach. *See, e.g.*, Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 326 (2004).

86. *See, e.g.*, William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003); Davis, *supra* note 80; Christopher R. Hedican, Jason M. Hedican, & Mark P.A. Hudson, McDonnell Douglas*: Alive and Well*, 52 DRAKE L. REV. 383 (2004); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109 (2007); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L. J. __ (forthcoming 2008); Matthew R. Scott & Russell D. Chapman, Essay, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395 (2005); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031 (2004); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004).

One unresolved issue in *Desert Palace*'s aftermath is whether Justice O'Connor's concurrence in *Price Waterhouse* still applies to "mixed-motive" em-

these frameworks, however, is the notion that once an employer is accused of impermissible discrimination, it must come forward with some alternative explanation for its action in order to escape, or at least reduce, liability. That requirement, in turn, places pressure upon the fundamental theme of employment at will: that an employer can terminate an employee not only for a

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ployment discrimination cases that are not brought under Title VII (such as ADEA cases), given that the Civil Rights Act of 1991 only amended Title VII. *Compare, e.g.*, Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB L. 217, 267 (2007) (arguing that *Price Waterhouse* should no longer be used), *and* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 310-11 (5th Cir. 2004) (concluding that the mixed-motives approach set forth in *Desert Palace* is also applicable to ADEA claims), *with* Glanzman v. Metropolitan Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004) (holding that Justice O'Connor's *Price Waterhouse* approach still applies to ADEA claims), *and* Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004) (suggesting, but not explicitly holding, that *Price Waterhouse* should continue to apply to ADEA claims).

Yet another major question is whether *Desert Palace*, in holding that the "mixed-motive" framework can apply even when the plaintiff has adduced only circumstantial evidence of discrimination, still leaves room for the *McDonnell Douglas* approach. Some commentators have argued that *Desert Palace* essentially rendered *McDonnell Douglas* irrelevant. *See, e.g.*, Corbett, *supra* at 200, 212 ("Make no mistake about it, for Title VII claims at least, the old *McDonnell Douglas* proof structure is as dead as a doornail. . . . All cases will now be mixed-motives . . . ."). Others, by contrast, have argued that *Desert Palace*'s scope is far more limited. *See, e.g.*, Scott & Chapman, *supra* at 404-07 (asserting that the "mixed-motive" category of cases remains limited to those cases in which there is (1) "a defendant . . . who admits to a partially discriminatory reason for its actions, while also claiming it would have taken the same action were it not for the illegitimate rationale" or (2) "otherwise credible evidence to support such a finding"). Still other courts and commentators have developed interesting ways of integrating the various approaches. *See, e.g.*, *Rachid*, 376 F.3d at 312. *Rachid* recognized and adopted a new "modified *McDonnell Douglas* approach," under which:

> [t]he plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, nondiscriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motives alternative).

Id. (citing Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)); Katz, *Unifying Disparate Treatment*, *supra* at 29-31. Arguing that both *Price Waterhouse* and the 1991 Act specify that plaintiffs must "prove 'motivating factor' causation," and that *McDonnell Douglas* should simply be one mechanism that the plaintiff can choose to use in order to do so. *Id.* at 21.

At this point, the dust has not yet settled and it is fair to say that all three frameworks are still at least arguably in play.

good reason, but also for a bad reason or even no reason at all, provided that the reason is not impermissible discrimination.

A quick examination of these frameworks illustrates where and how that pressure kicks in. Under *McDonnell Douglas*, once the plaintiff has made his prima facie case—which courts have explicitly described as an undemanding standard[87]—the employer must articulate a legitimate, non-discriminatory reason for the termination, or be held liable for discrimination. Thus, if the employer genuinely had no reason at all for the termination, and thus cannot articulate one, it faces liability. And if all that the employer articulates in response to the plaintiff's prima facie case is a "bad"—that is, an arbitrary, unsupported or illogical (albeit non-discriminatory)—reason, the plaintiff may well convince the fact-finder that this articulated justification is merely a pretext for discrimination and prevail on that basis. Similarly, under *Price Waterhouse* and the 1991 Civil Rights Act, an employer is fully liable once the employee shows that impermissible discrimination was a "substantial factor" in the adverse employment action, unless the employer can demonstrate that it would have made the same decision anyway. Here, too, if all that the employer proffers is an additional "bad" (and therefore unconvincing) reason, it is unlikely to prevail.

