

2.15 GOOD FAITH AND FAIR DEALING¹ (9/09)

The plaintiff in this case contends that he/she had an employment contract with the defendant and that the defendant breached what is known as the implied covenant of good faith and fair dealing.

In addition to the express terms of a contract, the law provides that every contract contains an implied covenant of good faith and fair dealing. This means that, even though not specifically stated in the contract, it is implied or understood that each party to the contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract.²

To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the agreed purposes of the contract and consistent with the

¹ The model civil charge for the Covenant of Good Faith and Fair Dealing in bilateral contracts outside the employment context is located at 4.10J. It is somewhat unusual in the employment context to encounter a breach of implied covenant of good faith and fair dealing because, as discussed *infra*, the claim requires proof that a contract existed between the parties. However, exceptions do of course exist and even an at-will employee may have a viable breach of implied covenant claim if he or she can prove the existence of some form of contract with the employer. Examples include a commission agreement or a contract arising out of an employee handbook. *See, e.g., Wade v. Kessler Institute*, 172 N.J. 327, 345 (2002). The judge should carefully consider whether there is a genuine issue of fact regarding the existence of a contract between the parties before charging the jury on such a claim.

² *Wade v. Kessler Institute, supra*, at 345; *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117 (1965) (quoting 5 *Williston on Contracts*, Sec. 670, pp. 159-160 (3d ed. 1961)). *See also Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 182 N.J. at 210 (2005); *Wilson v. Amerada Hess Corp.*, 168 N.J. at 236 (2001).

reasonable expectations of the parties.³ A party must not act in bad faith, dishonestly, or with improper motive to destroy or injure the right of the other party to receive the benefits of the contract.⁴

Thus, if there is a contract between an employee and employer, and the [employee] [employer] acts in bad faith or with improper motive to destroy or injure the right of the [employee] [employer] to receive the benefits or reasonable expectations of the contract, the [employee] [employer] has breached the implied covenant of good faith and fair dealing.⁵

³ The implied covenant of good faith and fair dealing generally arises in three contexts. The covenant applies where terms and conditions not expressly included in the contract are included because the parties must have intended these terms as necessary to give business efficacy to the contract. *N.J. Bank v. Pallidino*, 77 N.J. 33, 46 (1978). The covenant is also a form of redress of bad faith performance of an agreement although the defendant has not breached the express terms of any agreement. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. at 396 (1997). The covenant permits inquiry into a party's exercise of discretion expressly granted by a contract's terms. *Wilson v. Amerada Hess Corp.*, *supra*, at 270; *see also Seidenberg v. Summit Bank*, 348 N.J. Super. 243 (App. Div. 2002).

⁴ *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, *supra*, at 230-231; *Wilson v. Amerada Hess Corp.*, *supra*, at 251 (citations omitted); *Sons of Thunder, Inc. v. Borden, Inc.*, *supra*, at 420. *See also Wade v. Kessler Institute*, *supra*, at 327; *Palisades Properties, Inc. v. Brunetti*, *supra*.

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The plaintiff in this case claims that the defendant breached the implied covenant of good faith and fair dealing by [*give brief statement of plaintiff's claim of breach*]. To prevail on this claim, the plaintiff must prove each of the following three elements by a preponderance of the evidence:

First, the plaintiff must prove that some type of contract existed between the parties.⁶ There can be no breach of the covenant of good faith and fair dealing unless the parties have a contract.

Second, the plaintiff must prove that the defendant acted in bad faith with the purpose of depriving the plaintiff of rights or benefits under the contract.

Third, the plaintiff must prove that the defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm. I will now discuss each of these elements separately.

Was there a contract between the parties?

You must first determine whether some type of contract existed between the plaintiff and the defendant.⁷

⁶ For example, the contract could involve the employer's obligation to pay commissions, fringe benefits, bonuses, or other compensation. It could also be a contract to employ the individual for a certain period or a contract arising out of an employee handbook.

⁷ If the parties agree that a contract existed, the jury should be so instructed.

1. Express or Implied Contract

[Instruct the jury on the legal principles that apply to the particular contract. See Model Civil Jury Charge 4.10E.]

2. Implied Contract (e.g., arising from Employee Handbook)

[If the plaintiff alleges that an implied contract was created based on language in an employee manual that the employee reasonably understood created binding duties and obligations between employer and employee, Model Civil Jury Charge 2.12 (personnel manual creating contract) should be charged.]

If you find that an employment contract existed between the parties, you must then determine whether the defendant violated the implied covenant of good faith and fair dealing.

Did the defendant act in bad faith with the intent to deprive the plaintiff of rights or benefits under the contract?

As to this element, you must decide whether the defendant acted with bad faith to interfere with the plaintiff's right to receive the benefits of the employment contract. Proof of bad motive or intention is essential to a claim that the defendant has violated the covenant of good faith and fair dealing.

In considering what constitutes bad faith, you should consider a number of factors, including the expectations of the parties and the purposes for which the contract was made. You should also consider the level of sophistication between

the parties, whether the parties had equal or unequal bargaining power, and whether the defendant's action involved the exercise of discretion.

Keep in mind, however, that bad faith is not established by simply showing that the defendant's motive for his/her actions did not consider the best interests of the plaintiff. Contract law does not require parties to behave thoughtfully, charitably or unselfishly toward each other.⁸

In order for the plaintiff to prevail on his/her claim, you must specifically find that bad faith motivated the defendant's actions. A defendant who acts in good faith on an honest, but mistaken, belief that his/her actions were justified has not breached the covenant of good faith and fair dealing.⁹

Whether the defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm

The plaintiff must also prove that because of the defendant's actions, the plaintiff was unable to realize the benefits of the contract [*describe the specific losses alleged by the plaintiff*].

In summary, if you find that the plaintiff has proven by a preponderance of the evidence: (1) the existence of some type of employment contract; (2) that the defendant, although acting consistent with the contract's terms, acted in bad faith

⁸ *Wilson v. Amerada Hess Corp.*, *supra*, at 251.

⁹ *Silvestri v. Optus Software, Inc.*, 175 N.J. 113 (2003).

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with the intent to deprive the plaintiff of his/her reasonable expectations under the contract; and (3) the plaintiff sustained injury or loss as a result of such action, then you must find for the plaintiff.

If you find that the plaintiff has failed to prove any of these elements by the preponderance of the evidence, you must find for the defendant.