These potential outcomes call into question any notion that an employer can truly terminate an employee for any reason or no reason at all. In effect, these frameworks not only enforce the statutory prohibitions against discrimination, but also impose affirmative pressures on employers to have at least minimally reasonable bases for their actions.[88] Given the New York

87. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (referring to the "minimal requirements" of a prima facie case); McPherson v. New York City Dep't of Educ., 457 F.3d 211, 215 (2d Cir. 2006) (noting the "'minimal' burden of setting out a prima facie discrimination case").

88. Professor Richard Epstein has argued along similar lines, and has further asserted that this inconsistency provides grounds for opposing employment discrimination law altogether. *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 148 (1992).

> Courts will rightly be skeptical of any defense of a Title VII claim that says dismissal occurred for no reason at all. In some cases it might be possible to show that there was a bad but irrelevant reason. But in the typical case the best line of defense is to show that a refusal to hire or a decision to fire was made for a good cause, that is, for legitimate business reasons unrelated to

Court of Appeals' frequent use of these frameworks, the concerns that it has consistently expressed—from *Murphy* to *Horn*—about any judicially-created incursions on an employer's unfettered right to terminate at will indicate a lack of self-awareness.[89] Relatedly, the very fact that employment at will has co-existed with these evidentiary frameworks demonstrates its potential to be balanced with other competing interests as well, such as those underlying the particular good-faith covenant I have advocated here.

These frameworks can also readily be pulled into use for the resolution of claims alleging a breach of that covenant. Indeed, the frameworks, rather than being employment discrimination-specific, are generally applicable methods of ascertaining causation, and have already been adapted to other areas of the law. In *Batson v. Kentucky*,[90] for instance, the Supreme Court employed the *McDonnell Douglas* framework in the context of assessing whether a prosecutor had used his peremptory challenges for discriminatory reasons, in violation of the Constitution.[91] Much closer to the subject of this piece, the

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> race or sex. Title VII thus works a major shift from the paradigmatic and most common version of an employment contract, the contract at will.

Id. See also Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1193-94 (2003).

> Title VII and early case law did . . . strike at the very heart of one aspect of employment at will. That is, it took away from employers the ability to give no reason for their decisions. . . . It transformed the rule into one in which employers could make decisions for any reason that was not prohibited by Title VII (or any other statutory or common-law exception), but not for 'no reason.'

Id.

89. In *Horn*, for instance, the New York Court of Appeals stated that "[t]he only exceptions to the employment-at-will rule ever adopted by this Court have involved very specific substitutes for a written employment contract." Horn v. New York Times, 100 N.Y.2d 85, 96 (2003). Nowhere did the court acknowledge that the proof structures that it routinely applied to employment discrimination cases had worked a far greater limitation on employment at will.

90. 476 U.S. 79 (1986).

91. *Id.* at 93-99, n.18; *see also, e.g.*, Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 53, 57 (2007) ("The burden-shifting procedural structure for proving race discrimination in *Batson* cases is the same as that which the Supreme Court set out in *McDonnell Douglas Corp. v. Green* for Title VII individual disparate treatment cases (the majority of individual claims)"); Lisa M. Cox, Note, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages Batson Gets from Employment Dis-*

above-described frameworks are also employed in the context of various whistleblower protection claims adjudicated by the Secretary of Labor.[92]

Accordingly, if courts were to adopt these structures for purposes of the breach of implied covenant of good faith and fair dealing claim that I have advocated here, an employee bringing such a claim would first be required to set forth a prima facie case that he was terminated merely for adhering to an explicit job obligation. He would need to identify the precise source and scope of that obligation, and to establish that it was mandatory in nature. He would further need to show that the action that he took was in fact in fulfillment of that obligation. Finally, he would need to identify an adverse employment action taken against him and allege a causal connection between that action and his earlier fulfillment of the employment responsibility.

Once the employee sets forth the prima facie case, the burden would shift to the employer to articulate some other reason for the adverse action. (Alternatively, the employer might argue along the lines of the mixed-motive framework described above, asserting that even if the employee's adherence to that obligation played a role in prompting the adverse action, the employer would have taken the same action anyway.) It is important to note a particular wrinkle here. In the context of employment discrimination claims, the employer can respond to a prima facie case simply by articulating a job-related reason—as opposed to a discriminatory one—for the action in question. In the type of good-faith claim I am advocating here, however, the distinction between impermissible and permissible reasons for an adverse action is much finer. These cases are not about unlawful extraneous reasons versus job-related reasons, but rather about illegitimate job-related reasons versus legitimate job-related reasons. It is important, therefore, to focus the inquiry on the precise issue in question: whether the employee was terminated for the mere fact of his adherence to the job re-

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crimination, 56 CASE W. RES. L. REV. 769, 784 (2006) ("The test the Supreme Court established for proving employment discrimination in *McDonnell Douglas Corp. v. Green* was the foundation for the *Batson* burden-shifting framework.").

92. *See generally* William Dorsen, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43 (2006).

sponsibility in question (which would be an illegitimate job-related reason), as opposed to the *particular manner* in which he performed that duty (which would be an entirely legitimate-job-related reason).

Several examples help illustrate this point. Imagine, for instance, that the *Murphy* plaintiff's belief that there had been accounting improprieties actually arose from a fundamental misunderstanding of accounting principles. When he presented them to top management executives, they quickly realized his error and lost confidence in his abilities, prompting them to terminate him. Alternatively, imagine that the *Murphy* plaintiff raised his concerns by inappropriately barging into a packed meeting, causing disruption and prompting those present to lose confidence in his judgment, such that they decided to terminate him. Similarly, imagine that Ceballos' employers demoted and transferred him not for the fact of having written the memo in question, but because his memo contained faulty legal or factual analysis. These reasons, on their face, would be legitimate job-related justifications for an adverse employment action. In each of these situations, once the defendant employer articulated these reasons, the employee would bear the burden of proving them false.

Other scenarios are also possible. In response to the employee's prima facie case, the employer might assert that the adverse job action had nothing to do with the fact *or* manner of the employee's adherence to the job responsibility in question, and was instead due to something else entirely. Here, too, the employee would bear the burden of proving otherwise. Alternatively, the employer might acknowledge that one reason for the adverse employment action was the employee's adherence to the duty in question, but claim that it was also motivated by other considerations (such as, for example, a need for financial belt-tightening). Here, once the employee showed that the illegitimate job-related reason was a motivating factor in the employer's action, the employer would bear the burden of proving that it would have taken the same action anyway.

Such inquiries would certainly require finely-grained factual analysis. But the evidentiary frameworks described above are well-equipped to facilitate such determinations. To continue with the *Murphy* and *Ceballos* hypotheticals set forth

above, it is easy to imagine the types of evidence the employers would likely produce in support of their proffered explanations: testimony from eyewitnesses, perhaps expert testimony and so on. The credibility of the particular supervisors in question, of course, would also be an important aspect of the fact-finding process, as would the plaintiff employee's own credibility. In short, there is no reason to think that the standard adversarial process for fact-finding would not be workable here.

Conclusion

Despite the tension between the common law doctrine of employment at will and the proof structures for employment discrimination claims, both have survived, in a kind of rough co-existence with each other. And despite the New York Court of Appeals' concerns that any recognition of an implied covenant of good faith and fair dealing in at-will employment relationships would eviscerate the doctrine of employment at will, a similar co-existence is possible here.

The New York Court of Appeals should therefore permit employees to bring claims for breach of the implied covenant of good faith and fair dealing when their underlying factual allegation is that they were terminated for performing the very duties that their position required of them. Employers, in turn, can defend themselves by articulating another reason for the termination, just as they must do when faced with employment discrimination claims. Only where the employee can then demonstrate that these proffered reasons are false or independently insufficient, and that he was actually terminated for the very fact of his adherence to required job responsibilities—i.e., that he was placed in an untenable catch-22—should he be able to prevail on his good-faith claim. Such an approach would appropriately balance the competing principles underlying the doctrines of employment at will with the implied covenant of good faith and fair dealing, fulfilling the legacy of *Wood v. Lucy, Lady Duff-Gordon.*